

IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No.11868 Of 2021
(Through hybrid mode)**

M/S. Ravi Udyog Pvt. Ltd.

....

Petitioner

Mr. T.Roy, Advocate

-versus-

***The President, ESSEL Mining and
Industries Ltd. and others***

....

Opposite Parties

Mr. D. P. Nanda, Senior Advocate
with Mr. B.P.Das, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
23 .02.2022**

Order No.

5.

1. Mr. Roy, learned advocate, appears on behalf of petitioner and submits, impugned is order dated 15th February, 2020 (annexure-5) made by the arbitral tribunal under section 33 in Arbitration and Conciliation Act, 1996. He submits, his client had laid evidence of increase in employees cost at pages 340 to 343 in the statement of claim. The tribunal inadvertently did not consider the same while passing the award. This amounted to a mistake requiring correction under section 33. He submits, the tribunal, in considering his client's application to be for review and not possible under the Act, made the order on this aspect with illegality and material irregularity.

2. Mr. Nanda, learned senior advocate appears on behalf of opposite party nos.1 and 2 and submits, there cannot be judicial review of the reference outside of provisions in the Act permitting appeal. An order made under section 33 is not appealable under section 37.

3. Without prejudice to above contention he submits, the tribunal has made impugned order. Section 33 prescribes for various time limits. Petitioner had approached for correction within prescribed time and the arbitrator has dealt with it, also within prescribed time. There is no scope for enlarging the time by judicial review under writ jurisdiction. He relies on views of a Division Bench of High Court of Allahabad in **M/s. Kali Charan Pandey vs. Union of India** reported in **(2014) 107 ALR 409**, also available at **2014 SCC On line ALL 15963**, paragraph 11 reproduced below.

“ 11. In view of the specific language of section 33 of Act, 1996 which is not under challenge before us, there cannot be a mandamus by this Court to the Arbitrator to act contrary to the Statutory provisions, as the outer limit fixed for making of the correction i.e., 30 days from the date the request is made has expired long back.”

He submits, if petitioner is aggrieved by impugned order, merged in the award, petitioner might challenge the same.

4. He also relies on **judgment dated 22nd November, 2021** of the Supreme Court in **Civil Appeal no.6876 of 2021 (Gyan Prakash Arya vs. Titan Industries Limited)**, paragraphs 11 and 12 reproduced below.

“11. Therefore, the original award passed by the learned arbitrator was as per the original claim made by the respondent in the statement of claim. Thereafter, in an application under Section 33 of the 1996 Act, the respondent prayed to modify the award as per the market value of 3648.80 grams of pure gold at Rs.20,747/- per 10 grams, instead of Rs.740 per gram and the learned arbitrator allowed the said application under Section 33 of the 1996 Act and modified the original award dated 04.12.2010. The modified award is reproduced hereinabove.

12. The original award was passed considering the claim made by the claimant as per its original claim and as per the statement of the claim made and therefore subsequently allowing the application under Section 33 of the 1996 Act to modify the original award in exercise of powers under Section 33 of the 1996 Act is not sustainable. Only in a case of arithmetical and/or clerical error, the award can be modified and such errors only can be corrected. In the present case, it cannot be said that there was any arithmetical and/or clerical error in the original award passed by the learned arbitrator. What was claimed by

the original claimant in the statement of claim was awarded. Therefore, the order passed by the learned arbitrator on an application filed under Section 33 of the 1996 Act and thereafter modifying the original award cannot be sustained. The order passed by the learned arbitrator in the application under Section 33 of the 1996 Act is beyond the scope and ambit of Section 33 of the 1996 Act. Therefore, both, the City Civil Court as well as the High Court have committed a grave error in dismissing the arbitration suit/appeal under Sections 34 and 37 of the 1996 Act respectively. The modified award passed by the learned arbitrator allowing the application under Section 33 of the 1996 Act cannot be sustained and the same deserves to be quashed and set aside.”

5. Petitioner in its application under section 33 had prayed that the tribunal correct the error as mentioned in paragraphs 8, 9 and 12. Petitioner, in said paragraphs, had stated about disclosure of documentary evidence omitted, not taken into account, to result in calculation error in the award. Sub-section (4) in section 33 provides for this situation. The tribunal in paragraph 8 of impugned order said as follows:-

“ Now the question is whether the evidence contained in page 340 to 343 of the Statement of Claim can legally be taken into consideration by the Tribunal at

*this stage, particularly when there is no provision of review in the Act. In my considered opinion **if the left out evidence is taken into consideration now**, it would amount to review the award. **So, the prayer for correction of the award on the basis of the left out evidence stands rejected.**”*

(emphasis supplied)

6. Fact is, the evidence was there in the tribunal. It cannot, therefore, have been a cause for review before the tribunal since review, if permissible, is from discovery of new and important matter or evidence, which after exercise of due diligence was not within knowledge of the party applying for it. Here, in this case, the evidence was there in the tribunal and petitioner did not subsequently discover it to bring it before the tribunal seeking review. The reasoning therefore is illegal and was made with material irregularity, so far as the law on review is concerned.

7. By reason of this illegality and irregularity committed by the tribunal, petitioner is faced with award closure on a part of its claim, on omission by the tribunal, clearly by mistake, to have correctly calculated the award amount. The Division Bench view in **M/S. Kali Charan Pandey** (supra) says that there cannot be *mandamus* to the

arbitrator to act contrary to statutory provisions. In this case, the tribunal has acted within the time prescribed but has acted with, as aforesaid, illegality and with material irregularity. The question arises whether petitioner, as a consequence, should be compelled to challenge the same under section 34. What would be the result? If petitioner succeeds, at best petitioner's remedy would be to initiate a fresh reference on the overlooked evidence and miscalculation. It would be a clear case of multiplicity of proceedings. It is to avoid this, the provisions by section 33.

8. In **Gyan Prakas Arya** (supra) there was case of modification, the award holder having caused it, not permissible under section 33. The party had originally claimed return of the gold giving value of it @ Rs.740 per 10gms and alternatively the money value with interest. Subsequent to passing of the award, it is obvious, the party realized that by reason of depreciation of the rupee, Rs.740/- valuation had become Rs.20,747/- per 10 gms. **Gyan Prakash Arya** (supra) is not applicable here.

9. In **Bhaven Construction vs Executive Engineer Sardar Sarovar Narmada Nigam Ltd.** (Judgment dated 6th January, 2021 in Civil Appeal no.14665 of 2015) the Supreme Court declared that

there may be judicial review in matters of arbitration, in rarest of rare cases. Here, the parties have gone through the reference, concluded on the award with admittedly an omission on part of the tribunal leading to miscalculation. The section 33 application was also dealt with within the time provided but the grievance of mistake attributed to be as seeking review of the award. There could not be and cannot be compulsion for a party to go through the rigor of challenge to the award for purpose of obtaining setting aside of it on this aspect, for a fresh reference on matter in the already concluded reference. **M/S. Kalicharan Pandey** (supra) does not come in the way because in this judicial review the prayer is not for enlarging the time for the tribunal to deal with the section 33 application. It was already dealt with but with illegality and with material irregularity. In the circumstances, the application is restored to the tribunal, to be dealt with under section 33 and in line with observations made herein.

10. Accordingly, the writ petition as well as the interim application stand disposed of.

(Arindam Sinha)
Judge

Prasant