

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.1 Of 2020
(Through hybrid mode)**

NALCO

....

Appellant

Ms. Pami Rath, Advocate

-versus-

M/S. Agarwal Rasayan

....

Respondent

Mr. Goutam Mishra, Senior Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
08.04.2022**

Order No.

5.

1. Ms. Rath, learned advocate appears on behalf of appellant and submits, her client's appeal is against judgment dated 16th October, 2019 dismissing her client's challenge to award dated 17th March, 2015.

2. She submits, her client entered into a contract with respondent for obtaining supplies of specified quantity over a period of 24-26 months. Respondent was in breach in not being able to supply minimum specified quantity in any month. It purported to rely on force majeure clause in the contract to claim on alleged second incident of fire, they were unable to continue with the supplies. Her client, in view of earlier continuing breach and wrongful termination, invoked the

bank guarantees. The tribunal held that the termination was proper on not requiring proof of fact on invocation of the force majeure clause. As such, award for refund of proceeds of the bank guarantees and interest thereon was made. The award suffers from patent illegality on the face of it inasmuch as the finding is based on no evidence. She relies on judgment of the Supreme Court in **Delhi Airport Metro Express (P) Limited Vs. Delhi Metro Rail Corporation Limited (DMRC)**, paragraph 29. The relied upon passage therein is quoted below.

“The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the

expression “patent illegality”.”

3. Mr. Mishra, learned senior advocate appears on behalf of respondent and submits, his client was rendered unable to continue with the supplies by reason of the second fire incident, the first having seriously hampered his client’s performance. The second incident of fire was a fact. Appellant did not seek to verify and thereupon dispute the incident as had happened or that it did not affect performance capability of his client. In the circumstances, the tribunal being chosen forum, considered and adjudicated the controversy and passed the award. It bears reasoning and cannot be said to be based on no evidence. He submits, the Court below appreciated the circumstances and adjudication in the award, to dismiss the challenge. There should not be interference in appeal.

4. Ms. Rath in reply relies on fax message dated 15th May, 2006 sent by her client to submit, her client did dispute the second incident of fire and invocation of the force majeure clause, purportedly based thereon. On query from Court she submits, the second alleged incident of fire allegedly took place on 1st May, 2006. Text of the fax message is reproduced below.

“THIS HAS REFERENCE TO OUT P.O. NO.

NBC/MM/01/99/2372 DTD.24.01/2005 PLACED ON YOU FOR SUPPLY OF 13.600 MT OF LIQUID COAL TAR PITCH FOR THE YEAR 2005 & 2006 & ALL SUBSEQUENT CORRESPONDENCE INCLUDING OUR FAX DTD.09/05/2006 (.) THE CONTENTION MENTIONED BY YOU VIDE YOUR LETTER DTD.13/5/2006 IS NOT ACCEPTABLE & LEGALLY NOT TENABLE (.) YOU HAVE BEEN GIVEN ENOUGH OPPORTUNITY TO IMPROVE YOUR SUPPLY. BUT YOU HAVE FAILED TO SUPPLY MATERIAL AS PER TERMS OF THE ORDER (.) ACCORDINGLY RISK & COST PROCUREMENT WAS TAKEN AS PER TERMS OF THE ORDER (.) YOUR RELIANCE TO CLAUSE-14 IS NOT TENABLE & NOT ACCEPTABLE IN PRESENT SITUATION WHERE YOUR FAILURE IS NOT RELATED TO SO CALLED FORCE MAJEURE CONDITION (.)”

5. The only ground of appeal is that the award has patent illegality on face of it by omission of basis in evidence to have the finding of due invocation of the force majeure clause. The force majeure clause is reproduced below.

“ If an any time during the continuance of the order, the performance, in whole or in part by either party, or any obligations under the order, shall be prevented or delayed by reasons of any war, hostilities, acts of public enemy civil commotion, sabotage, fires, floods, explosion epidemics, quarantine restrictions, which

affects the execution of this order directly or acts of God (hereinafter referred to as events then, provided a notice of the happening of any such event is given by either party to other by cable within 48 hours from the date of occurrence thereof, neither party shall be reasons of such events be entitled to terminate this order nor shall any party have any claim for damages against the order in respect of such non-performance or delay in performance and delivery order shall be resumed as soon as practicable after such an event has come to an end or ceased to exist provided it can be done within 60 (sixty) days time from the date of commencement of the event, provided further that if the performance in whole or part of any obligation under this order is prevented or delayed by reasons of any such event for a period exceeding sixty days either party may at its option, terminate the order.”

6. Perused the award. On the point arising out of the ground taken, the tribunal found, inter alia, as reproduced below.

“ The language contained in the clause 14 above is not explicit when the notice for invoking force majeure can be issued, whether one party has to wait for 60 days before invoking force majeure or not. However, it is clear that if the performance can be done within 60 days, neither party can invoke force majeure. Considering the provisions of the clause above and the termination letter of the respondent, it is apparent that the respondent clearly informed the claimant that the

*performance under the contract cannot be resumed within 60 days. **The claimant had opportunity and the means to verify any claim of the respondent and the provisions of the clause do not require the respondent to prove the force majeure.** I am thus of the view that force majeure stood invoked with effect from 1/5/2006”.*

(emphasis supplied)

7. The fax message dated 15th May, 2006 cannot be said to be an attempt at verification or dispute raised thereby upon attempt at verification. It appears from contents of the message, in the circumstances there were assertions of contractual rights. When appellant had not raised the question of proof, the tribunal cannot be faulted for not requiring proof or the interpretation given that the force majeure clause does not specify, who is to furnish the proof. Presumption is possible in law. Where respondent had asserted an incident of fire, appellant had the means to find out whether there was such an incident recorded with the appropriate authorities like the police and the fire services. Not having done so, presumption is possible that appellant knew that the incident of fire had taken place. Such incident has been given in the force majeure clause as a basis for the party suffering to terminate the contract. In the circumstances,

reasoning in the award cannot be said to be perverse or not possible.

The parameters declared in **Delhi Airport Metro Express (P) Limited** stand satisfied by the award.

8. There is no reason for interference in the appeal. It is dismissed.

(Arindam Sinha)
Judge

Prasant

