

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**ARBA No.40 of 2013**  
(Through hybrid mode)

***Union of India***

....

***Appellant***

Mr. P.K. Parhi, ASG  
Mr. S.S. Kashyuap, CGC

*-versus-*

***M/s. Loknath Biswal***

....

***Respondent***

Mr. A. Patnaik, Advocate

**CORAM: JUSTICE ARINDAM SINHA**

**ORDER**

**13.09.2022**

**Order No.**

**20.**

1. Mr. Kashyuap, learned advocate, Central Government Counsel led by Mr. Parhi, learned advocate, Assistant Solicitor General appears on behalf of Union of India and submits, the Court below erred in not setting aside award dated 31<sup>st</sup> December, 2001 regarding application by the Tribunal, of the deviation clause. He submits, there could not have been deviation fond since respondent did not complete the work.

2. Grounds of appeal are against award on claim nos. 1 and 15. The deviation was incorrectly found by the arbitrator, to award market rate under claim no.1, inspite of escalation paid at Rs.99,000/- and again claimed under claim no.15. Mr.

Kashyuap submits, counter claims made by his client were also erroneously rejected.

3. He relies on deviation clause 7 in General Conditions of Contract (GCC) to submit, deviation on items of any individual trade included in the contract shall not exceed +/- 25% value of that trade in the contract as a whole or half the deviation limit, whichever is less. According to him the deviation was well within the limit and, he reiterates, the contractor was paid escalation on contractual provisions, at Rs.99,000/-. He then refers to the award to submit, the arbitrator while dealing with claim no.15 categorically said that it is covered by claim no.1 but, went on to award on the claim. Adjudication on award of above two claims discloses apparent patent illegality on the face. This was not appreciated by the Court below. In the circumstances, there be intervention in appeal.

4. Mr. Patnaik, learned advocate appears on behalf of the contractor. He submits, the arbitrator found deviation to be variation in respect of all items at around 105%. This being above the deviation limit, claim no.1 was awarded on basis of market rate. There is no error apparent in the award in regard to the finding or calculation.

5. On claim no.15 Mr. Patnaik refers to the award paragraph-41 and places it. He submits, thereby it will appear there was no award in respect of the claim.

6. He relies on **judgment dated 30<sup>th</sup> June, 2022** of the Supreme Court in **Civil Appeal no.6832 of 2021 (Punjab State Civil Supplies Corporation Ltd. and another v. M/s. Ramesh Kumar and Company and others)** to submit, law was declared thereby on scope of appeal under section 37 in Arbitration and Conciliation Act, 1996. He also relies on **Haryana Tourism Limited v. Kandhari Beverages Limited** reported in **(2022) 3 SCC 237**, paragraph-9, quoted below.

*“9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial*

*Court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable.*

He submits, the appeal be dismissed.

7. Perused the award in context of extension of the challenge by appeal with regard to claim nos.1 and 15. A passage from paragraph-8 of the award dealing with claim no.1 and the variation found, is extracted and reproduced below.

*“8. xxx xxx xxx On a perusal of the charts filed by both parties and on calculation in regard to the percentage of the  $\pm$  variation I find that the total variation in respect of all the items of works is around 105%. In this view of the matter, following the dicta of law laid down by the Apex Court, I have no doubt in my mind that the claimant-contractor is entitled to the market rate, and that he should not be compelled to accept the contract rate, which was agreed upon by both parties at the time of acceptance of the tender and awarding of the contract.”*

Court required the parties to file the charts that were filed in the reference. Respondent filed the chart and Court ascertained from Mr. Kashyup, it was the chart filed in the reference. Amongst several particulars given in the chart, there is a

column indicating percentage of increase in quantity. Aggregate of figures in said column divided by the number of items there with indication of and no variation yielded arithmetical result of 92.53%. It is sufficient for Court to hold there is no apparent error in the Tribunal finding the deviation to be above the limit of 25%. On perusal of clause-7 in the contract it also appears, provided also was that in no case there shall be additions/deductions (arithmetical) exceed twice the deviation limit. The figure found by the arbitrator and the figure found by Court on a cursory arithmetical exercise, are both above 50% i.e. twice the deviation limit. In the circumstances, the arbitrator could not have been faulted for allowing claim no.1 at market rate.

8. On perusal of paragraph-41 in the award it appears the arbitrator said no material was placed about escalation of price of materials to disentitle claimant on the item. Similar also was in respect of claim of high sales tax dues in contract period. It is only incidentally that the arbitrator noted the claim to be covered by claim no.1.

9. As aforesaid, claim no.1 was awarded on basis of market rate. The arbitrator finding claim no.15 covered by

claim no.1, where claim no.15 did not merit award but claim no.1 did, inference, in absence of any other ground taken against claim no.1, is that items of claim under claim no.15 were part of claim no.1. On query from Court it is ascertained from the parties that claim no.1 was made at Rs.17,49,098/- (rupees seventeen lakh forty nine thousand ninety eight) and got award at Rs.9,48, 214/- (rupees nine lakh forty eight thousand two hundred fourteen). As such, here too, no apparent error disclosing patent illegality or a finding therein against public policy appears in this part of the award.

**10.** Clause 54 in the GCC provided for cancellation of contract in part or in full, for contractor's default. There are provisions, inter alia, for the accepting officer to exercise authority to cancel the contract in part as in this case and he had got the work completed at contractor's risk and cost. Appellant's contention is that Rs.59 lakhs spent to get the work completed, ought to have been awarded on counter claim in the reference. The arbitrator rejected this counter claim. A passage from paragraph-44 in the award is extracted and reproduced below.

*“44. xxx xxx xxx On a perusal of the pleadings of both parties, I find that the respondent*

*has all along blamed the contractor for delay in execution of the works and for not sticking to the time schedule; but the respondent has nowhere in his pleadings blamed the claimant contractor for bad workmanship. In other words, the work done by the contractor till the rescission of the contract were all according to the standard specification. In the premises of the foregoing factual aspects of the case, I am not inclined to allow the counter-claim made by the respondent against the claimant-contractor. xxx xxx xxx”*

Above is a plausible view and hence, the finding cannot be said to be perverse.

11. In adjudicating this appeal Court has remained strictly within scope of section 37 declared by **Punjab State Civil Supplies Corporation Ltd.** (supra) and **Haryana Tourism Limited** (supra).

12. The appeal bears no merit and it is dismissed. The Registry to inform dismissal of the appeal and return the L.C.R. to the Court below.

**(Arindam Sinha)**  
**Judge**