

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1036 of 2011

IA No: GA 3 of 2022

State of West Bengal

Versus

Tapas Kumar Hazra

Mr. Dhruba Ghosh, Sr. Adv.

Mr. A. Alim, Adv.

Mr. P. Sinha, Adv.

Mr. A. Mandal, Adv.

.....For the petitioner

Mr. Nirmalya Dasgupta, Adv.

Mr. R. L. Mitra, Adv.

.....For the respondent

Heard on : 08.08.2022

Judgment on : 25.08.2022

Krishna Rao, J.: This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Ld. Sole Arbitrator dated 2nd September, 2011. The petitioner had invited item rate tender for construction of Sub-Divisional Court at Kalyani in the District of Nadia (Structural portion) two storied building for an estimated cost of Rs.

1,21,38,824/- . The respondent had participated in the said tender process and offered less rate of 2.90 % i.e. Rs. 1,17,86,798/- than the estimated cost fixed by the petitioner. The rate quoted by the respondent was accepted and work order was issued in favour of the respondent on 09.01.1997. After issuance of work order an agreement was entered between the parties and as per agreement, the tender amount was Rs. 1,17,86,798/-, date of commencement was 15th January, 1997, time of completion was 18 months and date of completion was 14th July, 1998.

As there was delay on the part of the petitioner for providing working drawing and finalization of lay out of the building and thus the respondent could not complete the work in the stipulated in the agreement and accordingly the respondent had made a request to the petitioner for extension of time with the condition to claim in respect of additional cost of construction and added expenses but the petitioner had not extended the time as prayed for by the respondent and the contract was closed on completion of period stipulated in the agreement.

On 15th July, 2002, the respondent had made request to the Chief Engineer, Public Works Department, Govt. of West Bengal for appointment of Arbitrator and accordingly in terms of Clause 25 of the agreement, an Arbitrator was appointed. The respondent had raised following claims before the Ld. Sole Arbitrator :

“LIST OF OUT STANDING DUES AND CLAIM

<i>Sl. No.</i>	<i>Description</i>	<i>Amount</i>
1.	<i>Compensation on account of loss of expected profit on the value of unexecuted portion of the contract.</i>	<i>Rs. 14,30,000</i>
2.	<i>Compensation on account of the cost of the materials; collected by the Claimant/Contractor at the site during the period intervening between middle of March 1998 and onset of monsoon in 1998, due to unlawful closure of the contract.</i>	<i>Rs. 90,000/-</i>
3.	<i>Compensation on account of advances given to the suppliers and/or manufacturers of various kind of building materials which could not be realized in view of nonexecution of job to the extent of scope of contract, for reasons solely attributable to the department.</i>	<i>Rs. 1,22,000/-</i>
4.	<i>Compensation on account of advances given to labor gangs of various kinds which could not be realized due to non execution of the contract to the extent of the scope of the agreement for the reason solely attributable to the department.</i>	<i>Rs. 6,70,000/-</i>
5.	<i>Compensation on account of loss of Goodwill and/or reputation due to unlawful closure of the contract by the department.</i>	<i>Rs. 10,00,000/-</i>
6.	<i>Compensation on account of idle/barren labour detained at the site of work due to suspension of the job from time to time for the reasons attributable to the department.</i>	<i>Rs. 91,000/-</i>
7.	<i>Amount payable to the Claimant/Contractor in respect of works executed but not paid by the department, despite repeated request and/or reminders made for the same (Be it noted here that no payment has been made in respect of instant contract till date).</i>	<i>Rs. 19,82,361/-</i>
8.	<i>Compensation on account of maintenance of establishment (both offsite and on site) during the period till July-1998 inception.</i>	<i>Rs. 5,62,000/-</i>
9.	<i>Compensation on account of mobilization including the expenditure incurred towards construction of temporary structures at the location shown by the department (Site Godown, camp, labour hutments, Site Office, bath and W.C. etc etc.)</i>	<i>Rs. 1,24,000/-</i>

10.	<i>Compensation on account of extra expenses incurred by the claimant towards carriage of building materials by head load.</i>	<i>Rs. 40,000/-</i>
11.	<i>Amount payable on account of extra labour employed for additional leads and lifts due to change in design of foundation made by the department at the belated stage.</i>	<i>Rs. 32,000/-</i>
12.	<i>Compensation on account of wastage of materials at site due to inadequate working space</i>	<i>Rs. 31,000/-</i>
13.	<i>Amount payable; on account of recording of jobs and used steel materials (bended and cut to size as per instruction of the department) due to reasons attributable to the department.</i>	<i>Rs. 11,000/-</i>
14.	<i>Compensation on account of interest on blocked capital borrowed at an exorbitantly high rate of interest (till july-1998)</i>	<i>Rs. 4,20,000/-</i>
15.	<i>Compensation on account of further interest on blocked capital borrowed at an exorbitantly high rate of interest for the period after July 1998.</i>	<i>As to be accrued.</i>
16.	<i>Interest @ 22% per annum from 16.07.1998 till payment on due amounts on claim Nos. 1 to 15 as above.</i>	<i>As accrued and to be further.</i>
17.	<i>Cost of Arbitration Proceedings.</i>	<i>As to be found due (to be furnished on the concluding day of hearing)</i>
18.	<i>Interest on claim amount of Rs. 66,05,561/-</i>	

On completion of pleading and documentary evidence available on record, the Ld. Arbitrator has passed the following Award on 2nd September, 2011:

“51. AND WHEREAS on the basis of the above observations I, Rajat Dasgupta, Sole Arbitrator do hereby award and direct the Respondent/State of West Bengal to pay the sum of (Rs. 15,02,126/ + Rs. 90,000/- + 20000/-) = Rs. 16,12,126/- (Rupees

Sixteen lakh twelve thousand one hundred and twenty six) only in respect of the sums awarded against Claim Nos. 1 to 15 to the Claimant/Contractor.

- 52.** *Also, I hereby award and direct the Respondent/State of West Bengal to pay Rs. 1,00,000/- (Rupees One Lakh only) on account of cost.*
- 53.** *Also, I hereby award and direct the Respondent, State of West Bengal to pay interest @ 13 % per annum on Rs. 16,12,126/- the sum of the amounts awarded in respect Claim Nos 1 to 15 from 1.2.2000 till payment **AND WHEREAS** this award has been made on Non-Judicial Stamp Paper amounting to Rs. 200/- (Rupees Two hundred only) submitted by the Claimant."*

The respondent had made altogether 18 claims including interest but the Ld. Arbitrator has Awarded Claim No. 1 amounting to Rs. 15,02,126/, Claim no. 9 amounting to Rs. 90,000/-, Claim No. 10 amounting to Rs. 20,000/-, Claim No. 16 interest of 13% per annum from 1.1.2000 and Claim No. 17 Cost of Rs.1,00,000/-.

Mr. Dhruba Ghosh, Ld. Advocate representing the petitioner submits that the Ld. Arbitrator has passed the award without any evidence. The contract was expired by efflux of time as the respondent was not willing to carry with work without extra compensation as the claimant has sought for extension of time with the condition of additional cost. It is further contended that the Ld. Arbitrator has held that the petitioner was required to refuse to entertain the said claim made for additional cost for execution by the respondent.

Mr. Ghosh further submits that the Ld. Arbitrator has held that non completion of the work in time cannot be ascribed exclusively to one of the parties. It is further contended that the Ld. Arbitrator has wrongly come to

the finding that the petitioner was mainly responsible for delay in the instant case in particular with regard to providing firm decision after 27th May, 1997. It is further contended that the Ld. Arbitrator in one hand held that the respondent is entitled to the claim in part and on other hand Ld. Arbitrator has allowed claim No. 1 in favour of the respondent more than the claim made by the respondent.

Mr. Ghosh submits that the claim no. 1 of the respondent is totally barred by limitation as the contract expired on 14th July, 1998 and the respondent has submitted his claim for arbitration on 5th July, 2002 i.e. after the period of three years as prescribed under law. It is further contended that the respondent had accepted final bill without any objection on 1st July, 1999 and claim was submitted on 5th July, 2002. The Ld. Arbitrator has wrongly come to the finding that payment was made long after May, 2002.

Mr. Ghosh further submits that the respondent has received the security deposit without any objection as per the request made by the respondent vide his letter dt. 1st March, 1999. It is further contended that claim No. 9 and 10 was allowed by the Ld. Arbitrator in favour of the respondent without any evidence. It is further contended that the award passed by the Ld. Arbitrator is arbitrary, perverse and based on no evidence.

Per Contra, Mr. Nirmalaya Dasgupta, Ld. Counsel representing the respondent submits that the Ld. Arbitrator had given sufficient reasons while allowing claim nos. 1, 9 and 10 in favour of the respondent. It is

further contended that the reasons for allowing claim of the respondent is appearing at page nos. 39 to 52 of the award.

Mr. Dasgupta submits that admittedly final bill was paid on 1st July, 1999 but the respondent had made his claim before the petitioner on 20th May, 2002 i.e. before completion of three years and thus there is no delay for raising the claim by the respondent. It is further contended that admittedly there is no dispute with regard to quantum of the portion of unexecuted work. The Ld. Arbitrator has rightly held that the petitioner is responsible for non- completion of the work and closure of the work.

Mr. Dasgupta submits that in the instant case the arbitrator was an engineer and the Hon'ble Supreme Court held that the Award passed by a non-legal person having no legal knowledge cannot be compared with as award passed by a person having legal knowledge and legal background. It is further contended that the issue with regard to the Tapas Hazra Development concern is irrelevant and respondent was prevented from completing the job and the petitioner had floated a fresh tender for the balance work wherein the partnership firm was awarded the work thus an individual cannot be mixed up with the partnership firm in any manner whatsoever.

Mr. Dasgupta further contended that acceptance of final bill cannot restrict the respondent to make further claim. Ld. Counsel for the respondent further submits that the Ld. Arbitrator has passed well-reasoned order and it is settled law that under Section 34 of the Arbitration and

Conciliation Act, 1996, this Court cannot sit in appeal by appreciating the evidence.

Heard, the Ld. Counsel for the respective parties, considered the documents relied by the parties and the impugned award.

“Claim No. 1 : Compensation on account of loss of expected profit on value of unexpected portion of the contract.”

The respondent has claimed Rs. 14,30,000/- with respect of claim no.1. The Ld. Arbitrator has allowed claim no. 1 in favour of the respondent by awarding an amount of Rs. 15,02,126/- which is more than the amount claimed by the respondent. The arbitrator has also allowed interest @ 13% per annum from 1st February, 2000 till the payment is made. The arbitrator while considering the said claim had considered that the site for the proposed work was handed over to the respondent on 4th March, 1997 and drawing was made available to the respondent on 4th March, 1997. It was further held that the drawing contains errors and discrepancies and the same was duly intimated to the Assistant Engineer concern of the petitioner. The Arbitrator has further taken into consideration that the Superintending Engineer concern along with Superintending Engineer, Planning Circle, PWD of the petitioner visited the site and found that the entire foundation trench was filled up with water due to heavy rain on 23rd May, 1997 and the Executive Engineer had instructed the respondent to remove PCC (8:4:1) already casted. The arbitrator in one hand held that *“As I find on detailed scrutiny of the sequence of events right from inception in particular, reasons for such non completion cannot be ascribed exclusively to one of the parties.*

On the other hand it is held that the respondent department was mainly responsible for delay occurred in the instant case in particular with regard to providing firm decision after 25th May, 1997.”

Ld. Arbitrator held that *“In these circumstances, as I feel, that the claimant is entitled to claim preferred on account of loss of excepted profit as preferred under Sl. No. 1 of course, part.”* But while awarding the claim with respect of claim no. 1 the Arbitrator has awarded an amount of Rs. 15,02,126/- though the claim of the respondent was 14,30,000/-.

In the judgment reported in (2006) 11 SCC 181 (McDermott International Inc. -vs- Burn Standard Co. Ltd and Others) held that :

“55. *Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award.*

56. *In Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56, it is stated:*

“... ‘Reason’ is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration. In Re, ‘proper, adequate reasons’. Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word ‘reason’ was explained by the Kerala High Court in the contest of a reasoned award....

‘Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....’

A mere statement of reasons does not satisfy the requirements of Section 31(3) . Reasons must be based upon the materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored....

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision."

59. *Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of [Section 34](#) of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merit of the matter."*

In the case reported in (2004) 5 SCC 109 (Bharat Cooking Coal Ltd.- versus- L. K. Ahuja) the Hon'ble Supreme Court held that :

"24. *Here when claim for escalation of wages bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss of Profit". It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. 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. Ltd. vs. Cunard White Star Ltd., 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."*

In the present case, the reasons arrived by the Arbitrator is contradictory as initially the arbitrator held that reasons for such non completion cannot be ascribed exclusively to one of the parties but had held

that the respondent is entitled to the claim preferred on account of loss of expected profit of course in part but the arbitrator allowed claim no. 1 more than the award claimed by the respondent. The Arbitrator has calculated the claim no. 1 of the respondent as 15 % of the amount of Rs. 1,17,86,798 – 17,72,623 = 15,02,126/- though the total claim was Rs. 14,30,000/- and thus the claim no.1 awarded in favour of the respondent is contradictory and without application of mind. The respondent has claimed compensation on account of loss of expected profit on the value of unexecuted portion of work. The respondent has not established his case that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earn profit. Ld. Arbitrator held that the petitioner was required to refuse to entertain the claim for additional cost for execution by the respondent, in that event the respondent would have disagree to continue with the work after such refusal by the petitioner and in that circumstances, the respondent could be hold for making compensation. The Arbitrator has not consider that vide letter dt. 13.07.1998, it was informed to the respondent that *“it is not possible to consider, as it is conditional to the rights of claim for prolongation of the job beyond the agreed period. So, the agreement may be treated as closed beyond the stipulated period which expired on 14.07.1998 as agreement”*.

On receipt of the said communication, the respondent has accepted the same and has not informed the petitioner that the respondent is ready to complete the work without any condition or additional amount. On the other hand, the respondent had participated in the tender process through

the partnership firm and had used the materials, machineries, camp, Godown and establishment of the respondent for execution of the remaining work.

“Claim No. 9 : *Compensation on account of mobilization including the expenditure incurred towards construction of temporary structures at the location shown by the department (Site Godown, camp, labour hutments, Site Office, bath and W.C. etc etc.). – Rs. 1,24,000/-*

Claim No. 10 : *Compensation on account of extra expenses incurred by the claimant towards carriage of building materials by head load. – Rs. 40,000/-.”*

Ld. Arbitrator has awarded an amount of Rs. 90,000/- with respect of Claim no. 9 and Rs. 20,000/- with respect of Claim no. 10. While awarding the said amount the arbitrator has not assigned any reasons. The arbitrator has also not mentioned as to how the arbitrator come to conclusion of the said amount.

In the judgment report in (2019) SCC Online Cal 3605 (State of Bengal – vs- Bharat Vanijya Eastern Private Ltd.) the Hon’ble division bench of this Court held that :

“18. *The other way of dealing with the award is to treat it at face value and assess it on the less unpleasant ground of lacking in reasons. The Act of 1996 commands that an award that is passed in any arbitral proceedings governed by such statute ought to be reasoned. Reasons are the links between the fact and the conclusion and they reveal the application of mind to the matters in issue and trace the journey from the narrative to the directive. Reasons are the lifeblood of any acceptable process of adjudication and, as to whether an award or an order is reasoned or not, it depends more on the quality than the quantity of the words expended. On a set of facts, where the conclusion*

or the inference is self-evident, elaborate reasons may not be necessary to justify the conclusion; but where even if the factum is established the quantum of compensation requires detailed attention, the reasons furnished call for a stricter scrutiny. Reasons are the plinth on which the edifice of conclusion stands; and the stronger the base, the more difficult it is to dislodge the conclusions.

24. *It is undeniable that there is an element of subjectivity which is always involved but such subjectivity has to stand on some objective footing and, without the fundamental premise of the quantification or the arithmetical basis therefor being indicated, the mere lip service that the arbitrator pays to having read the pleadings, the evidence and the documents would not suffice for the reasons that the statute commands the arbitrator to furnish. After all, a party was being saddled with a liability in excess of Rs.8.22 crore and such party was entitled to know the basis for the same. At any rate, the award does not reveal why and how the arbitrator came to be a finding that 108 out of 492 days claimed were not justified. The material referred to in support of the conclusion was primarily on the documents relied upon by the contractor and the oral evidence of the contractor. It does not appear - at least it is not recorded in the award - that the contractor abandoned its claim for 108 days. In the circumstances, it has to be concluded that there are no reasons for the arbitrator's finding that 108 of the 492 days ought to be disregarded or, for that matter that any part of the claim was justified. For the sheer lack of reasons, the amounts awarded under the first two heads of claim cry out to be annulled."*

In the instant case also the arbitrator has not furnished any arithmetical basis or any documentary evidence to support the claim awarded to the respondent. The parties are entitled to know the basis on which the said claim was awarded in favour of the respondent. There is no documentary evidence available to show that the respondent had incurred expenditure for said claims or the petitioner had admitted the claims of the respondent.

After the expiry of the period of agreement on 14th July, 1998, the petitioner had appointed a new agency namely “Tapas Kumar Hazra & Development Concern” for execution of balance work in which the respondent is also one of the partner of the said agency and on 1st March, 1999, the respondent had informed the petitioner that “so far as site clearance is concerned the matter is mutual settled with ‘Tapas Kumar Hazra & Development Concern’ the newly appointed agency for the balance portion of the said work vide S.E.C.E’s (PWD) memo no.-324/W dated 24.02.1999.” From the said communication, it is established that the construction of temporary structure at the site is being used by the new agency in which the respondent is also one of the partner.

The Counsel for the respondent relied upon the judgment reported in (2015) 5 SCC 698 (Navodaya Mass Entertainment Limited –vs- J. M. Combines) and relied para 8:

“8. In our opinion, the scope of interference of the Court is very limited. The court would not be justified in reappraising the material on record and substituting its own view in place of the arbitrator’s view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. [See: Bharat Coking Coal Ltd. v. L.K. Ahuja, Ravindra & Associates v. Union of India, Madnani Construction Corpn. (P) Ltd. v. Union of India, Associated Construction v. Pawanhans Helicopters Ltd. and Satna Stone & Lime Co. Ltd. v. Union of India].”

The judgment referred by the respondent is distinguishable. In the present case, the finding of the Ld. Arbitrator is different than the award

passed with respect of claim no. 1. As regard claim nos. 9 and 10, the Arbitrator has not assigned any reason.

The respondent has relied upon the judgment reported in (2022) 1 SCC 131 (Delhi Airport Metro Express Private Ltd. –vs- Delhi Metro Rail Corporation Ltd.) Paragraphs 41 and 42 read as follows:-

“41. *The CMRS certificate dated 18-1-2013 was relied upon by DMRC before the Arbitral Tribunal as a strong piece of evidence to support its case that the defects were cured. DMRC did not contend before the Tribunal that the CMRS certificate is binding and is conclusive of the defects being cured/effective steps taken to cure the defects. The conditions imposed by the Commissioner relating to speed restrictions and close monitoring of the Line, according to the Tribunal, support the contention of DAMEPL that the defects were not fully cured. The issue before the Tribunal was whether the defects were cured within 90 days from the notice dated 9-7-2012 and the certificate dated 18-1-2013 is relevant for deciding the said issue. We are not in agreement with the High Court’s view that the issue of the CMRS certificate being dealt with separately has a bearing on the Tribunal’s determination of the validity of the termination notice. The members of the Arbitral Tribunal, nominated in accordance with the agreed procedure between the parties, are engineers and their award is not meant to be scrutinised in the same manner as one prepared by legally trained minds. In any event, it cannot be said that the view of the Tribunal is perverse. Therefore, we do not concur with the High Court’s opinion that the award of the Tribunal on the legality of the termination notice is vitiated due to the vice of perversity.*

42. *The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in SCC OnLine Del para 103 of the impugned judgment amounts to appreciation or reappraisal of the facts which is not permissible under [Section 34](#) of the 1996 Act. The Division Bench further held that the fact of the AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole judge of the quality as well as the quantity of the evidence, the task of being a Judge on the evidence before the Tribunal does not fall upon the Court in exercise of its jurisdiction under [Section 34](#). On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account.”*

Though in the instant case, the Ld. Arbitrator is the retired Technical Secretary and Superintending Engineer, PWD but as already held above the award with respect of claim no. 1 is contradicting and with respect of claim nos. 9 and 10 there is no reason assigned by the Arbitrator and thus the judgment is not applicable in the instant case.

As regard the point of limitation raised by the petitioner the arbitrator has wrongly held that payment in respect of works executed had been released by the petitioner long after preferring claims by the respondent dt. 20.05.2002. The arbitrator has not considered that final bill amount was released on 01.07.1999 and security deposit was released on 26.07.1999. The respondent has raised claim on 20th May, 2002 and thus the objection raised by the petitioner with regard to limitation cannot be sustained.

In view of the above, the award dt. 2nd September, 2011 is set aside. **AP No. 1036 of 2011 is allowed and accordingly GA 3 of 2022 is dismissed.**

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Krishna Rao, J.)