

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.18 of 2014
(Through hybrid mode)

NALCO

....

Appellant

Mr. Manoj Kumar Mishra, Senior Advocate
Mr. T. Mishra, Advocate

-versus-

Amardeep Constructions

....

Respondent

Mr. G.N. Mishra, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
05.07.2022

Order No.
6.

1. Mr. Manoj Kumar Mishra, learned senior advocate had moved the appeal on 28th June, 2022. He had submitted, the award is removed from the evidence. The arbitrator misdirected himself in looking at the dispute to be a difference in the measurement of excavated silt. In fact, claim made by respondent was for additional work. There was no scope for additional work in the contract. No direction was made to do the additional work.

2. He referred to cross-examination of claimant witness Amar Budhwar. He demonstrated from the deposition that the evidence was, second RA bill covered work executed in

addition to work mentioned in the agreement. There is admission that no order was issued by NALCO for doing any additional work. According to the witness the additional work was ordered by NALCO Engineer. He submits, no such order was made.

3. Today Mr. G.N. Mishra, learned advocate appears on behalf of respondent and submits, as found by the arbitrator, controversy between the parties revolved on the simple question whether the silt excavated from Sabari lake was 11,225.524 cu. mts. as claimed by his client or 6,500 cu. mts. as contended by appellant. He draws attention to deposition of said witness, both in chief and cross-examination, to point out that it was not a claim for additional work but the variation from quantity provided in the contract. He draws attention to impugned judgment dated 27th January, 2014 for reliance on the contract quantity clause introduced and extracted in it. He relies upon following passage, reproduced below.

“The quantity variation has been mentioned in Clause 9.0 which runs as follows:

“The quantity mentioned in the schedule is approximate in nature and may vary widely. The contractor shall have to execute the work accordingly as per the direction of Engineer-in-

Charge. You shall not be entitled to any compensation whatsoever for a variation in the quantum of job.””

He submits, there should not be interference in appeal on the Court below having found that the award cannot be said to suffer from any ground under section 34 in Arbitration and Conciliation Act, 1996, for it to be set aside.

4. Upon perusal of materials on record in the appeal, it is clear that appellant's scope of work as per the contract was to excavate 6,500 cu. mts. of silt from the lake. It appears to be without dispute that the procedure provided for measurement of silt excavated, was not adhered to. Several notings were made and the engineer of appellant was also said to have maintained record of measurements in his personal diary, not produced. The arbitrator had before him parties having laid evidence. The Tribunal found, scoring out of the figure arrived at on measurements recorded, to be substituted by 6,500 cu. mts., did not tally with rest of the notings made in the record of measurements, maintained, as aforesaid, not as per procedure provided in the contract. In analyzing the evidence, the Tribunal found that the controversy arose because the contractor had initialed the scoring out. The arbitrator appears to have been

impressed with evidence of the contractor that he had initialed on being told that first R.A. bill was to be confined to the contract quantity and for the balance, another bill had to be raised. Hence, relying on evidence adduced, the Tribunal came to the finding that the controversy was only about calculation of quantity of excavated silt.

5. Appellant has relied on cross-examination of claimant witness to emphasis there is admission that the second R.A. bill did not constitute any claim for extra work. The contract providing for excavation of a specified quantity, anything above that was extra work. There was no direction by his client to do such extra work and nothing could be disclosed before the Tribunal to show otherwise. This contention cannot be accepted because clause 9, quoted above, while providing for wide variation in the quantity excavated, only barred the contractor from claiming compensation for doing more work. Thus he could claim for the actual quantity difference but not as an extra, to include compensation.

6. Considering that the measurements recorded were not as per procedure provided in the contract, the controversy between parties necessarily enlarged scope of inquiry by the Tribunal. It

allowed both parties to lay evidence, documentary and oral. On going through the evidence the Tribunal found as aforesaid. The finding cannot be said to be such as a reasonable and prudent person would not come to or that the view taken is not possible. In the circumstances, this Court does not find that any of the grounds in section 34 has been demonstrated as present in the award.

7. Impugned judgment is confirmed. The appeal is dismissed.

(Arindam Sinha)
Judge

Sks

