

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.8 of 2002
(Through hybrid mode)**

State of Odisha and another

....

Appellants

-versus-

***Choudhury Natbar Sahoo
(Dead) and others***

....

Respondents

Advocates appeared in the case:

For Appellants:

- Mr. S. N. Das, Advocate
(Additional Standing Counsel)

For Respondent:

- Mr. S. P. Mishra, Senior Advocate

CORAM:

JUSTICE ARINDAM SINHA

**JUDGMENT
13.10.2022**

1. Mr. Das, learned advocate, Additional Standing Counsel appears on behalf of appellant. He submits, the award was made under provisions in Arbitration Act, 1940. State had challenged the award under section 33, contending that there was misconduct, as defined in section 30. The Court below erred in not appreciating contentions made before it and hence, the appeal.

2. He submits, the only point for adjudication of the appeal is that

the tribunal applied 1972 schedule of rates in respect of 2nd Running Account (RA) to final bills. He submits, the contract was made on 1st May, 1972. Pursuant to respondent having submitted tender on 21st July, 1971 per the 1964 schedule of rates. Work order was issued on 26th April, 1972. The work was abandoned and the contract closed on 6th July, 1974. Respondent raised and obtained payments till 9th RA bill as on 12th July, 1974. In the circumstances, respondent having had raised purported claim based on 1972 schedule of rates by letter dated 24th May, 1974 (marked exhibit 5 in the reference), could not have been favoured with award on basis thereof.

3. He relies on **order dated 1st December, 2021** of the Supreme Court in **Civil Appeal no.7738 of 2011 (Pranab Jyoti Das vs. The General Manager and others)**, wherefrom paragraphs 4 and 5 are extracted and reproduced below.

“4. The arguments of the appellant is that Ex.P-12, schedule of items of work and quantities were revised as 450% above North Signature Not Verified Frontier Schedule of rates on 5th June, 1992. Digitally signed by DEEPAK SINGH Therefore, the appellant Date: 2021.12.04 13:00:16 IST Reason:is entitled to 450% increase as on 5th June, 1992 above the schedule of rates, over and above the rate quoted by the appellant.

5. We do not find any merit in the argument raised.

Ex.P-12 is an internal calculation sheet of the department which was never circulated or became part of the schedule of rates. Any noting in the file is not an order on the basis of which the appellant could lay a claim for higher rates. The High Court has declined the claim of the higher rates on good and sufficient grounds.”

He relies on another judgment of the Supreme Court in **South East Asia Marine Engineering and Constructions Limited vs. Oil India Limited**, reported in (2020) 5 SCC 164, paragraph 30, reproduced below.

“30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.”

He submits, said award be set aside in appeal.

4. Mr. Mishra, learned senior advocate appears on behalf of respondent contractor. He submits, aggregate sum awarded was

Rs.4,18,566/- on rejecting most of the claims. Of this, claim, on account of escalation by reliance on 1972 schedule of rates, was awarded at Rs.94,766/-. The award was duly made on reasons given in paragraph 15 in the award. He submits, raising RA bills and accepting payment in the face of the employer itself having upwardly revised the schedule of rates made applicable almost simultaneously with commencement of work under the contract, cannot prevent his client from having claimed. The employer did not automatically or mindlessly make the upward revision. It was based on statutory increase in respect of labour costs and also factoring in increase in cost of materials. The employer, at the time of issuance of work order and thereafter was aware that it itself had increased the rates. It was unfair and unjust on part of the employer to compel his client to terms of the contract in raising and accepting payments on the RA bills.

5. He submits, the work could not be completed because work site could not be provided by the employer. In the circumstance, this award at Rs.94,766/- should not be interfered with in appeal.

6. The facts are, the tender was submitted on 21st July, 1971 as per 1964 schedule of rates. The agreement was executed on 1st May, 1972. Work order was issued on 26th April, 1972 and the 1972 schedule of rates was with effect from 10th November, 1972. 8th RA

bill was prepared on 27th March, 1974 and soon thereafter on 24th May, 1974, respondent requested for extra rates on basis of the 1972 schedule of rates.

7. On above facts the tribunal said, the work executed from 2nd RA to 10th RA and final RA bills will be covered by 1972 schedule of rates, to award aforesaid sum of Rs.94,766/-. The award does not disclose any reason to reveal working of the mind in adjudicating contention raised here in appeal. There has been no demonstration that the arbitration agreement required reasons to be given.

8. It will appear from **Pranab Jyoti Das** (supra) that claim for upward revision on rates was claimed by the contractor on basis of internal calculation sheet of the department. This was not accepted by the High Court as confirmed by the Supreme Court. **In Oil India Limited** (supra) agreement clause 23 between parties therein was under consideration by the Supreme Court. The clause stood quoted in paragraph 16, reproduced below.

“16. We begin by looking at the clause, i.e Clause 23 which is extracted below:

Subsequently Enacted Laws:

Subsequent to the date of price of Bid Opening if there is a change in or enactment of any law or interpretation of existing law, which results in additional cost/reduction in cost to Contractor on account of the operation under the Contract, the Company/Contractor shall reimburse/pay

Contractor/Company for such additional/reduced cost actually incurred.”

It is in context of the clause that the Supreme Court did not accept interpretation of the clause given by both the arbitral tribunal and the High Court. Paragraph 31 is reproduced below.

“31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.”

This judgment does not come to aid of appellant since adjudication of the point contended is not based on a similar contract clause between the parties. The question for adjudication is whether, appellant having itself found that there was increase, for it to effect upward revision by publishing schedule of rates almost simultaneously with commencement of work under the contract, could turn around and resist implementation of its own schedule of rates. The inference that the contractor had factored in upward revision in prices to have made his bid, cannot stand in face of appellants’ own position taken by publishing upward revision on the 1972 schedule of rates. However, that need not weigh with Court since, it has already been found that the award on this claim is without reason and the 1940 Act allowed the arbitrator/tribunal to make award without giving reasons, unless

otherwise agreed between the parties. Furthermore, Court also notices that on this award of Rs.94,766/-, appellant preferred this appeal as presented on 17th September, 2002. The appeal was kept pending, during which time respondent died. Order-sheet bears several orders regarding substitution being made and thereafter there is order dated 18th January, 2019, made by co-ordinate Bench, reproduced below.

“This matter has not been admitted except there is an order for service of copy on the counsel for the respondent, by order of this Court dated 26.09.2003.

Admit.

Records of Arb. Case No.155-AA of 1983 from the Arbitration Tribunal, Bhubaneswar be called for in the meantime.

As the matter is pending since 2002, list this matter for final disposal after three weeks.”

9. The appeal has been listed under heading ‘Old Matters’ at instance of this Bench. In the circumstances, after having filed the appeal, Court does not evince intention to prosecute on part of appellant.

10. For reasons aforesaid, impugned judgment dated 28th September, 2001 is confirmed. The appeal is disposed of.

(Arindam Sinha)
Judge