

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.40 of 2014
(Through hybrid mode)**

***Steel Authority of India Limited
and another***

....

Appellants

Mr. N.K.Sahu, Advocate

-versus-

***M/S. G.C. Kanungo Construction
(P) Ltd., Cuttack.***

....

Respondent

Mr. M. Kanungo, Senior Advocate.

CORAM: JUSTICE ARINDAM SINHA

**ORDER
05.05.2022**

**Order No.
22.**

1. Steel Authority of India Limited (SAIL) has preferred appeal against order dated 17th May, 2014 made by the Court below, rejecting its challenge to award dated 8th August, 2012.
2. Mr. Sahu, learned advocate appears on behalf of appellant and was heard on 29th March, 2022. He had submitted, parties had agreed, inter alia, after his client filed counter/written statement, respondent (claimant) would have opportunity to file rejoinder to the counter and counter claim, if any. The agreed procedure was recorded by the tribunal on order dated 9th May, 2008. In breach of this procedure, respondent was allowed to file additional rejoinder, disclosing disputed documents, allegedly sent to his client under certificate of posting.
3. He drew attention to paragraph 17 in the award to demonstrate

that additional rejoinder was accepted from claimant. From paragraph 20 he pointed out that the documents disclosed in the additional rejoinder were marked exhibits C-20, 22, 25 to 28, 33 to 39, 41 to 44 and 47 to 51. Claimant had claimed these documents to have been dispatched under certificate of posting. His client never received those documents. In the circumstances, reliance on those documents, for purpose of making the award, was in violation of provisions in sections 19 and 28 in Arbitration and Conciliation Act, 1996.

4. Claimant had, in compliance with requirement under the contract, furnished bank guarantee. His client duly invoked the bank guarantee. The tribunal travelled beyond scope of the contract to rule on the invocation and consequently award claimant in respect thereof.

5. The tribunal also travelled beyond four corners of the contract in awarding Rs.25,000/- as transportation cost for every school site, there being 90 such sites. This could not be done since clause 4 in Additional Special Conditions (exhibit R-10) specifically included transportation in scope of the work. He had submitted, by reason of above, the award was liable to have been set aside in the challenge. The Court below erred in not appreciating the challenge.

6. He referred to paragraph 24 in the award, which deals with

whether his client was entitled to recover cost of material and interest. He submitted, there was a cost and interest component, outstanding from respondent on account of supply of steel. The tribunal committed illegality in rejecting the counter claim. On query from Court he submitted, the supply was made on request of respondent and not as an obligation under the contract.

7. He then drew attention to clause (iii) under paragraph 30 in the award. He submitted, there was award of Rs.2000/- per school, aggregating Rs.1,00,000/-, said to be payable due to use of potable water. Referring to clause 8 in the Letter of Intent dated 24th April, 2000 (Ext. R-10), he demonstrated that, inter alia, water was to be arranged by the contractor, at its cost.

8. Moving on to clause (iv) under the paragraph he submitted, extra transportation cost including lifts and leads were awarded at Rs. 31,50,000/-. There was clear mention under clause 4 in Additional Special Conditions (Ext. R-10) that all leads, lifts, transportation were included in the scope of work.

9. With reference to clause (x) under the paragraph he submitted, compensation could not have been awarded. There was arbitrary award of Rs.1000/- for each completed school, 86 in number. The

contract did not provide for payment of compensation and the arbitrator could not have awarded. Furthermore, there was award of Rs.8,95,000/-, also arbitrarily made at the rate of Rs.10,000/- per school for 60 schools that were taken out of the scope of work, Rs.15,000/- for 13 schools and Rs.20,000/- for 5 schools. He submitted, claimant/respondent itself pleaded for reducing scope of the work. Hence, from total number of schools in original scope of work, some schools were taken out. Compensation for pilferage or stealing or whatever could not have been awarded as not provided in the contract. The arbitrator travelled beyond four corners of the contract. There should be interference.

10. He relied on several judgments of the Supreme Court.

(i) **State of Chhatisgarh vs. Sal Udyog Pvt. Ltd.** reported in (2022) 2 SCC 275, paragraph 26.

ii) **MMTC Ltd. vs. M/S.Vedanta Ltd.**, reported in (2019) 4 SCC 163, paragraphs 10 to 12, wherein earlier judgments of the Court in **Associate Builders vs. BDA**, **ONGC Ltd. vs. Saw Pipes Ltd.** etc. were referred for well settled law that Court does not sit in appeal over the arbitral award and may interfere on merits on limited grounds provided under section 34, Arbitration and Conciliation Act, 1996.

iii) **Food Corporation of India vs M/S.Chandu Construction**, reported in (2007) 4 SCC 697, paragraphs 11 to 13. He submitted, this judgment too was rendered under the Act of 1940, on jurisdictional error committed by the arbitrator in travelling beyond four corners of the contract.

iv) **Maharashtra vs. Rashid Babu Bhai Mulani**, reported in AIR 2006 SC 825, paragraph 14. The Supreme Court, in the paragraph said, regarding postal dispatch under certificate of posting and the ease, with which such certificate can be procured by affixing ante dated seal with the connivance of any employee of the post office, was a matter of concern. He reiterated, the tribunal relied on documents introduced by additional rejoinder. Those were copies of letters allegedly sent to his client under certificate of posting.

v) **Steel Authority of India Ltd. Vs. J.C. Budharaja**, reported in (1999) 8 SCC 122. He submitted, this judgment was rendered in adjudication under Arbitration Act, 1940 but the principle of law applies. The Court found that the award was passed in disregard of express terms of the contract and therefore was arbitrary, capricious and without jurisdiction, as in the case here.

11. Mr. Kanungo, learned senior advocate appears on behalf of

respondent and submits, the arbitrator decided in terms of the contract. He draws attention to paragraph 17 in the award to submit with reference thereto, that on 25th April, 2009 appellant had filed a memo of admission and denial, which was inclusive of documents annexed to the additional rejoinder. In paragraph 18, the tribunal said that some of the documents annexed to the additional rejoinder were admitted by said memo dated 25th April, 2009 and on some others, his client's witness was extensively cross-examined. On yet some other documents, absolutely no question was raised, either during the examination or in personal hearing. In this background, the tribunal had dealt with the additional rejoinder as part of pleadings of his client and the disclosures therein, as was tendered in evidence. On query from Court he hands up procedural order no.3 dated 9th May, 2008, wherein was recorded procedure regarding, inter alia, pleadings to be filed by the parties.

12. On invocation of bank guarantee and adjudication in respect thereof he submits, two bank guarantees were furnished. One was in respect of security deposit. It was refunded. The other bank guarantee was for Rs.53,48,028/-. He draws attention to paragraph 32 in the award to show that the arbitrator had found that the bank guarantee

had been furnished in respect of the mobilization advance, being 10% of contract value. The tribunal went on to find that major part of the mobilization advance was recovered from running bills leaving balance of Rs.17,08,339/-. The bank guarantee, having had been furnished as security for recovery of mobilization advance, therefore, the tribunal found that recovery in excess of Rs.17,08,399/- could not be sustained and awarded Rs.36,39,629/- on that account.

13. Moving on to appellant's contention regarding award of Rs.25,000/- each for 90 sites as made beyond four corners of the contract. He draws attention to clauses (iv), (v) and (vi) in paragraph 30 of the award. He points out that the tribunal referred to, inter alia, letter dated 27th November, 2000 of SAIL (Ext. C-11). For the context he relies on a paragraph in the letter, extracted and reproduced below.

"You will be pleased to know that an additional amount of Rs.15,000/- per School is being considered for payment to you for construction in locations identified under 'Difficult approach'."

14. He submits, it is true that Additional Special Conditions clause-4 said, inter alia, all leads, lifts transportation are included in the scope of work but there was this enhancement granted by appellant itself, in consideration of difficult approach to identified construction locations.

The tribunal enhanced this additional amount to Rs.35,000/- for the 90 schools constructed by his client. He submits, there should not be scrutiny by a magnifying glass regarding the reason or reasonableness. He relies on **judgment dated 18th January, 2022 in Civil Appeal no.1533 of 2017 (Atlanta Limited Vs. Union of India)**, paragraphs 10, 12 and 21 in Manupatra print. Paragraph 21 is quoted below.

“21. In the instant case, having gone through the Award, we find that the learned Sole Arbitrator was lucid in his reasoning for taking a particular view on the interpretation of the terms and conditions of the contract between the parties. It was for this very reason that the learned Single Judge had forbore from interfering with the arbitral Award and dismissed the petition filed by the respondent-Union of India under Sections 30 and 33 of the 1940 Act. By going into the minute details of the evidence led before the learned Sole Arbitrator with a magnifying glass and the findings returned thereon, the Appellate Court has clearly transgressed the limitations placed on it. In any case, we are of the opinion that the reasons offered for taking such a view, are neither justified nor called for interfering with the arbitral Award. ”

15. He reiterates his submissions recorded in last preceding paragraph as also made with regard to award of aggregate Rs.1,00,000/- for potable water and compensation of Rs.10,000/- for each completed school at aggregate Rs.8,60,000/-. He submits further, part of appellants counter claim was awarded and by paragraph 24 in the award the tribunal was justified in rejecting the other counter claim

regarding cost and interest component on account of supply of steel.

16. On the judgments relied upon by appellant Mr. Kanungo submits, he has no quarrel with the propositions of law declared therein. He reiterates reliance on **Atlanta Limited** (supra) and submits, even though, it is a judgment in respect of challenge to an award made under the 1940 Act, the principles declared are applicable.

17. Mr. Sahu in reply reiterates reliance on the judgments already cited by him and in particular on **State of Chhattisgarh** (supra), paragraph 26, from where following passage is extracted and reproduced below.

“... We are, therefore, of the view that failure on the part of the learned Sole Arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the “patent illegality ground”, as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an Award. The said ‘patent illegality’ is not only apparent on the face of the Award, it goes to the very root of the matter and deserves interference.”

18. Appellant’s first point is regarding agreed procedure, particularly in respect of pleadings. Perusal of procedural order dated 9th May, 2008 reveals that the tribunal said, after discussion with both parties it is has been decided in the following manner, as stated

thereafter in the clauses 1 to 10. There being no disclosure of otherwise written agreement regarding procedure, this procedural order must taken to be decision of the tribunal, taken upon hearing the parties. The tribunal having decided the procedure, accepted the additional rejoinder. The award mentions that appellant had filed memo of admission and denial, admitted some documents, denied others, presumably on which there was cross examination made of claimant's witness and still other documents, about which nothing was said. In the circumstances, keeping in mind pleadings are for purpose of giving notice of case to the other side, it is clear that appeallant had sufficient notice of pleadings by the additional rejoinder as well as opportunity to deal with disclosures made therein. In the situation, it is not necessary to express a view on communication dispatched under certificate of posting. Mr. Kanungo had handed up copy of letter dated 26th May, 2003, marked Ext.C-1 in the reference, sent by appellant to his client under certificate of posting.

19. So far as, appellant's contention regarding bank guarantee is concerned, it will appear from above record of submissions that it cannot be said there is patent illegality appearing in the award. The tribunal found that the guarantee was furnished for mobilization

advance and encashment of it was in excess of the unrecovered amount.

20. The tribunal awarded Rs.25,000/- as transportation cost for every school site, there being 90 school sites. Clause 4 in the Additional Special Conditions stood in the way. However, appellant itself appreciated difficult approach to identified locations and by Ext. C-11 informed that claimant would be paid Rs.15,000/- on those sites. The arbitrator went on to increase the cost from Rs.15,000/- to Rs.35,000/-. This the arbitrator deed in respect of all sites. It does not appear from Ext.C-11, as to which were the identified sites or they were how many in number. This difficulty respondent has been able to overcome by reliance on **Atlanta Limited** (supra), wherein the Supreme Court said as quoted above.

21. So far as the claims on account of potable water and compensation are concerned, these claims are clearly outside the contract and there was no concession or relaxation made by appellant with regard thereto. Award on account of potable water and compensation are severable and hereby set aside. Appellant's counter claim for cost and interest component, outstanding from respondent on account of supply of steel was a counter claim, rejected. Court has

ascertained that the supply was made on request of respondent and not as an obligation under the contract. That the arbitrator cannot travel beyond four corners of the contract has been appellant's contention.

22. Impugned judgment is modified to extent that claims awarded on account of potable water at aggregate Rs.1,00,000/- and compensation at Rs.10,000/- per school for 86 completed schools, are hereby set aside.

23. The appeal is partly allowed and disposed of.

(Arindam Sinha)
Judge

Prasant

