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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 08/05/2019****Judgment Delivered on : 17/06/2019****ARB APPEAL No. 32 of 2007**

Chhattisgarh State Civil Supplies Corporation Limited Raipur Through
Managing Director, Balashram Parisar, Near Kutchhari Chowk, Raipur,
Chhattisgarh, District : Raipur, Chhattisgarh.

--- (Respondent No.2 before learned Court below)

---- Appellant

Versus

1. Vaishanvi Rice Industries A Partnership Firm, Duly Registered Under
The Provision Of India Partnership Act, Having Office Ganjpara Raipur,
Chhattisgarh, District : Raipur, Chhattisgarh
2. Shri Kishore Agrawal S/o Mohan Lal Agrawal R/o Ichcha Niwas Building
Telghani Naka , Raipur C.G.
3. Smt. Savita Agrawal W/o Shri Arun Kumar Agrawal, R/o Ichcha Niwas
Building, Telghani Naka Raipur .C.G
4. Smt. Janki Devi Agrawal W/o Shri Dwarika Prasad Agrawal R/o Ichcha
Niwas Building Telghani Naka Raipur .C.G

--(Applicants No. 1 to 4 before learned Court below)

5. Shri M.K. Raut, Secretary, State Of C.G. Food Civil Supplies And
Consumer Protection Department D.K.S. Bhawan Raipur C.G.

-- (Respondent No.3 before learned Court below).

---- Respondents

For Appellant	:	Shri N.K. Vyas, Advocate.
For Respondents No.1 & 2:		Shri K.R. Nair and Ms. Veena Nair, Advocates.
For Respondents No.3 & 4:		Shri Dilman Rati Minj and Ms. Pushplata Khalkho, Advocates.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV JUDGMENT

Heard.

- (1) This appeal has been preferred under Section 37(1) of the
Arbitration and Conciliation At, 1996 against the order dated 11.7.2007

passed in Arbitration Case No. 16A of 2007 by the Court of District Judge, Raipur allowing the petition of respondents No.1, 2, 3 & 4.

(2) The facts of the case are that the appellant is a Government Company. With respect to milling of paddy, an agreement was executed between the appellant and respondent No.1 on 3.4.1998 in which terms and conditions were agreed between both the parties. Respondent No.1 – Vaishanvi Rice Industries lifted 26,872.45 quintals of paddy for milling which was to be supplied back after milling on date agreed i.e. 31.5.1998. Respondent No.1 has milled only 17,783.45 quintals of paddy, which was in short supply. The rice from the remaining paddy after milling was not supplied by respondent No.1. The value of remainder paddy was Rs.47,71,992.75. As respondent No.1 failed to respond despite various communications and reminders, the matter was referred to Arbitrator, Respondent No.5. Learned Arbitrator arbitrated the case and passed the award dated 31.3.2007 directing the respondents to make a payment of Rs.42,47,502/- alongwith 9.1% interest from 1.4.1999 till 31.1.2007. It was further ordered by learned Arbitrator to make a payment of Rs.78,900/- towards the costs of 6575 gunny bags.

Respondents No. 1 to 4 filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act, 1996') before the Court of Learned District Judge, Raipur. Learned District Judge has allowed the application and set aside the award dated 31.1.2007 passed by the learned Arbitrator.

(3) Learned counsel for the appellant submits that according to the terms of contract between the parties, total 3,500 tonnes of paddy was to

be milled by respondent No.1. Respondent No.1 was supplied 26,872.45 quintals of paddy, a part of that was milled and rice was supplied by respondent No.1 to the appellant. The remaining paddy 9,089.51 quintals has neither been milled nor returned to the appellant. The Court below has passed an erroneous order against respondent No.1 by exceeding the scope of Section 34 of the Act, 1996. The Court below has exercised the powers of an Appellate Authority, which has been seriously deprecated by the Hon'ble Supreme Court. Relying on the judgment of Supreme Court in the case of **Mcdermott International Inc vs. Burn Standard Company Limited and Others** reported in **(2006) 11 SCC 181**, it is submitted that the scope for interference under Section 34 of the Act, 1996 is very limited, in fact, it is a supervisory role which has to be kept at a minimum level. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. Interference on the ground of patent illegality is permissible only on the ground that the cause goes to the root of the matter and in case of violation of public policy, the circumstances should be so unfair and unreasonable as to shock the conscience of the Court. Therefore, it is very clear that the Learned District Judge has exercised the powers of Appellate Court in setting aside the arbitral award, which is totally unfair. The public policy was not at all examined by the Court below. It has been similarly observed by Hon'ble Supreme Court in the case of **Fiza Developers and Inter-Trade Private Limited vs. AMCI(I) Private Limited and Another** reported in **2009 vol 17 SCC 796**.

Relying on the judgments of the Supreme Court in the cases of **Oil & Natural Gas Corporation Limited vs. Western Geco International Limited** reported in **2014(9) SCC 263**, **Swan Gold Mining Limited vs. Hindustan Copper Limited** reported in **2015(5) SCC 739** and **Maharashtra State Electricity Distribution Company Limited vs. M/s. Datar Switchgear Limited** reported in **AIR 2018 SC 529**, it is submitted that the public policy interpreted in these cases has not been examined by the Court below and there is a clear observation made that the evidence on record cannot be scrutinized as if the Court was sitting in appeal which is a settled principle. Similar reliance has also been placed on the judgment in the case of **Associate Builders vs. Delhi Development Authority** reported in **2015(3) SCC 49** and it is prayed that the order of the Court below be set aside and the award of the Arbitrator be restored.

(4) Learned counsel for respondents No. 1 & 2 submit that the dispute itself is misconceived. The appellant was making a claim for 9089.51 quintals of paddy, which was admittedly not supplied to respondent No.1. The copy of the agreement itself mentions that paddy was to be stored in lock and key of the Corporation in the godown of the appellant. According to clause 9 of the agreement, respondent No.1 had the responsibility to deliver the rice after milling the paddy and claim for the charges of the same. It was also a condition that if the loss in rice is found beyond permissive criteria of loss, then the excess loss shall be reimbursed by the respondents. The appellant had never raised any dispute about the short supply of rice against the paddy supplied and no notice for reference of dispute to Arbitrator was given to the respondents.

It is also submitted that no notice was served upon the respondents for referring the matter to the arbitrator under Section 21 of the Act, 1996, which is mandatory.

Reliance has been placed on the judgment of Delhi High Court in **Alupro Building Systems Private Limited vs. Ozone Overseas Private Limited** in **O.M.P. No. 3 of 2015** decided on 28.2.2017, in which it was clearly held, that without the notice under Section 21 of the Act, 1996, a party seeking reference of disputes to arbitration, will be unable to demonstrate that there was a failure by one party to adhere to the procedure. Therefore, service of notice under Section 21 of the Act, 1996 is a condition precedent. It has been held by the Court below in paragraph 23 of the impugned order that the respondents were not given full opportunity to present their case and were not provided with the copy of the claims made by the appellant in this case, which is a violation of Section 18 of the Act, 1996 and the same provision was also not followed, which amounts to another violation of statute. Therefore, it is a case of patent illegality in completing the arbitration process. Relying on the judgment of the Supreme Court in **Associate Builders vs. Delhi Development Authority** (supra), it is submitted that the present is a case where patent illegality had been committed by the Arbitration Tribunal by violating the provisions under Section 28(3) of the Act, 1996, as respondent No.5 – Shri M.K. Raut, Arbitrator had completely failed to decide the controversy between the parties. It is also submitted that the impugned order is well reasoned and detailed therefore, the arbitral award has been rightly set aside by the Court below.

(5) In reply, it is submitted that the appellant had briefly established regarding the paddy supplied to respondent No.1 and out of that respondent No.1 has neither accounted for 9089.51 quintals of paddy nor supplied the rice against the same. According to clause 17 of the agreement, respondent No.1 had the responsibility to supply the details and accounts of the milling of paddy which he has not done. The non-compliance of the provisions that has been pointed out by counsel for respondent No.1 can be regarded as mere irregularity and not illegality. In view of this, where the irregularity has been committed in arbitrating the case, the Learned Judge could have ordered for re-arbitration of the case and setting aside of the award simply means that the dispute has been left unresolved. Therefore, it is prayed that this appeal be allowed.

(6) Heard counsel for both the parties and perused the record.

(7) The main dispute between the parties is that the appellant is claiming that after milling of paddy and supply of rice made in part by respondent No.1, the possession of the balance paddy i.e. 9089.51 quintals of rice was with respondent No.1, whereas, respondent No.1 has replied and taken the stand that the possession of the balance paddy was with the appellant in accordance with the terms and conditions of the agreement, kept in the go-down of respondent No.1 but under the lock and key of the appellant, which was never supplied to respondent No.1 for milling the same.

(8) Closely scrutinized the statements made by both the parties, submissions made in that respect and also the documents filed alongwith

in support of the same.

(9) Respondent No.5 is a Government Arbitrator. After examining the claim and response of the parties, he has given this finding that respondent No.1 had failed to prove that the balance paddy 9089.51 quintals was in possession of the appellant, on that basis, the award was passed on 31.1.2007 in favour of the appellant.

(10) Learned District Judge, while deciding the application under Section 34 of the Act, 1996 on 11.7.2007 has held that the proceedings were not in accordance with the provisions of Act, 1996. Proper opportunity of hearing was not given to respondent No.1 and even the copy of the claim was not supplied to him. It was held that neither any issues were framed nor any opportunity to adduce evidence was given to the parties and that there is an express provision under Sections 21, 23 and 28 of the Act, 1996 which have not been followed, therefore, there is no material to prove that the balance paddy was in possession of respondent No.1. On this basis, it was held that the arbitrator has failed to pass an award following the provisions of law and procedure and as such, the award has been set aside by the impugned order.

(11) The dispute between the parties regarding the possession of balance paddy has now become secondary and now the main issue before this Court is whether the arbitral award was passed by the Arbitrator by following the law and procedure as provided under the statute. There is no dispute regarding the arbitration clause. The objection raised by respondent No.1 is that he was never served with a

notice under Section 21 of the Act, 1996.

(12) In **Alupro Building Systems Private Limited vs. Ozone Overseas Private Limited** (supra), it has been held that where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice given invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. It was held in paragraph 27 of the same judgment that even in case where the arbitration clause permits one of the parties to choose an arbitrator there would be a necessity of advance notice to the other party before appointment of such arbitrator.

(13) The Arbitration Clause between the parties is as under:

“यह कि इस संविदा की किसी भी कंडिका के संबंधित विवाद उत्पन्न होने की स्थिति में विवाद पंच निर्णय हेतु प्रमुख सचिव/सविच म0प्र0 शासन खाद्य तथा नागरिक आपूर्ति एवं उपभोक्ता संरक्षण विभाग को सौंपा जायेगा। जिसका निर्णय दोनों पक्षों को मान्य होगा।”

(14) The Arbitration Clause though gives the entitlement to one of the parties to refer the matter for the arbitration, the statement made by respondent No.1 that the appellant never served him with notice under Section 21 of the Act, 1996, has not been specifically replied by the appellant and there is no such document present on the record to demonstrate that any such notice was served on respondent No.1 before

the matter was referred to respondent No.5 for arbitration. This appears to be a lapse on the part of the appellant.

(15) Another point raised by respondent No.1 is this that no opportunity was given to adduce evidence on perusal of the arbitral award, it appears that nowhere it has been mentioned that the parties were afforded with an opportunity to adduce the evidence.

(16) The parties to an arbitration shall be treated with equality and it is provided under Section 18 of the Act, 1996:

'18. Equal treatment of parties.— The parties shall be treated with equality and each party shall be given a full opportunity to present his case.'

(17) Clause (iii) of sub-section(2)(a) and Clause(ii) of sub-section(2)(b) of Section 34 of the Act, 1996 provides as under:

'34. Application for setting aside arbitral award.—

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(b) the Court finds that—

(ii) the arbitral award is in conflict with the public policy of India.'

It has been observed earlier in this order that no proof has been submitted by the appellant that notice was served upon respondent

No.1 under Section 21 of the Act, 1996. Another statement made by respondent No.1 is that he was never given any opportunity to present his case, finds support from the other facts and circumstances of this case.

(18) On minute perusal of the arbitral award dated 31.1.2007, it appears that there is not a single sentence in that order to show both the parties were provided with opportunity to adduce evidence before passing of the arbitral award.

(19) Section 19 of the Act, 1996 provides that the Arbitral Tribunal shall not be bound by CPC or Indian Evidence Act. However, it is provided that the parties are free to agree on the procedure to be followed by the Arbitration Tribunal in conducting its proceedings. It is also provided that where the parties fail to come to an agreement regarding the procedure of an Arbitral Tribunal, in that case the Arbitral Tribunal shall be at liberty to conduct the proceedings in the manner it considers appropriate.

(20) On perusal of the arbitral award, it has appears that the learned Arbitrator has decided the disputes only on the basis of claim presented by the appellant and the written response given by respondent No.1 and there is no such mention regarding any procedure agreed between the parties or any reference to the appropriate proceeding that was adopted by the Arbitrator as it is provided under Section 19 of the Act, 1996 so as to hold that the parties were afforded with full opportunity to present their case. Therefore, there is nothing to suggest that the arbitral award was passed after complying with the provisions under law as provided in Act,

1996.

(21) Considered on the issue of possession of balance paddy. On perusal of the documents filed by the appellant's side and the respondents' side, it is found that there had been a clear stipulation in the agreement between the parties that all the paddy supplied to respondent No.1 shall be kept in the go-down of respondent No.1, under the lock and key of the appellant. Therefore, the claim of the appellant that the balance paddy of 9089.51 quintals was in absolute possession of respondent No.1 is a question which could not have been determined without the evidence in this respect *vice-versa* statement of respondent No.1 that the balance paddy is still in the go-down of respondent No.1 under the lock and key of the appellant is a fact, which was required to be established by bringing evidence on that point. Therefore, considering the dispute between the parties regarding the possession of the balance paddy learned Arbitrator was required to afford the parties opportunity to adduce evidence, which would have been the appropriate procedure for arbitrating the dispute. On perusal of the arbitral award, there appears to be no mention of following any procedure.

(22) In **Mcdermott International Inc vs. Burn Standard Company Limited and Others** (supra) and **Oil & Natural Gas Corporation Limited vs. Western Geco International Limited** (supra), it has been held that in case it is found that the patent illegality has been committed in passing the arbitral award, the arbitral award passed may be interfered under Section 34 of the Act, 1996. In **Associate Builders vs. Delhi Development Authority** (supra), it was held that the interference is

permissible when findings of the Tribunal is arbitrary, capricious or perverse or when it shocks the conscience of the Court or when such illegality must go to the root of the matter, in such cases, it can be held that the arbitral award passed is against the public policy. As the award is a result of total disregard to the provisions of law under the Act, 1996, therefore, after overall consideration, I am of this view that the Learned Court of District Judge, Raipur has rightly set aside the award dated 31.1.2007 as it was an award passed in conflict with the public policy. However, it is also held that such an award which shows patent illegality committed in conducting the procedure of arbitration, by itself is non-existent. Therefore, in such case the appellant shall have the liberty to refer the matter again for arbitration in accordance with the arbitration clause present in the agreement after following the procedure as provided under the law.

(23) After due consideration and on the basis of the discussions made herein-above, I do not find any substance in this appeal. Hence, it is dismissed.

Sd/-
(Rajendra Chandra Singh Samant)
JUDGE