

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.12 of 2008
(Through hybrid mode)

Suresh Chandra Mirchandani ***Appellant***

Mr. S.K. Purohit, Advocate

-versus-

Chief General Manager, Mahanadi ***Respondents***
Coalfields Ltd. and another

Mr. S. Mohanty, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER

07.07.2022

I.A. no.24 of 2022

Order No.

19.

1. This application is for recall of order dated 3rd March, 2022, dismissing the appeal. Mr. Purohit, learned advocate appears on behalf of applicant/appellant and had moved the application on 24th June, 2022. Order made that day is reproduced below.

“Mr. Purohit, learned advocate appears on behalf of applicant and submits, his client is interested in the appeal but unfortunately had not given instructions, causing the appeal to be dismissed. He prays for recall of order dated 3rd March, 2022.

2. *Applicant is directed to serve copy of the recall application along with this order on learned advocate, who had appeared on 3rd March, 2022,*

when the appeal was dismissed. It is made clear that the appeal itself will be taken up on adjourned date. In event applicant is not ready with the appeal, the recalling application is likely to be dismissed.

3. *List the recall application on 30th June, 2022, immediately after old matters.”*

2. Mr. Mohanty, learned advocate appears on behalf of respondents. Parties are ready for hearing and disposal of the appeal. In the circumstances, causes shown for lack of instruction in pressing the appeal on 3rd March, 2022 are accepted. The appeal is restored to file and the application is disposed of.

3. Mr. Purohit submits, his client was contractor engaged by Mahanadi Coalfields Ltd. (MCL) to do work. Though time for doing the work was specified, several extensions were granted by the employer. It is because of the employer that the work could not be completed. 20% of the work remained outstanding. In the circumstances, his client required resolution of disputes by arbitration.

4. Chairman-cum-Managing Director (MCL) appointed sole arbitrator. MCL was the employer. As such the Chairman-cum-Managing Director (MCL) was ineligible to be arbitrator. He could not then have appointed sole arbitrator,

notwithstanding the arbitration agreement clause. He submits, arbitration is based on neutrality. The employer appointed its person as arbitrator. Nothing further need be said on the adjudication suffering from bias.

5. He relies on judgments of the Supreme Court.

(i) **Judgment dated 26th November, 2019 in Arbitration Application no.32 of 2019 (Perkins Eastman Architects DPC v. HSCC (India) Ltd., paragraph 14 (Indiainkanoon print). Relied upon passage is extracted and reproduced below.**

“14. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.”

(ii) **Decision dated 10th February, 2017 in Arbitration**

Petition (Civil) no.50 of 2016 M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation, paragraph-16 and 17 (IndiaLawLib print).

(iii) **Decision dated 3rd July, 2017 in Civil Appeal no.5306 of 2017 (TRF Ltd. v. Energo Engineering Projects Ltd.)**, paragraphs 11, 56 and 57 (IndiaLawLib print). On query from Court he submits, both **Voestalpine** (supra) and **TRF** (supra) were referred to in **Perkins** (supra).

6. On further query from Court regarding whether the declaration of law relied upon for the proposition that an arbitrator, himself ineligible, cannot appoint another as based on the year 2015 amendment, if can be made applicable to the present case wherein the award was passed long before the amendment, he reiterates his submission that because there is inherent bias attributed to an ineligible person, the principles of the declaration of law do apply.

7. Mr. Mohanty submits, the award is good and there should not be interference in appeal on it having been upheld by the lower Court. The judgments cited by Mr. Purohit do not apply since the award is dated prior to the year 2015 amendments.

8. The position in law regarding bias in an adjudication prior to the year 2015 amendment relied upon was to find it appearing from the record. In this case Court has perused the award. There is no apparent bias in the award. It is true that Chairman-cum-Managing Director of MCL appointed the sole arbitrator. The person then held office as General Manager, Management Training Institute, MCL. The award is dated 1st February, 2000.

9. In the award the arbitrator has tabulated respective cases presented by the parties. It is clear that only 80% of the work was done. The award says appellant had alleged that sites were handed in piecemeal during June and July, 1993. Several extensions of time were granted. The department had sent express telegram to appellant requesting completion of balance work within 20th March, 1996, to be treated as final notice.

10. The award also gives analysis of the evidence adduced by the parties. The analysis says that appellant had not stated when he submitted drawing to the department while the department adduced documentary evidence to show that delay was due to the late submission. Though appellant had said that monsoon affected the work but the arbitrator found that the whole work were to be completed in six months time but during

the first four months appellant did only 10% of the work. On contention of appellant that there were two separate individual work sites, the arbitrator found mention in the Notice Inviting Tender (NIT) of the scope of work at the sites. In rejecting the claims of work done but not paid for, refund of security deposit and overheads, the arbitrator also rejected the consequential claims of interest etc. There was finding on facts regarding the amount of work done and that it had been paid for. There was rejection of claim for refund of security deposit on the work remaining incomplete.

11. The arbitrator allowed counter claims put up by the employer. Two counter claims were allowed. Firstly, forfeiture perpetual of security deposit and secondly, imposition of due to belated completion of work. On perusal of reasons given in the award for allowing the claims, Court finds that as aforesaid the arbitrator awarded forfeiture of security deposit because the work was not completed. However, the arbitrator held that MCL had not closed the contract. In the circumstances, the award of penalty appears to be perverse. This is because penalty imposed at 10% of agreement value is on an agreement right to impose penalty due to belated completion of work but the arbitrator himself found that the work was incomplete and MCL had not

yet closed the contract. This counter claim award on penalty of Rs.91,800/- is severable and is set aside.

12. Impugned judgment dated 28th July, 2007 is modified as above.

(Arindam Sinha)
Judge

Sks

