

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.53 of 2018
(Through hybrid mode)**

***G.M., East Coast Railway and
another***

....

Appellants

-versus-

Rail Welders JV

....

Respondent

Advocates appeared in the case:

For Appellants:

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Mr. P. K. Parhi, ASGI

Mr. S. S. Kashyuap, CGC

For Respondent:

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Mr. Kamal B. Panda, Advocate

CORAM:

JUSTICE ARINDAM SINHA

JUDGMENT

22.09.2022

1. Mr. Kashyuap, learned advocate, Central Government Counsel led by Mr. Parhi, learned advocate and Assistant Solicitor General appear on behalf of appellants (railway). Mr. Kashyuap submits, awards made on several heads of claim bear patent illegality on the face and are opposed to public policy. He draws attention to paragraphs 7 and 8 in the award, where the 10 claims made were tabulated. He submits, challenge against claim nos.2 to 7 and 9 was

erroneously rejected by the Court below. His client is, therefore, in appeal.

2. Claim nos.3, 3(A) and 4 relate to termination of the contract by his client and consequences thereof. He submits, clause 62 in General Conditions of Contract (GCC) provide for circumstances, in which there could be determination of contract owing to default of contractor and the consequences. His client duly terminated the contract upon seven days, followed by 48 hours notices. Entry-(vii) under the clause was relied upon to terminate it. Consequences of the termination provide for forfeiture of security deposits as well as encashment of performance guarantee, by subsequent clause in respect thereof. His client having acted within four corners of the clauses in the contract, the arbitrator in awarding those claims, did so on committing patent illegality.

3. Award was also made on claim for price variation. Further award was made on claim for refund of statutory increase in minimum wages paid by claimant. He submits, award on price variation claim must include additional claim of refund of statutory increase in minimum wages because, the increase is a variation. The two claims on same count of price variation were wrongfully made, which the arbitrator could not distinguish and awarded.

4. On claim nos.6 and 7, for payment of idling of machineries and their depreciation, the award made does not carry any basis or reason. So also in case of award on claim no.9, for compensation on the balance value of contract work. He adds, there was no term in the contract in regard to such claim.

5. Mr. Panda, learned advocate appears on behalf of the contractor. He refers to his client's statement of claim, wherein stand disclosed special conditions quoted by his client and corresponding remarks made by the railway. He draws attention to entries (i) and (iv) under sub-clause (b) in clause 2 to submit, his client had made it clear that on it not being responsible for any delay in availability of rails, suitable extension of time was to be granted without levy of liquidated damages or any other penalty and resultant idle time also suitably compensated. Suspension and delay on account of the railway were also to be compensated. Remarks were made by the railway. It was said that in case progress of work suffered on account of it, same would be compensated by granting suitable extension of time as per GCC. On the arbitrator being satisfied, upon finding of fact that there were no laches on part of his client, it was held that termination of the contract was wrongful, to consequentially award on claims for refund of security deposits and encashed performance guarantee amount.

6. He draws attention to page 29 in the award, where the arbitrator dealt with his client's claim nos.6 and 7. He submits, there was no error committed by the arbitrator, on facts or in law, for awarding Rs.15,00,000/- on taking cumulative view of the circumstances. He refers to clause 11 in said quoted special conditions to show idle time compensation stood quoted at equivalent to 50 welds per day. He submits, award on the cumulative view took into consideration such count in arriving at the figure, to be a liquidated claim.

7. On compensation for wrongful termination of contract regarding balance value of the work, he draws attention to page 30 in the award to demonstrate that the arbitrator relied on judgment of the Supreme Court in **A.T. Brij Paul Singh vs State Of Gujarat**, reported in **AIR 1984 SC 1703**. He relies on two more judgments of the Supreme Court. **M/s. J.G. Engineers Pvt. Ltd. v. UOI**, reported **AIR 2011 SC 2477**, paragraphs 10,12,14,15 to 18, 23 and 24. The second judgment is **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.**, reported in **2018(1) Arb LR 236 (SC)**, paragraphs 42, 55 and 58. He submits, there should be no interference in appeal with impugned award.

8. Entry (vii) under clause 62 in GCC has been relied upon by appellant in assailing award under claim nos. 3, 3A and 4. Said entry is

extracted and reproduced below.

“(vii) persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or”

On query from Court there was reference made by appellant to first notice dated 27th January, 2012, leading to termination of the contract by the railway. Text of the letter is reproduced below.

*“In spite of repeated instructions to you by the subordinate offices as well as by this office in various letters (1) Dy.CE/C/I/SBP letter No.DCE/C/I/SBP/FB Welding/185 dated 15-12-2011 and (2) Dy. CE/C/KUR’s Lr. No.DCE/C/KUR/KUR-BLGR/Rail Welds (JV)/OT/08/2010/1062 dated 14-11-2011. You have **failed to start work/show adequate progress and/or submit detailed programme for completing the work.***

2. *Your attention is invited to this office Letter Nos.CE/Con/HQ/BBS/RW/W/921/03971 dated 20-12-2011 and CE/Con/HQ/BBS/W/RW/921/03820 dated 07-12-2011 in reference to your representation No.RWJV/ECOR/FBW/111 dated 24.11.2011.*

3. *As you have failed to abide by the instructions issued to commence the work/to show adequate progress of work, you are hereby given 7 days notice in accordance with clause 62/General Conditions of Contract to commence works/to make good the progress, failing which further action as provided in clause 62 of General Conditions of Contract viz. to terminate your*

Contract and complete the work at your risk and cost will be taken.

Kindly acknowledge receipt.”

(Emphasis supplied)

It will appear that reason given as basis of the notice is three fold being, failure to start work/show adequate progress and / or submit detailed programme for completing the work. When there has been termination of contract, and the procedure required 7 days and 48 hours notices to be given, attributing default of contractor and entry-(vii) under clause 62 relied upon, the notice is insufficient for Court to accept it for purpose of finding apparent patent illegality in the award. A vague notice stood issued for invoking clause 62 in GCC, purportedly relying on entry-(vii) therein. There thus cannot be found patent illegality disclosed in the award, on the arbitrator having taken view that the termination was wrongful. On such a finding, natural consequence would, inter alia, be allowing claims for refund of security deposit and performance guarantee encashed amount.

9. Contention of appellant on award against claim no.5 is that it was included in award against claim no.2. Claim no.5 was for refund of statutory increase in minimum wages paid, while claim no.2 was for price variation. Obviously, price variation claim referred to materials

and refund of statutory increase in minimum wages, to workmen's wages. The two claims are different. No other ground having been urged regarding award on claim no.5, the contention cannot be accepted for finding patent illegality in this regard, in the award.

10. On claim nos.6 and 7 the arbitrator took a cumulative view of the circumstances and awarded Rs.15,00,000/-. Claimant had quoted at 50 welds a day to be liquidated compensation and the railway had said it should be 42 welds per day. Cumulative view of circumstances given as basis for awarding Rs.15,00,000/ on these claims cannot be said as not having considered quantification at 42 welds a day, admitted by the railway. It, therefore, is a possible view on the quantification and cannot be interfered with.

11. Award on claim no.9 is the last ground of challenge, on contention of there being no term provided for its award. The arbitrator relied on judgment of the Supreme Court in **A.T. Brij Paul Singh** (supra) to award the claim at the rate, taken as to have been declared as law. Paragraph 11 from the judgment is reproduced below.

“11. Now if it is well-established that the respondent was guilty of breach of contract in as much as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a

part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.”

(Emphasis supplied)

Above declaration of law on damages for loss of profit being measured was on acceptance by the High Court, in the case between same parties and for same type of works at 15% of value of remaining parts of the work contract, to be the measure. There are no facts found in impugned award on this claim to form basis for acceptance of measure of damages on loss of profit at 15% of value of the balance work.

12. In **M/s. J. G. Engineers Pvt. Ltd. v. UOI**, reported AIR 2011 SC 2477, claim no.11 in the award was for Rs.54,03,669/- being loss of anticipated profit in regard to value of unexecuted work. The arbitrator had held that termination of the contract was wrongful. Value of the work, which could not be executed due to wrongful termination, was Rs.3,91,21,589/-. Ten percent (10%) thereof would be standard estimate of the loss of profits and consequently award of Rs.39,12,000/-. Challenge against the award and in particular on this

claim was on ground, it was an excepted matter. The District Court, Guwahati dismissed the challenge. The order was reversed by the High Court. The Supreme Court restored order dated 12th December, 2003 of the District Judge. Thus, it transpires that measure of damages at 10% of value of unexecuted works was not disputed by the employer. As such, this decision is not an authority on measure of damages for anticipated loss of profits.

13. In **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.**, reported in 2018(1) Arb. LR 236 (SC), it was the contractor, who terminated the contract citing breach on part of the employer. The contractor complained of fundamental breach and elected to treat the breach as repudiation, bringing the contract to an end and sued for damages. The Supreme Court in paragraph 58 referred to **Suisse Atlantique Societe d'Armement SA vs. NV Rotterdamsche Kolen Centrale**, reported in 1966 AC 361 (pages 397-398). The extract referred to is reproduced below.

“...if facts of that kind could be proved I think it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated

when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance.

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term...

(emphasis supplied) ”

Cardinal principle of damages, reiterated by the Supreme Court in paragraph 55 was that the injured party should be placed in as good a position as money could do as if the contract had been performed. This principle is based on premise that the party in breach has, by his breach, produced a situation fundamentally different from anything, which the parties could, as reasonable men contemplate, when the contract was made. The principle cannot be applied to present case because on appellant having wrongfully terminated the contract, it

only prevented execution of the balance work. Respondent may have suffered loss of anticipated profit but there ought to have been adjudication on the measure of it.

14. Section 73 in Contract Act, 1872 provides for compensation for loss or damage caused by breach of contract. It is compensation for any loss or damage caused to the party, as a consequence of breach of the contract by the other, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. The provision requires several things to be proved. In this case, of the several things, breach on wrongful termination by appellant stands proved. That being unable to perform the whole contract would result in loss of profit to respondent is accepted as also, on wrongful termination, such loss was likely to result. As aforesaid, in **M/s. J.G. Engineers** (supra) 10% of value of balance work was not disputed. The challenge was, it was an excepted matter. It was, therefore, implied admission, on part of the employer, on measure of damages at 10%. Admission is good proof. In **A.T. Brij Paul Singh** (supra) same parties had accepted the measure to be 15% before the High Court. In that case too measure of damages was by proof of admission. In this case there was no measure asserted, to be decided on proof. Reliance on **A.T. Brij Paul Singh**

(supra) by the Court below was misplaced, leading to error of law in this part of the award.

15. For reasons aforesaid award on claim no 9 at Rs.56,07,550/- being severable, is set aside in appeal. Impugned judgment is varied to that extent.

16. The appeal is allowed in part and disposed of.

(Arindam Sinha)
Judge

Orissa High Court
Dtd. 22nd day of Sept., 2022/PKS

