

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.11 of 2011
(Through hybrid mode)

M/s. Engineers India Ltd. ***Appellant***

Mr. S.P. Mishra, Senior Advocate

-versus-

***Shyam Sunder Agarwal and
another*** ***Respondents***

Mr. Y. Dash, Senior Advocate

Mr. Rajeet Ray, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
05.04.2022

Order No.

19.

1. Impugned in this appeal is judgment dated 22nd June, 2011, whereby the Court below rejected petition of appellant made under sections 30 and 33 of Arbitration Act, 1940, for setting aside award dated 29th August, 2008.

2. Mr. Mishra, learned senior advocate appears on behalf of appellant and submits, the arbitrator travelled beyond his jurisdiction in making the award. That can be looked into under section 30. He relies on three decisions of the Supreme Court.

(i) **Associated Engineers Co. v. Government of Andhra Pradesh** reported in (1991) 4 SCC 93, paragraphs 24 to 29.

Paragraph 29 is reproduced below.

“The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra fines compromissi.”

(ii) **T.N. Electricity Board v. Bridge Tunnel Constructions** reported in (1997) 4 SCC 121, paragraphs 24 and 41.

(iii) **Rajasthan State Engineering Enterprises v. Eastern Engineering Enterprises** reported in (1999) 9 SCC 283, paragraphs 44 to 47.

3. Relying on above decisions he submits, in matters of challenge to the award there are two distinct or different grounds. First is error apparent on face of the record and the other that the arbitrator has exceeded his jurisdiction. He submits, in this case the arbitrator exceeded his jurisdiction.

4. He draws attention to the award. Referred paragraph-12 is reproduced below.

“12. After going through the claims statement, written statement, Rejoinder, oral evidence,

documentary evidence, written submissions filed by both the sides and all the materials placed before me and having heard both the parties at length, I do hereby award that the opposite party shall pay a sum of Rs.52,00,000.00 (rupees fifty two lakhs) to the claimant. I further award that the claimant shall be entitled to receive from the opposite party interest from 13.09.1989, the date of initiation of the Arbitration proceeding by invoking arbitration at the rate of ten percent per annum on the awarded amount till the same is paid. Both the parties are left to bear their own costs of the arbitration proceeding.”

He submits, though it is non-speaking award, it refers to, inter alia, documentary evidence. He relies on memo dated 24th February, 2022 filed by appellant disclosing Exhibits 2, 5 and 37. He submits, Ext.2 is Letter of Intent dated 29th November, 1983. It expresses intent of taking on hire, one bus. Inter alia, payment of bills was provided for and value of the contract given in the schedule of rates. The schedule provided for payment of Rs.21,000/- per month in the hire period, all told, for one bus. In addition, there was given rate for trips within radius of 500 kilometers at Rs.2 per kilometer. On query from Court he submits, certain other payments were provided for in the Letter of Intent, requiring proof of expenditure on those.

The heads were increase in cost of fuel, over time wages, taxes, permits and insurances were in addition to the consolidated all told payment of Rs.21,000/- per month. Ext.5 is agreement dated 31st December, 1983 pursuant to the Letter of Intent and it reflects contents thereof as part of it. Ext.37 is notice dated 11th May, 1983 inviting tender.

5. He then draws attention to of paragraph-5 in the statement of claim mentioning details of the claims made. He demonstrates therefrom that Rs.12,17,481/- was received by respondent. He submits, this amount included aggregate of Rs.21,000/- per month for 47 months. He clarifies, the contract was for three years and extended thereafter, for one year. It was terminated by his client one month before expiry of 48 months. He reiterates, aggregate agreed remuneration of Rs.21,000/- per month was paid as included in the total amount of Rs.12,17,481/-, paid to respondent. Pointing out from the items of claim he submits, they had been made in respect of two buses, over and above the agreed amount, already paid. Retention charges, running charges, minimum running charges, price escalation on fuel without supporting documents, transportation of fuel, Court expenses for procuring permit,

carrying extra passengers, damages for violation of Motor Vehicles Act are most of the claims made, totaling Rs.1,56,04,884/- with interest added. He submits, even without speculating on working of mind of the arbitrator, the four corners of the agreement are very narrow in scope of additional payments being made. There was no adjudication but award of Rs.52,00,000/-. The arbitrator committed misconduct in making the award in the circumstances. He submits, the award is liable to and should be set aside on ground made out under section 30.

6. Mr. Dash, learned senior advocate appears on behalf of respondents and also relies on judgments of the Supreme Court.

(i) **Indian Rare Earths Ltd. v. Unique Builders Ltd.**

reported in (2016) 1 SCC 700, paragraphs 5 to 10. He submits, the award being a non-speaking one, it is covered thereby and there should be no interference.

(ii) **Judgment dated 18th January, 2022 in Civil Appeal no.1533 of 2017 (Anlanta Ltd. v. Union of India), paragraph-20, reproduced below.**

“20. We are of the opinion that once the learned Sole Arbitrator had interpreted the clauses of the

contract by taking a particular view and had gone to great length to analyse several reasons offered by the appellant-claimant to justify its plea that it was entitled for extension of time to execute the contract, the Division Bench of the High Court ought not to have sat over the said decision as an Appellate Court and seek to substitute its view for that of the learned Arbitrator.

He submits, in this judgment was discussed, inter alia, earlier judgments of said Court relied upon by Mr. Mishra.

7. He comments on the judgments relied upon by Mr. Mishra. On **Associated Engineers Co.** (supra) he submits, the award in that case was urged to be a speaking award. As such, it is not applicable on facts. He relies on paragraph-25 in **T.N. Electricity Board** (supra) to submit, the arbitrator decided the dispute with reference to the agreement. That was within his jurisdiction. In the adjudication, even if an error was committed, it may not be an error apparent on the face of the record since the tribunal was the chosen forum and therefore may commit an error in exercising jurisdiction. This is because the award is non-speaking. If reasons were given the question of error apparent may have arisen. He submits, the arbitrator did not transgress his jurisdiction. Regarding **Rajasthan State Engineering Enterprises** (supra)

he submits, there can be no dispute on the propositions of law declared in paragraph-44 therein.

8. Clause (a) under section 30 says that an award can be set aside when an arbitrator or umpire has misconducted himself or the proceeding. This clause has been interpreted to include jurisdictional error. Appellant has sought to demonstrate that there was jurisdictional error committed by relying upon exhibits 2, 5 and 37 in the reference. This can be looked into by Court since the award, even though a non-speaking award, specifically refers to the documentary evidence as considered in making of it.

9. Appellant has brought to notice of this Court that the contract provided for all toll payment in respect of the hire for the period. It is clear that the contract was in respect of one bus. Items of claim made in the statement of claim refers to two buses but gives the registration number of only one bus. Court has noticed that it carries several items of claims, which came within the ambit or scope of the comprehensive hire charges at Rs.21,000/- per month.

10. Court has also looked into the counter statement filed by appellant. One paragraph reproduced below makes it clear that the point of arbitrariness was taken in the reference.

*“12. That soon after the close of the contract on 30.11.87, the contractor by his letter dt.19.12.87 made an **unconscionable fantastic and preposterous claim** of Rs.1.56 Crores (approx.) against the Respondent in respect of the contract for providing one super deluxe bus for about 4 years, the value of which would be around Rs.12 lakhs then.*

(emphasis supplied)

Court has also perused, inter alia, para 22.4 in the counter statement.

11. The arbitrator, having before him the assertion and denial leading to controversy regarding arbitrability of the claims, did not express any view in the award other than making non-speaking award of Rs.52,00,000/-, carrying interest. Court has also considered the judgments cited for declaration of law on the issue. It will be appropriate here to reproduce paragraphs 8 and 38 from **T.N. Electricity Board** (supra).

“8. Against the claims, objections were raised by the appellant. They have disputed the claim set up by the respondents and requested the Arbitrators to decide on the arbitrability of the items mentioned in the claims of the respondents. The umpire, without going into the details, in a non-speaking award as against the claim of Rs. 2 crores 10 lakhs, has awarded a consolidated sum of Rs. 70.83 lakhs as under :

"I hereby award and direct as follows:

(1) The Respondent shall pay the claimant a sum of Rupees Seventy Lakhs eighty three thousand seven hundred and ninety three only (Rs.70,83,793/-) and release the earnest money deposit and Bank Guarantees furnished by the claimant in lieu of Security Deposit, in full settlement of all claims and counter-claims."

“38. Thus considered, we hold that the arbitrator, having been invested with the jurisdiction to decide the arbitrability of certain claims, has committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award, awarding a sum of Rs. 70.83 lakhs and odd. It is difficult to ascertain as to what extent he has awarded the claims within the contract or the claims outside the contract, of a total claim of Rs. 2.10 crores. Under those circumstances, we are constrained to hold that it is difficult to give

acceptance to the award made by the umpire as upheld by the courts below. Equally, we find it difficult to accept the contention that out of a claim of Rs. 2.10 crores, only a sum of Rs. 70.83 and odd was awarded. So, it is not a fit case for interference on the basis of the mere fact that a lesser sum than was claimed has been awarded. An illegal award cannot be upheld to be valid or within jurisdiction.”

Facts in this case are clearly covered by **T.N. Electricity Board** (supra).

12. In **Indian Rare Earths Ltd.** (supra) the point urged by appellant in the Supreme Court was mainly that the arbitrator did not have jurisdiction to pass a non-speaking award when arbitrarily of the disputes was questioned. The Court relied on its earlier five Judge Constitution Bench judgment in **Raipur Development Authority v. Chokhamal Contractors** reported in (1989) 2 SCC 721 for well settled position of law that an award can neither be submitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. This is not the case here. Appellant has urged that the arbitrator misconducted himself in awarding beyond four

corners of the contract. It has urged jurisdictional error. The Letter of Intent and agreement were relied upon to draw the boundaries and thereafter reference to the items of claim to show that most of them, if not all, were beyond scope of the contract. Appellant did not found its ground on the jurisdiction of the arbitrator to pass non-speaking award. As such, **Indian Rare Earths Ltd.** (supra) does not come to aid of respondents.

13. In view of discussion above Court finds that appellant has made out a ground on clause (a) under section 30 in Arbitration Act, 1940. Impugned judgment is set aside in appeal. As a consequence the award is also set aside.

14. The appeal is allowed and disposed of.

(Arindam Sinha)
Judge