

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.17308 of 2018

(Through Hybrid mode)

***M/s. Odisha Power Transmission
Corporation Ltd.***

Petitioner

Mr. S. P. Mishra, Senior Advocate

-versus-

***The Arbitral Tribunal in the
Arbitration Proceeding and others***

Opposite Parties

Mr. U. C. Behura, Advocate (for O.P. nos.2 to 5)

CORAM: JUSTICE ARINDAM SINHA

ORDER

26.09.2022

Order No.

08. **1.** Mr. Mishra, learned senior advocate appears on behalf of petitioner and submits, the reference was on three contracts. Subject matter of this writ petition are contracts in respect of Udala and Sarasmal. Adjourned date of the reference was fixed on 11th December, 2017. The Tribunal convened earlier at instance of parties and consent. The joint venture (JV) company was claimant. It was duly represented in participating for convening earlier sitting of the Tribunal and withdrew its claim, for termination of the proceeding in respect of said contracts.
- 2.** Other partners/stake holders of the JV then applied to the Tribunal and ultimately by order dated 17th September, 2018, the Tribunal recalled its earlier order dated 25th October, 2017, impugned herein, of having terminated the proceeding.

He submits, this was not possible for the Tribunal to have done. It was without jurisdiction.

3. Section 32 in Arbitration and Conciliation Act, 1996 provides for termination of proceedings. Clauses (a) and (b) under sub-section (2) were met, in the Tribunal having terminated the proceedings in respect of the two contracts. Only recourse for opposite party nos.2 to 5 was under section 34. He submits further, judgments of the Supreme Court relied upon on their behalf are inapplicable but erroneously construed by the Tribunal in impugned order.

4. Mr. Behura, learned advocate appears on behalf of opposite party nos.2 to 5. He submits, counter has been filed disputing authority of the person, who purported to execute settlement in regard to the contracts and urged withdrawal of the claims in respect thereof.

5. Paragraph-11 from impugned order is reproduced below.

“11. In view of the ratio in the aforesaid decisions of the Hon’ble Supreme Court, the Tribunal has no hesitation to hold that the order dated 25.10.2017 suffers from procedural irregularity inasmuch as there was no notice to the parties that the Tribunal shall sit on the said date and by passing the said order, the petitioners, who are Directors of M/s. Powercon and Projects and Associates Limited, which is a party to the joint venture, have been prejudiced. The Tribunal, therefore, has no hesitation to recall the said order dated 25.10.2017. Ordered accordingly.”

It is clear from aforesaid extract that the Tribunal recalled order of termination of proceeding on reason given that it suffered from procedural irregularity, inasmuch as there was no notice to the parties that the Tribunal shall sit on said date. Mr. Behura submits further, the person who represented the JV in achieving purported settlement, on causing the Tribunal to convene prior to adjourned date, was not authorized to settle or withdraw the claims. Interference of Court is limited by section 5. He then relies on **Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd.**, reported in (2022) 1 SCC 75 to submit, the Supreme Court declared the law to be that interference in writ jurisdiction must only be in rarest of rare cases, whereby a party is rendered remediless or clear bad faith is shown.

6. Mr. Mishra in reply draws attention to resolution dated 19th January, 2017, from which following is extracted and reproduced below.

“RESOLVED THAT the Company had issued Specific Power of Attorney to M/s Powercon Projects & Associates Ltd. for execution of OPTCL projects (PKG 616-06 & PKG 618-01) with Mr. Tathagat Mohanty as Authorized Signatory on 01.02.2010, 03.11.2010, 06.02.2011 valid upto completion of the projects & defect liability project or till revocation, which now stands further validated for the Arbitration filed for these projects till completion of the Arbitration process and acceptance of award and any other legal formalities thereof.

xxx

xxx

xxx

FURTHER RESOLVED THAT Mr. Tathagat Mohanty, is hereby authorized to sign and execute all documents pertaining to the arbitration, other claims on OPTCL, correspondences with the legal counsel, OPTCL and others which shall be accepted and ratified by us."

He then refers to order no.4 dated 20th September, 2017. Inter alia, first three paragraphs of those relied upon in said order, are reproduced below.

*"The claimant was directed to file his statement of claim before the Tribunal today. However, the claimant has sent a petition in the form of a letter, inter alia, indicating that the claimant is seriously ill and unable to appear before the Tribunal and file his statement of claim. He has also indicated that he is unable to do so for his precarious financial constraint and **there is a negotiation for mutual reconciliation between the parties to settle the dispute, which is in process.***

In that view of the matter, the claimant has prayed for an adjournment of the proceeding for two months.

In reply, the respondents have also addressed a letter expressing their no objection for adjournment of the proceeding and also indicating that the claimant has approached them for mutual reconciliation to settle the dispute."

(emphasis supplied)

7. In Grindlays Bank Ltd. v. Central Government Industrial Tribunal, reported in (1980) Supp. SCC 420, relied upon by the Tribunal in impugned order, the Supreme Court declared there is no prohibition in the Act, prohibiting

the Tribunal to be considered as invested with such incidental or ancillary powers (of review). **Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd.**, reported in (2005) 13 SCC 777 was also relied upon by the Tribunal, wherein the Supreme Court said that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit, only if the Court or quasi judicial authority is vested with the power of review by express provision or by necessary implication. Distinction was made regarding procedural review, on cases where a decision is rendered by the Court or quasi judicial authority, without notice to the opposite party or under a mistake of impression that notice had been served on opposite parties or, the matter is taken up for hearing and decision on a date other than a date fixed for its hearing.

8. Resolution dated 19th January, 2017 passed at the meeting of Board of Directors of Mahashakti Energy Limited, authorized Mr. Tathagat Mohanty to, inter alia, sign and execute all documents pertaining to the arbitration. Order no.4 dated 20th September, 2017 was made by the Tribunal, on it being apprised about negotiation for mutual reconciliation between the parties to settle the disputes, as being in process. This was noted by the Tribunal on a scheduled adjourned date of the proceeding. On prayer for adjournment of two months, the next sitting was fixed on 11th December, 2017, serious illness of Mr. Tathagat Mohanty being one of the grounds for prayer for adjournment. Hence, the Tribunal, when it received

intimation for convening a sitting on 25th October, 2017 for purpose of recording withdrawal of claim and termination of proceeding, did not either doubt authority on representation of claimant or substance of settlement arrived at. Considering that scheduled adjourned date was on agreement of parties, there can be no reason to imply a bar on the Tribunal to have fixed an earlier date at the instance of the parties. Question arises as to whether the party was duly represented by its authorized representative, in asking to bring forward date of sitting as well as record settlement and withdrawal of claims, for termination of the proceeding in respect of the two contracts. The resolution authorized Mr. Tathagat Mohanty to execute all documents. He is/was also power of attorney holder of the JV. The scheduled sitting in September cannot be said to be not on notice of other stake holders of the JV, wherein the Tribunal was informed of settlement in process. Once settlement had been arrived at thereafter, there could be understandable urgency to have it recorded and the matter closed. In the circumstances, it cannot be said that the sitting brought forward on agreement and at instance of the parties, was without notice to the JV or that the matter was taken up for hearing and decision made on a date other than the date fixed for its hearing. There was no decision made by the Tribunal on 25th October, 2017. It was record of settlement and withdrawal of claims by claimant on absence of objection thereto by respondent, for the proceeding being terminated under the provision.

9. Dispute inter se between stake holders of the JV was not and cannot be subject matter of the reference. Nothing was shown to demonstrate that authorization of said person was since withdrawn. For reasons aforesaid Court finds, the Tribunal passed impugned order on illegality and with material irregularity. In this case, when there is specific remedy provided under the Act, invoking power to recall citing procedural lapse on the facts and circumstances, makes it a rare one for interference. Petitioner had been rendered remediless, while opposite party nos.2 to 5 have remedy under section 34.

10. Impugned order of the Tribunal is set aside and quashed.

11. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS