

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.04 of 2014
(Through Hybrid mode)

Nilachakra Constructions ***Appellant***

Mr. Santanu Kumar Sarangi, Senior Advocate

-versus-

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

Mr. T. Patnaik, Addl. Standing Counsel

CORAM: JUSTICE ARINDAM SINHA

ORDER
12.07.2022

Order No.

22. 1. Mr. Sarangi, learned senior advocate, appears on behalf of appellant. He submits, his client was contractor. The work was agreed to have time for completion less than a year. However, there was extension of time granted, without imposition of penalty, by which the work was completed in total period of one year and seven months.
2. In the reference his client was successful in obtaining award on two claims. On State (employer) having mounted challenge to the award, one awarded claim on escalation along with interest thereon was set aside. Hence, his client is before this Court in appeal.
3. He draws attention to the award dated 30th July, 2009. He refers to claim no.2 recited therein as for reimbursable price variation adjustment amount at Rs.17,10,846 and interest

on it from 1st July, 2005 to 19th May, 2008 at Rs.5,91,953/-. In dealing with this claim the arbitrator considered clauses 28 and 32 of conditions of contract laying down provisions relating to extension of the intended completion date and early working given by the contractor necessitating extension. He points out, the arbitrator found that the engineer was satisfied regarding genuineness of the causes for extension of time till 30th June, 2005 and requested for payment of final bill amount by submitting completion report. Hence, the arbitrator found in favour of his client to award escalation by price variation. He submits, the working out of the contract took a little more than one year and hence there was no bar for award of escalation.

4. Mr. Pattnaik, learned advocate, Additional Standing Counsel appears on behalf of State and submits with reference to impugned judgment dated 20th January, 2014 that the Court below found in the order, according to him, there was no price escalation clause. The extension was obtained by appellant upon furnishing undertaking to not claim for escalation and lastly, reason given in the award for rejecting claim for compensation was also good reason to have been applied in correspondingly rejecting claim of escalation. He submits, clause-44 in the contract provided for compensation. The arbitrator correctly found that claim for compensation did not deserve to be awarded. He reiterates, on same logic and keeping in mind that the contract did not provide for escalation, the Court below correctly set aside award on it. He relies on judgment of the Supreme Court in **National**

Insurance Company Limited v. Boghara Polyfab Private Limited, reported in (2009) 1 SCC 267, paragraph 52 for instances, declared by the Supreme Court, to be where claims are arbitrable pursuant to conduct of parties. He prays for adjournment to rely on views of the Delhi High Court that after having given undertaking of no claim, thereupon settlement of bills and payment, the contractor had to prove that there was coercion or undue advantage of superior dominant position by the employer in obtaining the undertaking.

5. Court is not inclined to grant adjournment. This is an old matter of year 2014, listed as such and both sides have been heard.

6. The contractor had claimed, inter alia, both for compensation as well as price escalation. The arbitrator dealt with both claims in the award. It appears, compensation was provided for in clause 44 of the contract, in which 12 compensation events were mentioned. It appears from the award that parties had agreed to rely only on documentary evidence. On the basis of pleadings and documentary evidence the arbitrator gave reasons for finding that none of the compensation events provided in clause 44 of condition of contract could be proved to have occurred for appellant to be entitled for compensation, claimed at 25% of contract value. Thus, there is no question of the reasoning in the award being contradictory as there are separate reasons given for award of price escalation. The arbitrator has recorded contention in defence raised by the State being also that the contractor had

given undertaking not to claim on the final bill being settled and thereafter paid. The arbitrator found that where extension of time was recommended by the engineer and granted for the work to have taken around one year and seven months, there was no bar in the contractor claiming escalation as imposed by a contract of agreed duration less than a year. There is no question of the contract having provided for escalation clause since the contract was for duration of less than a year. It does not appear from the award that there was resistance put by State in urging that claimant had to prove there was coercion in obtaining the undertaking of no claim, for settlement and payment on the final bill.

7. In **Boghara Polyfab** (supra) the Supreme Court gave some illustrations as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed. Illustration (iii) in paragraph 52 is reproduced below.

“(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer.

Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.”

8. The forum for adducing evidence and proof based thereon was the Tribunal. In the award the arbitrator recorded issues framed, reproduced below.

- “(1) Whether the arbitration proceeding is maintainable and the claim of the claimant is justified?*
- (2) Whether the claimant is entitled to claims made in the Statement of Claims?*
- (3) Whether the claimant is entitled to be reimbursed so far as price variation is concerned?*
- (4) Whether the delay in execution of work is attributable to the claimant and/or the Respondents?*
- (5) Whether the Claimant is entitled to any amount due to escalation ?*
- (6) Whether the respondents are responsible for delayed payments to the claimant?*
- (7) Whether the respondents have acted in accordance with the terms and conditions during execution of work?*
- (8) Whether the claimant is entitled to interest on the sum blocked by the respondents?*
- (9) Whether the claimant is entitled to get interest on the claims made by him?*
- (10) Whether the claimant is entitled to compensation constituting 20% of the Bid amount?”*

It will appear there was no issue framed on coercion regarding obtaining undertaking. In this connection paragraph 6 in the award is also reproduced below.

“6. No oral evidence was adduced by the parties. Each party relied upon certain documents filed by them to prove their respective case.”

9. Court is satisfied that in the Tribunal, the parties had a fair hearing and there was adjudication on pleadings and documentary evidence. The Tribunal has taken a view, which is logical and very much possible on the claim for escalation awarded to appellant. In the circumstances, the Court below had erred in appreciating the award on the claim for escalation and accompanying interest. Impugned judgment is set aside to that extent and the award claim restored.

10. The appeal is allowed as above and disposed of.

(Arindam Sinha)
Judge

RKS