

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.1 of 2022
(Through hybrid mode)**

***M/s Kohli Builders and Developers
Private Limited***

Appellant

Mr. S. S. Das, Senior Advocate
Ms. S. Modi, Advocate
Mr. S. Das, Advocate
Mr. S. Das, Advocate
Mr. S. Pattanaik, Advocate
(Respondent in ARBA No.22 of 2022)

-versus-

M/s VISA Steel Limited

Respondent

Mr. Gautam Mukherji, Senior Advocate
Mr. Manoj Kumar Pati, Advocate
Ms. M. Mishra, Advocate
Mr. R. Mohapatra, Advocate
(Appellant in ARBA No.22 of 2022)

CORAM: JUSTICE ARINDAM SINHA

**ORDER
24.08.2022**

**ARBA No.1 of 2022
and
ARBA no.22 of 2022**

Order No.

- 06.** 1. Two appeals have been preferred against judgment dated 23rd October, 2021 passed by the Court below on the challenge petition under section 34 in Arbitration and Conciliation Act, 1996.
- Mr. Das, learned senior advocate appears on behalf of appellant in

ARBA no.1 of 2022 while Mr. Mukherji, learned senior advocate appears on behalf of appellant in ARBA no.22 of 2022.

2. On perusal of the award dated 23rd April, 2016, as corrected on 24th May, 2016, it appears claims of the claimant (appellant in ARBA no.1 of 2022) were allowed in part. Counter claims made by respondent in the reference (appellant in ARBA no.22 of 2022) were rejected. Hereinafter, reference to the parties will be as they were in the reference.

3. Claimant was the contractor. Respondent had invited tender for construction of guest house. During working out of the contract a further contract was entered into for constructing administrative building. Several amendments to the contracts were made. Times for conclusion were mentioned in the contracts, including provision for imposition for liquidated damages.

4. It appears from the award and impugned judgment that claimant completed 90% of the work in respect of the guest house and only about 10% of the work regarding the administrative building. The Court below also recorded submission of respondent that Rs.5,02,46,963/- was paid in respect of guest house against contract value of Rs.5,24,94,736/- and Rs.2,74,15,294.32/- against Rs.7,85,29,4220/- being contract value, towards construction of the

administrative building. Mr. Mukherji hands up a chart showing, inter alia, claims made by claimant and particulars of award/rejection thereon. It appears from the chart that claims for work done, escalation, interest on delayed payment, additional tools and plants, charges for extended period, additional overhead for extended period, loss of profit, insurance charges, idle charges and shuttering charges were allowed to claimant at aggregate amount mentioned in impugned judgment at Rs.8,33,17,519/- along with interest at 9% per annum on a lesser sum as directed therein. Respondent had challenged the award. By impugned judgment respondent though obtained success in having it set aside, it, later and during pendency of appeal filed by claimant, also preferred appeal. Mr. Mukherji submits with reference to impugned judgment that other genuine grounds of challenge to the award were not dealt with by the Court below, compelling his client to prefer the appeal. He submits, this would appear from paragraph 11 in impugned judgment.

5. Reasons given for setting aside the award are in paragraphs 10 and 11 of impugned judgment, reproduced below.

“10. The core question before the learned arbitrator was whether time was the essence of contract and the same was answered in the negative. The learned

advocate for the petitioner contended that due to non-completion of the building in time, the company suffered huge loss, which practically does not sound to be incorrect. The learned advocate for the O.P. citing some precedents and illustrations contended that in case of construction works, time is not the essence of contract. It may not be proper to give any finding regarding correctness of the same. But however, the terms of written contract i.e. the Work Order, Ext.5, cannot be ignored. I find, in this vital document, there is clear mention in clause 9, 10 & 11 that the construction of the Guest House was to be completed within 6 months with additional period of 15 days for mobilization. There is a specific clause no.15, which states-

Completion of works is the essence of contract. Liquidated Damage (LD) will be levied for delay in completion of the works. If the contractor fails to complete the works within the completion period including extension if any, LD will be 1% of the contract value per week of delay or part thereof subject to maximum 10% of the contract value.

The O.P. No.1 accepted the letter of confirmation on dt.09.05.2007 and assured to execute the work of the petitioner to his satisfaction and thereafter, the work order was issued in his favour on dt.20.06.2007. He was therefore, bound by the said condition of the contract. Admittedly, the O.P. submitted his final bill, asking payment although the building was not completed. What to speak of timely completion ? In my

considered view, when there is specific mention in Ext.5 that construction in time is the essence of contract and that too, there is clear stipulation of liquidated damage, it cannot be said that time was not the essence of the contract between the parties. The finding of the learned Arbitrator in this regard is accordingly perverse.

The petitioner, reposing confidence upon the O.P. no.1, assured him to entrust the work for civil construction of an administrative building at the same rate, terms and conditions. But the conduct of the contractor (O.P.no.2) was in the nature of betrayal. It is well settled in law that express terms and conditions of a contract document would exclude extraneous considerations. It is true that the petitioner allowed the O.P. to continue construction despite the completion of the stipulated term/period, without notice to claim liquidated damage, but the same cannot be utilized to his discomfort. The Contractor (O.P.no.1) should not be allowed to take advantage of his own wrong and latches. There being no specific clause in the contract exonerating the O.P. from his liability to pay liquidated damage on deviating the terms of contract in the matter of time, I feel, the counter claim of the petitioner was not properly appreciated by the learned arbitrator.

11. Although there are some more genuine grounds to question the correctness of the award, the above three aspects (highlighted in paragraph 8 & 9, supra) amount to patent illegality, apparent on the face of the award. The petitioner has satisfied this Court the

ingredient embodied in section 34 (2A) of the Arbitration Act, so as to exercise its power u/s 34 of the said Act. In view of the discussions made above, I am constrained to hold that the award suffers from patent illegality and as such needs to be set aside.”

6. On perusal of the paragraphs reproduced above, it will be clear that the reasons were founded on three aspects highlighted in paragraphs 8 and 9 of impugned judgment, found to amount to patent illegality apparent on face of the award. Here it is necessary to mention that respondent had raised counter claims, only one of which was for liquidated damages. This counter claim was framed as issue no.39, as a claim for Rs.1,31,02,415/- for liquidated damages per clause-15 of the work order. On perusal of paragraph 140 in the award, Court is satisfied that reasons given for rejecting the counter claim on liquidated damages on finding that time was not essence of the contract appears to have been on due adjudication and there is no apparent patent illegality. The arbitrator found that extension was granted by respondent without imposing liquidated damages for the conclusion, time was not the essence. This, however, has no relevance simply because the award was on claims of the claimant. Counter claims were not awarded. It is respondent who challenged the award on some claims of claimants having been awarded.

7. It follows, adjudication that was necessary in the challenge was regarding whether claims of the claimant as awarded, disclosed any patent illegality apparent on the face of the award or whether it contained any other ground in section 34, for it or a part of it to be set aside. That adjudication is not apparent from impugned judgment. Time being essence of the contract was a contention urged by the parties in context of respondent's counter claim of liquidated damages. It was, as aforesaid, not awarded on extension of time granted and the work not completed by claimant.

8. In view of aforesaid, impugned judgment is set aside in appeal and the petition under section 34 restored to the Court below/proper Court for expeditious adjudication and disposal on remand.

9. The appeals are disposed of.

(Arindam Sinha)
Judge

Prasant