

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.35 of 2015
(Through video conferencing mode)**

Paradip Port Trust and another* *Applicants

Mr. R.Mohanty, Senior Advocate

-versus-

M/s. Cimmco Birla Ltd.* *Opposite Parties

Mr. S. Choudhury, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
03.03.2022**

Order No.

18. 1. Mr. Mohanty, learned senior advocate, appears on behalf of applicants and submits, the appeal be dealt with on merits.
2. On 11th January, 2022, Mr. Mohanty submitted, the appeal was directed against judgment dated 16th September, 2015 passed by the learned District Judge rejecting his client's challenge to award dated 14th March, 2012. He submitted, the facts stood admitted in the reference but the Tribunal made some findings on 'force majeure', which are perverse. The Court below did not appreciate the perversity and hence the appeal. He referred to paragraphs 18 to 22 in the award. He submitted, paragraph-18 was a contention on 'force majeure' that

the Tribunal decided in favour of his client. The second contention was that by reason of lock out in Bharat Works Factory of claimant, from 15th November, 1998 to 31st January, 1999, there was delay. This was construed as a 'force majeure' situation by the Tribunal. Mr. Mohanty accepted that paragraph-20 dealing with the super cyclone on 29th October, 1999 was an act of God and therefore covered by 'force majeure'. He however submitted, the amount of latitude shown by the Tribunal on holding in favour of claimant on this contention was beyond the evidence. Appellant itself resumed work activities in the Port, fifteen days after the cyclone but claimant's personnel admittedly visited two months after it. Next contention of 'force majeure' was dealt with in paragraph-21 of the award. It was on strike resorted to by employees of appellant. Paragraph-22 was contention raised by claimant regarding hooliganism resorted to by persons connected with previous contractor of appellant. He submits, the Supreme Court by **judgment dated 5th January, 2022 in Civil Appeal nos.169-170 of 2022 (State of UP v. M/s. Mcdowell and Company Ltd.)** held that for invoking 'force majeure', there must be some act of God.

3. On 8th February, 2022 he had submitted that cancellation of the contract was not subject matter of the controversy decided in the award. Percentage of work unfinished was sought to be justified by respondent on force majeure and such condition was accepted by the tribunal. Today Mr. Mohanty submits further, the tribunal granted interest on claims awarded but did not do so on the counter claim, also awarded.

4. Mr. Chaudhury, learned advocate appearing on behalf of respondent had earlier submitted that cancellation clause 23 in general conditions of contract stood quoted under paragraph 24 in the award. On query from Court he had submitted that expanded meaning force majeure stood given in the contract.

5. The Court below in paragraph-11 of impugned judgment recorded the facts. Paragraph-11 is reproduced below.

“11. On careful scrutiny of the record, impugned Arbitral award in the light of submission of both the Counsel for the petitioner and the O.P., it shows the following are not the disputed facts:

(i) PPT had floated a tender for execution on the work, Designed, Manufacture, supply, Erection and commissioning of one number of stacker cum reclaimers of capacity of 2500 MTPH, 35 meters Boom length.

(ii) *O.P. (claimant's company) offered contract value of Rs.823 lakhs.*

(iii) *Arbitration Agreement was executed in between the claimant company and respondent-PPT with certain terms and conditions to commence the work on 26.3.1998 and its completion on 25.5.2000.*

(iv) *On 28.3.98 the claimant company deposited 10% of the contract value i.e. Rs.82,30,000/- in shape of Bank Guarantee towards performance security.*

(v) *99.995% of the contract work was compelled and balance of 0.005% was remained to be executed. On the request of both the parties, the same was extended up to 11.6.2001.*

(vi) *On dtd. 13.7.2001, the contract was cancelled with immediate effect with forfeiture of performance security.*

(vii) *Balance of 0.005% of the contract work was completed by the respondent-PPT by other agencies under its supervision."*

6. Clause 23 in general conditions of contract (Exhibit R-35) provided for termination. The clause quoted in the award is extracted and reproduced below.

"Clause 24 of the GCC (Ehibit R-35)

23.0 TERMINATION FOR DEFAULT

23.1 The Purchaser may, without prejudice to any other remedy for breach of contract, or written notice of default sent to the Supplier, terminate the contract in whole or in part;

(a) if the supplier fails to deliver any or all of the goods within the time period specified in the Contract or any extension thereof granted by the Purchaser pursuant to clause-22;

OR

(b) if the Supplier fails to perform any other obligation(s) under the Contract;

23.2 In the event the Purchaser terminates the contract in whole or in part, pursuant to clause 24.1 the Purchaser may procure upon such terms and in such manner as it deems appropriate, Goods similar to those undelivered, and the Supplier shall be liable to the Purchaser for any excess costs for such similar Goods. However, the Supplier shall continue performance of the Contract to the extent not terminated. ”

7. In paragraph 32 of the award, issue nos.4 and 6 in the reference were dealt with. The tribunal found that balance quantity of work to extent of 0.0048603 % of the total work at value Rs. 4,00,000/- remained unexecuted. The contract was cancelled on 13th July, 2001. As on cancellation respondent (claimant) had been paid Rs.6,87,77,683/-. Respondent had claimed Rs.3,06,72,085/- under different heads. The tribunal dealt with each of the heads of claim. It directed refund of the performance security. Rs.31,00,000/- on running account bills and refund of retention money Rs.92.4 lakhs. So far as the counter claims are concerned, the tribunal found that Rs.9,87,840/- was amount, to which appellant was entitled for

completing unfinished work and therefore, gave adjustment against forfeited performance security amount of Rs.82.3 lakhs, the balance to be paid to respondent. It is noticed that the amount awarded against counter claim regarding cost of unfinished work is more than percentage value of the contract work stated in the award. The tribunal also awarded interest to respondent.

8. Clause 24 in general conditions of contract (Exhibit R-35) also stood quoted in the award, extracted and reproduced below.

“Clause 24 of the GCC (Ehibit R-35)

24.0- “Force Majeure”

24.1 Notwithstanding the provisions of Clauses 22,23 and 24 the Supplier shall not be liable for forfeiture of its performance security, liquidated damages or termination for default if and to the extent that, its delay in performance or other failure to perform its obligations under the contract is the result of an event of “Force Majeure”

24.2 For purposes of this clause, “Force Majeure” means an event beyond the control of the Supplier and not involving the Supplier’s fault or negligence and not foreseeable. Such events may include, but are not restricted to, acts of the Purchaser either in its sovereign or contractual capacity, wars or revolutions, fires, floods, epidemics, quarantine restrictions and freight embargoes.

24.3. If a “Force Majeure” situation arises, the Supplier shall promptly notify the Purchaser in writing of such conditions and the cause thereof. Unless otherwise directed by the Purchaser in writing, the Supplier shall continue to perform its obligations under the Contract as far as is reasonably practical, and shall seek all reasonable alternative means for performance not prevented by the Force Majeure event.”

9. It is seen that the parties agreed on an expanded meaning of the phrase 'force majeure', to include an event beyond control of the supplier and not involving it or not being the supplier's fault or negligence and not foreseeable. This agreement of parties is deliberate departure from ordinary meaning of the phrase, interpreted by the Supreme Court in **State of U.P.** (supra). As such, the judgment does not come in aid of appellants. In addition, the parties' agreement on termination also covered the dispute arisen on the termination.

10. The contract was terminated/cancelled on 13th July, 2001. The disputes stood adjudicated in the award and the tribunal found that upon adjustment, claimant was still entitled. Hence, there was award of interest only to claimant @ 9 % per annum on aggregate award amount from 5th January, 2002 till payment. The award for interest does not have any patent illegality in it, requiring it to have been set aside on the challenge or by interference in appeal.

11. For reasons aforesaid impugned judgment is confirmed.

12. The appeal is dismissed.

(Arindam Sinha)
Judge

Prasant