

IN THE HIGH COURT OF ORISSA AT CUTTACK**W.P.(C) No.18536 of 2022
(Through hybrid mode)*****M/S. Bhadra Products***

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Petitioner***-versus-******M/s. Indian Farmers Fertilizer Co-operative Limited******Opposite Party*****Advocates appeared in this case:*****For Petitioner***

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**Mr. Nilamadhab Bisoi, Advocate
Mr. D. Mohanty, Advocate*****For Opposite Party***

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**Mr. S. P. Mishra, Senior Advocate
Mr. S. Grover, Advocate
Mr. S. P. Sarangi, Advocate
Mr. A. Das, Advocate****CORAM:****JUSTICE ARINDAM SINHA****JUDGMENT****13.10.2022**

1. Mr. Bisoi, learned advocate appears on behalf of petitioner and submits, there be judicial review over order dated 8th July, 2022, made by the Court below in hearing his client's challenge under section 34 in Arbitration and Conciliation Act, 1996. He submits, there was nil award. Principal ground for rejecting the claim was that the invoices were not produced. His client sought to produce them as additional

evidence, by application made under section 151 in Code of Civil Procedure. The application was rejected by impugned order. He relies on, inter alia, judgment of the Supreme Court in **Canara Nidhi Limited v. M. Shashikala**, reported in (2019) 9 SCC 462 to submit, on being allowed to produce the invoices there will be found apparent illegality in face of the award. Hence, this is an exceptional case, where the application ought to have been allowed.

2. Prayer (ii) in the writ petition is reproduced below.

“(ii) And, to direct the learned Court below to admit the Petitioner’s Additional Documents/Additional Evidences [i.e. equivalent Annexure-P/7, Annexure-P/8 (Series) and Annexure-P/11 of the Arbitration Petition, pending adjudication before the learned Court below] and to accept the Additional Evidence-on-Affidavit, along with the Application under Section 151 CPC, 1908 filed before the Ld. Court below vide dtd.16.05.2022 under Annexure-8 (Series) of the instant writ application.”

3. On query from Court Mr. Bisoi submits, annexure P/7 is tender inquiry document dated 23rd January, 2006. Annexure P/8 series are third copies of 166 tax invoices and annexure P/11 is authorization of the partner of petitioner.

4. Mr. Mishra, learned senior advocate appears on behalf of opposite party and draws attention to paragraph 72 in award dated 19th May, 2020, The paragraph is reproduced below.

*“72. As a result, Claimant sent the Notice invoking arbitration to Respondent. Claimant herein is claiming an amount of Rs.6,27,08,886/- as the payment due along with Rs.11,15,25,204/- as interest @ 24% p.a., totaling to an amount of Rs.17,42,34,090/-. **Claimant is also seeking a correct interpretation of the terms and conditions mentioned in Purchase Order dated 24.01.2007.**”*

(emphasis supplied)

He submits, there was appreciation by the arbitrator that petitioner was also seeking correct interpretation of the terms and conditions mentioned in purchase order dated 24th January, 2007.

5. He then refers to paragraph 174 in the award to demonstrate that the arbitrator found the invoices had no relevance since payment was based on production of P2O5, irrespective of quantity of defoamer consumed in the process. He submits, the arbitrator held there is no merit in claimant’s argument that per unit price for defoamer is mentioned in the purchase order thereby stipulating payments were to be made on quantity of defoamer supplied. He also relies on paragraph 183 in the award, reproduced below.

“183. In my considered opinion, after reading and analyzing all the above-cited excerpts, such a condition was placed because the Invoice value in the present arrangement held no significance, as the Invoices raised by Claimant were based on the quantity of Defoamer supplied to Respondent, whereas payment was based solely upon the

production of P205. The reason behind such a condition itself further points towards the understanding that payments were to be based on the production of P205 and not the quantity of Defoamer supplied.”

6. Mr. Mishra, then refers to the purchase order dated 24th January, 2007. He relies on following extract therefrom, reproduced below.

“THE ORDER VALUE IS TENTATIVE AND ACTUAL PAYMENT SHALL BE MADE @ Rs.217.76 MT P205 PRODUCED (IN CASE THE MATERIAL IS SUPPLIED IN NON RETURNABLE PLASTIC DRUM OF 200KG). AND @ Rs.208.36 MT P205 PRODUCED (IF DEFOAMER IS SUPPLIED BY ROAD TANKER) IRRESPECTIVE OF CONSUMPTION OF DEFOAMER OR RECEIPT OF ACTUAL QUANTITY OF DEFOAMER WHICHEVER IS LESS. THE P205 PRODUCED SHALL BE CERTIFIED BY THE TECHNICAL DEPARTMENT.”

He submits, the payment term was earlier also stated in Letter of Intent(LoI) dated 2nd November, 2006. Relied upon paragraph in the letter is extracted and reproduced below.

“Accordingly, we are pleased to place Letter of Intent on you for 800 MT of Defoamer at a total value of Rs.6,72,60,880/- (Rupees Six Crore, Seventy Two Lakh, Sixty Thousand Eight Hundred Eighty only). The total value mentioned above is tentative and actual payment shall be made @ Rs.217.76 per tonne of P205 produced, irrespective of consumption of defoamer, based on the

basic price of Rs.69,500/- per MT for the material supplied in 200 Kg. non-returnable plastic drums. If the Defoamer is supplied in Road Tankers, the payment shall be made @ Rs.208.36 per tonne of P205 produced based on the basic price of Rs.66,500 per MT.”

7. Referring to **Canara Nidhi Limited** (supra) Mr. Mishra relies on paragraph 20. He submits, the Court below correctly rejected the application to adduce additional evidence, as that would amount to retrial on merits of the issues decided by the arbitrator.

8. It must first be adjudicated as to whether, at all additional evidence can be adduced in the challenge to the award mounted under section 34. In paragraph 18 of **Canara Nidhi Limited** (supra) the Supreme Court quoted its earlier judgment in **M/S. Emkay Global Financial Services Limited vs. Girdhar Sondhi**, reported in (2018) 9 SCC 49, paragraph 21. Said paragraph was quoted on emphasis supplied. The passage with emphasis is extracted and reproduced below.

“xx xx xx So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the court by way of affidavits filed by both parties. Cross-examination of

persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. xx xx xx ”

Having supplied the emphasis the Supreme Court then went on to say as reproduced below.

“The legal position is thus clarified that section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.”

9. Keeping in mind above declaration of law Court perused impugned order. It appears therefrom, the Court below extracted paragraphs from the award to demonstrate that no bills/invoices had been brought on record by claiming to disprove the testimony. Court ascertained from opposite party that it had adduced oral evidence in the reference and there was no question of disputing the invoices therein since, they were not produced.

10. It is apparent from impugned order, it was passed on reliance in the award regarding omission to produce the invoices. Paragraphs from the award extracted in part and relied upon by the Court below, to reject petitioner’s prayer for producing additional affidavit evidence, are observations made by the arbitrator on non-production of the invoices. Said Court went on to find that in the petition under section

151, no reasonable explanation had been cited by petitioner as to why the invoices had not been submitted during the arbitral proceeding and no convincing or cogent reason had been assigned by petitioner to show that the documents are relevant for just decision of the case. The Court below went on to find that annexures P/7 and P/11 were irrelevant. It transpires that the Court below found annexure P/8 series (third copies of the invoices) could not be accepted as additional evidence for two reasons, the other two annexures (P/7 and P/11) held to be irrelevant. The Court below refused to take on record annexure P/8 invoices on two grounds. Firstly, that no reasonable explanation had been cited as to why the invoices had not been submitted in the reference and secondly, no convincing or cogent reason had been assigned by petitioner to show the documents were relevant for just decision of the case. The second reason militates against said Court's reliance on the award, regarding non-production of the invoices. So, there is left for adjudication the first reason, of no reasonable explanation cited.

11. Petitioner had in paragraph 12 of the application stated explanation for non-production of the invoices in the reference. Two passages from the paragraph are extracted and reproduced below.

“12. That it is humbly submitted that the aforesaid Additional Documents could not be filed by the Applicant /

Petitioner / Claimant / Seller along with the Statement of Claim (SoC) before the Delhi International Arbitration Centre (DAC), New Delhi for arbitration due to the fact that the Petitioner was unable to locate the said Additional Documents during the Arbitral Proceedings on account of Petitioner's frustration and suffering of trauma like mental stress and strain and imbalance of mental condition at the old age of 61 years, when Petitioner's Bank Account has been declared as Non-Performing Assets (NPA) by the Janata Sahakari Bank Ltd., Dadar, Mumbai, Maharashtra due to non-payment of loan amount, which was availed by the Petitioner on mortgage of residential house and factory of the Petitioner.

xxx xxx xxx

And, in the meantime, the residential house property and the plant / factory of the Petitioner has already been auctioned by the bank towards recovery of the default loan amount along with interest and, thereafter, the Petitioner is virtually in the middle of the street. And, the Petitioner is struggling till date with an expectation to get back its legitimate claim, raised in the aforesaid Claim Petition. And, the Petitioner filed the said "Tender Enquiry Document dtd.23.01.2006" and the "Counter foil of said total 166 Nos. of Tax Invoices" before this Hon'ble Court as additional documents after locating the same subsequently."

This explanation was rejected out of hand by the Court below in saying that no reasonable explanation was cited. In simply saying so, the Court below did not advert to the explanation, to say why it was

unreasonable. Inference is, petitioner's explanation regarding inability to produce the documents in the reference was not noticed by the Court below.

12. Furthermore, reiteration by the arbitrator in the award, of omission on part of petitioner to have produced the invoices was relied upon by the Court below, to imply repeated opportunity given to petitioner to produce them in the reference. In this regard two sentences from impugned order are reproduced below.

*“So, it apparent from the Final Award passed by the learned Arbitrator that, **though the learned Arbitrator repeatedly reflected that, no invoices has been filed by the claimant-petitioner** and the account summary lacked basic information about the bills, paid or unpaid. But, the petitioner-claimant has failed to bring the invoices before the learned Arbitrator during hearing.”*

(emphasis supplied)

There was reiteration by the arbitrator of omission of petitioner in producing the invoices. Impugned award does not disclose the arbitrator having said therein that opportunity was given to or direction made upon petitioner to produce the invoices.

13. Declaration of law in **Canara Nidhi Limited** (supra) as clarified is that a challenge under section 34 will not ordinarily require anything beyond record that was before the arbitrator and that cross-examination of persons swearing in affidavits should not be

allowed unless absolutely necessary. In this case opposite party has contended that the arbitrator held the invoices to be of no relevance. On the other hand the Court below by impugned order appears to have relied on the award to show that non-production of the invoices was one of the reasons for the final award and that petitioner ought to have had produced them. In view of aforesaid it cannot be said that in spite of opportunity given or direction made in the reference, petitioner chose not to produce the invoices. The clause in the purchase order following the passage relied upon in the LoI says that quantity of defoamer and manner of its supply had to be taken into consideration, to ascertain which rate was to be paid by opposite party. Court refrains from making any further comment.

14. The case thus appears to be an exceptional case warranting interference by judicial review of the challenge proceeding. Impugned order is set aside and quashed. The Court below is directed to admit annexure P/8 series, disclosed by the additional evidence affidavit, for purpose of adjudication of the challenge.

15. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant