IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.05 of 2014
(Through Hybrid mode)

Nilachakra Constructions .... ***Appellant***

Mr. Santanu Kumar Sarangi, Senior Advocate

-versus-

State of Orissa and another .... ***Respondents***

Mr. Tarun Kumar Pattanaik, Advocate
(Additional Standing Counsel)

CORAM: JUSTICE ARINDAM SINHA

ORDER

Order No. **11.08.2022**

09. **1.** This appeal was moved on 14th July, 2022, when it was contended on behalf of appellant that price variation claim under contract clause 44.2 awarded, was erroneously set aside in the challenge. On behalf of respondent, impugned judgment dated 20th January, 2014 was defended on contention that in award dated 3rd October, 2009 itself there was record of upward revision of estimated contract value from Rs.1,54,90,884/- to Rs.1,75,44,698/-.

2. Mr. Sarangi, learned senior advocate appears on behalf of appellant and had earlier pointed out, upward revision of value of contract was on account of deviation.

3. Mr. Pattnaik, learned advocate, Additional Standing Counsel submits, appellant had given clear undertaking of 'no claim' in obtaining settlement and payment of final bill. He could not thereafter make claim. He relies on judgment of the

Supreme Court in **United India Insurance Company Limited v. Antique Art Exports Private Limited**, reported in **(2019) 5 SCC 362**, inter alia, paragraph 15. Said paragraph is reproduced below.

> *"15. From the proposition which has been laid down by this Court, what reveals is that a mere plea of fraud, coercion or undue influence in itself is not enough and the party who alleged is under obligation to prima facie establish the same by placing satisfactory material on record before the Chief Justice or his Designate to exercise power under Section 11(6) of the Act, which has been considered by this Court in New India Assurance Co. Ltd. case as follows: (SCC p.429, para 9)*
>
> > *"9. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prima facie establish the same by placing material before the Chief Justice/his designate."*

He submits, this declaration of law was pursuant to earlier declaration in **National Insurance Company Ltd. v. Boghara Polyfab (P) Ltd.**, reported in **(2009) 1 SCC 267**.

4. Mr. Sarangi in reply submits, the arbitrator found from the undertaking itself that his client had further claims, even after settlement of final bill. He submits further, the appeal is otherwise covered by order dated 12th July, 2022 passed in ARBA no.4 of 2014 (parties' own case).

5. It appears from the award, issues were framed. They are quoted below.

> *"(i) Whether the Claimant is entitled to balance unpaid work done of the value of Rs.85,361/- ?*
>
> *(ii) Whether the Claimant is entitled to reimbursable price variation to the tune of Rs.28,61,517/- ?"*
>
> *(iii) Whether the Claimant is entitled to compensation as claimed ?*
>
> *(iv) Whether the Claimant is entitled to interest as claimed ?"*

The arbitrator went on to deal with the contention based on the 'No Claim Certificate' on extracting content of it in the award. The extract is reproduced below.

> *"The CCE, KKAAPL has submitted the Final Bill for the above noted work. I have accepted the final measurements and final bills certified by the CCE, KKAAPL & duly scrutinized by E.U. I have no other outstanding claims.*
>
> *The final bill along with other withheld amount may be released at an early date."*

6. The arbitrator relied on earlier judgments of the Supreme Court in **Union of India v. L.K. Ahuja**, reported in **AIR 1998 SC 1172** and **Damodar Valley Corporation v. K.K. Kar**, reported in **AIR 1974 SC 158** on the question being that while it is true, that on settlement of final bill, right to get further payment gets weakend but, the claim subsists and whether it does subsist is a matter which is arbitrable. Furthermore, whether there was full and final settlement of a claim under the contract is itself a dispute 'upon' or 'in relation to' or 'in connection with' the contract. That being so, the arbitration proceeded on the question, depending on contention raised by the parties in the Tribunal.

7. Facts in **United India Insurance** (supra) were that there was a claim on an insurance policy, upon happening of two fire incidents respectively on 25th September, 2013 and 25th October, 2013. Two claims were raised under the policy. By mail dated 5th May, 2016 the insurer informed settlement of the claims at Rs.2,81,44,413/- upon requisition made therein of, inter alia, deposit of reinstatement premium and execution of discharge voucher. The insured by reply of same date said the insurer could deduct the reinstatement premium from the settled claim and discharge voucher duly executed by it and endorsed by the bank was attached for doing needful. It is thereafter, the insured made queries regarding survey consequent to the fire incident and obtaining information raised claims. In those facts the Supreme Court said as quoted in paragraph 15 above, regarding omission to render prima facie satisfaction on the request for appointment of arbitrator made and appointment of arbitrator by the High Court. The case is clearly distinguishable on facts.

8. Issues arise at variance of pleadings. Even if claimant had not pleaded fraud or coercion or undue influence or dominant position of the employer regarding execution of the 'No Claim Certificate', respondent had denied the claim on basis of the certificate and the arbitrator dealt with the contention. It appears from the award that neither party disputed arbitrability of claims by reason of the 'No Claim Certificate' as could not be arbitrated on absence of plea of fraud, coercion or undue influence. As aforesaid, the arbitrator already found that the claims, in spite of the certificate, were arbitrable. He proceeded to arbitrate on the claims. This appears to have happened also on the arbitrator having taken view that the certificate itself, on the face of it, implied that appellant had other withheld amounts already due to him.

9. For reasons aforesaid, the appeal succeeds. Impugned order is set aside to that extent and the award claim restored.

10. The appeal is disposed of.

(Arindam Sinha)
Judge

RKS