

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.4 of 2016
(Through hybrid mode)**

State of Odisha and others

Appellants

Mr. P.P.Mohanty, AGA

-versus-

***M/S. B. Engineers & Builders Ltd.,
BBSR***

Respondent

Mr. Debendra Kumar Dwivedi, Advocate.

CORAM: JUSTICE ARINDAM SINHA

**ORDER
21.07.2022**

Order No.

20.

1. The appeal was moved before this Bench on 4th January, 2022. On behalf of appellant(State) it was submitted that State had entered into the contract with respondent. As per the contract and pursuant to request made by respondent, there was settlement of final bill and closure. It is only thereafter that the contractor raised dispute and invoked the contract clause regarding appointment of adjudicator. Being aggrieved by the ruling of the adjudicator, the contractor then invoked the arbitration clause. The arbitrator awarded on extra items, outside scope of the contract. This was not appreciated by the learned District Judge in dealing with the petition made under section 34, Arbitration and Conciliation Act, 1996. The award ought to have been

set aside and should be set aside in appeal.

2. It was further submitted, impugned judgment dated 10th September, 2015 should be interfered with in appeal. First ground of challenge against the award (since appeal is continuation of the challenge) is regarding claim no.1. There was rate fixed for extra works, not provided by the contract. The rates were fixed by the Supervisory Committee. The Committee cannot be said to have been a contracting party, to have modified terms of the contract. Regarding claim no.2 it was submitted, there should not have been interest granted for retention of security money. No such provision was there in the contract

3. Today Mr. Mohanty, learned advocate, Addl. Government Advocate appearing on behalf of appellant refers to paragraph 14 in award dated 10th December, 2010. It is in dealing with claim no.1 on removal of bulged concrete and rectification of guides under water. He submits, this was work outside scope of the contract. Same would appear from recital of the claim in the award itself. The arbitrator accepted finding of the adjudicator made before the reference that removal of bulged in concrete occurring in the dam phase underwater, has to be treated as extra item. He submits, this claim was rejected at the threshold. He relies on communication dated 11th February, 1999 from Engineer-in-Chief to the Government, disclosed by his client's

additional affidavit dated 14th March, 2022, to submit, the Supervisory Committee was constituted to assist and solve problems of the Executive Engineer, to take spot decision on site conditions for ensuring strict quality control and expedite execution of the works. It did not have authority to recommend rates for work, not contemplated under the contract, to thereby purport to act on behalf of the employer, to cause novation of it.

4. He submits further, all bills were paid and the security deposit refunded as well but on delay of eight months. The contract did not provide for payment of interest on refund of security money.

5. Mr. Dwibedi, learned advocate appears on behalf of respondent-contractor. He had submitted, supplementary agreements were entered into, which enlarged scope of the contract to include the six claims that were dealt with by the award. All claims were not awarded in favour of his client. There is no defect in the award as can be said to be one, which falls within the grounds in section 34. The appeal should be dismissed.

6. Controversy in the appeal is confined to aforesaid claim no.1 made by the contractor and award of interest on delayed refund of security money. Contention of appellant has been that both the claims awarded, were beyond four corners of the contract. The arbitrator, therefore, travelled beyond the contract and misconducted himself.

The contention of misconduct is based on two grounds. Firstly, the contract did not provide for extra work or rates, and secondly, it also did not provide for interest on refund of security money.

7. It appears from relied upon communication dated 11th February, 1999 that two committees were constituted by the employer, without reference to the contractor. The constitution of these committees was in aid of working out the contract. Constitution of the two committees, being Supervisory Committee and High Level Technical Committee, as stated in said communication, is extracted therefrom and reproduced below.

“A committee with the following members is constituted to function as supervisory committee to assist and solve the problems of the Executive Engineer, S&M Division, Hirakud to take spot decision on the site conditions for ensuring strict quality control and expeditious execution of the works.

1. S.E, Hirakud Dam Circle	Chairman
2. S.E, Mechanical, Hirakud	Member
3. E.E., H.D.R.D. Division, Burla	Member Secretary
4. E.E. Stores & Mech. Divn., Hirakud	Member
5. E.E. Main Dam Division, Burla	Member

All spot decisions on higher technical and financial matters are to be referred to the technical committee by the member secretary.

A high level technical committee is constituted under the Chairmanship of E.I.C., Water Resource with the following members to take decisions on the technical and financial matters upon recommendation (on its receipt) from the supervisory committee.

1. Sri R.C. Tripathy, Engineer-in Chief, Water Resources

2. *Sri B. B. Mishra, Engineer-in-Chief, Planning & Design*
3. *Sri R.K. Kanungo C.E. & Basin Manager, Upper Mahanadi Basin,
Burla*
4. *Sri Sanatan Deo, Chief Engineer, Mechanical”*

(Emphasis supplied)

8. Agreed procedure on dispute resolution, provided in the contract, required reference initially to an adjudicator. The dispute was so referred and the adjudicator ruled on it. The contractor being aggrieved on the adjudication made, sought reference to arbitration, which was concluded by the award. The adjudicator had found that claim no.1 was indisputably on extra work and it had to be paid. The finding was extracted and quoted in the award and is also reproduced below.

“As such the removal of Bulged in concrete occurring in the Dam face, Under Water, has to be treated as Extra Item and paid for.....”

It appears the contractor was aggrieved by the ruling because the adjudicator had reduced the area recorded in measurement book at 251 sqm. to 226 sqm. and the rate agreed at Rs.65,230/- per sqm. to Rs.6688/- per sqm.. What is significant is and as pointed out by Mr. Dwibedi, State did not challenge the ruling made by the adjudicator on both findings. What follows is that there was extra work got done and some rate provided therefor.

9. At instance of appellant the lower Court record was produced

but relied upon exhibit-11 was not found therein. Mr. Mohanty then produced copy of the exhibit with copy to Mr. Diwbedi.

10. Exhibit-11 relied upon in the reference has been perused by Court. Extract in paragraph 18 of the award was truly made therefrom. The exhibit is a document recording compliance to 8th meeting of the Supervisory Committee held on 22nd January, 2002. The document was tendered by the contractor and Court ascertained from Mr. Mohanty that there is no dispute regarding existence of it. The extract in the award from the document is reproduced herein as from the exhibit.

“In addition to rectification of misalignment the work involves cutting of bulge concrete and under water welding of missing link of guides. Under water welding of missing link has already been done in the left guide of emergency gate slot no.49. Hence the committee decided to include under water cutting of bulge concrete and welding of missing link as two extra items and continue with the work. The negotiated rates of Rs.14,500/- per meter of underwater welding and Rs.65,230/- per Sqm of removal of bulged concrete as agreed by 6th supervisory committee and 4th High level technical committee was recommended by the committee. The agency also agreed to it.”

(Emphasis supplied)

11. The employer was represented in the working of the contract by its several engineers and authorized personnel. No contention has

been made regarding constitution of the committees as were unauthorized. The Supervisory Committee had authority to take spot decision on higher technical and financial matters but, they were to be referred to the High Level Technical Committee. The High Level Technical Committee was empowered to take decision on the technical and financial matters upon recommendation (on its receipt) from the Supervisory Committee. The arbitrator found and there is clear statement in the document being exhibit-11 that the Supervisory Committee made the recommendation by its 6th meeting and in the 4th High Level Technical Committee meeting, same was agreed to.

12. So far as the interest on delayed payment of retention money is concerned, on query from Court Mr. Mohanty could not demonstrate existence of any clause in the contract authorizing delayed repayment. In the circumstances, award for interest on delayed refund of retention money appears to be a possible view.

13. Impugned judgment is confirmed. The appeal is found to be without merit and the same is dismissed.

(Arindam Sinha)
Judge

Prasant