A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.24 of 2019

(From the judgment dated 05.07.2019 passed by the learned District Judge, Cuttack in ARBP No.05 of 2018 confirming the award dated 15.12.2017 passed by the learned Arbitrator in Arbitration Proceeding No.55 of 2016).

New India Assurance Co. Ltd., B-34, Saheed Nagar, Bhubaneswar, District-Khurda …. *Appellant*

-versus-

Orissa State Warehousing Corporation, Plot No.2, Cuttack-Puri Road, Bhubaneswar, District- Khurda & Anr. …. *Respondents*

Advocates appeared in the case:

For Appellant : *Mr. G.P. Dutta, Adv.*

-versus-

For Respondents. : *Mr. Braja Kishore Sahoo, Adv. (for Caveator/ O.P.1)*

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-15.11.2022
DATE OF JUDGMENT:-22.12.2022

Dr. S.K. Panigrahi, J.

1. The Appellant through this Appeal challenges the judgment dated 05.07.2019 passed by the learned District Judge, Cuttack in ARBP No.05 of 2018 confirming the award dated 15.12.2017

passed by the learned Arbitrator in Arbitration Proceeding No.55 of 2016.

2. The learned Arbitrator vide award dated 15.12.2017 passed in Arbitration Proceeding No.55 of 2016 awarded in favour of the claimant/ Respondent No.1 a sum of Rs.19,79,010.60/- together with interest @ 12% per annum for the period from 24.8.1999 to 15.12.2017, amounting to Rs.43,52,088/- and future interest @ 6% per annum on the total amount of Rs.63,31,099/- from the date of the award till realization of the same unless the said amount is paid within 3 months from the date of the Award.

3. Next, the learned District Judge, Cuttack rejected the challenge to the award, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for brevity).

I. FACTUAL MATRIX OF THE CASE:

4. Respondent No.1 had taken a fidelity guarantee policy from the Appellant to insure safe management and recording of stocks in the Ware House from 23.11.1998 to 22.11.1999 (hereinafter referred to as 'the policy period'), covering its 490 employees, for a floating sum of Rs.20,00,000/-.

5. As per the policy, the Appellant agreed to indemnify Respondent No.1 against any direct pecuniary loss sustained

because of any fraud/dishonesty committed during the coverage period and/or during uninterrupted service with Respondent No.1; discovered during the continuance of the policy. The policy contains several terms and conditions including a provision for arbitration in case of a dispute.

6. During the policy period, a claim intimation was lodged by Respondent No.1 for the alleged loss of Rs.23,51,560/- for misappropriation of stock by one employee namely M.R.K. Rao, who was in charge of Podagada Sub-Depot, during the policy period.

7. A special audit ascertained that there was a loss of Rs.23,18,000/- marking a shortage of rice and Rs.33,250/- towards the value of empty gunny bags. For the alleged defalcation, a departmental proceeding was initiated and a police complaint was lodged against the errant employee.

8. In response to the aforementioned claim, the present Appellant appointed a Chartered Accountancy-Cum-Surveyor firm namely Sanjeeb Kumar and Associates on 28.05.1999. The said surveyor submitted his report on 07.06.2000 recommending a compensation of Rs.9,89,505.35/-. The report mentioned that the misappropriation of stock took place over a period of time, against which an exact date could not be ascertained. While making the aforesaid assessment,

the surveyor had taken 01.01.1999 as the cut-off date for reckoning the quantum of stock misappropriation.

9. However, the present Appellant was aggrieved by the report of Sanjeeb Kumar and Associates and appointed one M.K. Nanda, Chartered Account-cum-Surveyor to seek a review of the aforementioned report.

10. Mr. Nanda ascertained the cut-off date as 12.01.1999 for reckoning/assessing the quantum of stock misappropriation and ultimately, assessed the loss at Rs.1,14,168/-. Thereafter, the Appellant appointed an Investigator, Mr. Sugyan Choudhury, to examine the incident.

11. It is the case of Respondent No.1 that based on the report of Mr. M.K. Nanda, the Appellant had approved the claim for Rs.1,13,168/-, after deduction of policy excess of Rs.1,000/- and forwarded the discharge voucher to Respondent No.1 on 20.10.2018. It is stated that there was no response from Respondent No.1 to the discharge voucher, despite the issuance of a copy of the report of Mr. N.K. Nanda. The Appellant claims that it had sent several reminders and, thereafter, it repudiated the claim and sent a "NO CLAIM" letter to Respondent No.1 on 13.02.2009.

12. Notwithstanding the same, the Appellant offered to re-open the claim and pay Rs.1,13,168/- to the Respondent. However, Respondent No.1 sought appointment of an Arbitrator against

Clause-15 of the Policy. Since the Appellant did not accede to the request for appointment of an Arbitrator, Respondent No.1 approached this Court, seeking the appointment of an Arbitrator under Section 11 of the Act, by filing an ARBP No.16 of 2012 and this Court vide order dated 27.10.2016 appointed the sole Arbitrator to adjudicate the dispute between the parties.

13. As per the order dated 27.10.2016, Respondent No.1 filed a claim before the learned Arbitral Tribunal *inter alia* claiming a total sum of Rs.71,48,742/-, under the following heads:

A.	Towards loss of Sugar	Rs.2,08,968/-
B.	Towards loss of Rice	Rs.9,50,187/-
C.	Fine	Rs.11,59,155/-
D.	Towards loss of empty bag	Rs.33,250/-
E.	Towards interest @ 12%	Rs.47,97,181/-
	TOTAL	**Rs.71,48,742/-**

14. In response to the notice issued by the learned Arbitrator, the Appellant filed a written statement and also moved two applications i.e., one under Section 16(2) of the Act challenging the jurisdiction of the learned Arbitrator and another under Section 12(3) and 14(1) of the Act alleging partiality and incompetency of the Arbitrator. Both the

petitions were, however, dismissed by the learned Arbitrator, during the proceedings.

15. The learned Arbitrator, based on pleadings, framed as many as five issues for determination. For better appreciation, the issues are quoted hereunder:

> *"(a) Whether the present Arbitration proceeding is maintainable?*
> *(b)Whether the claim is barred by limitation?*
> *(c)Whether the claims of the claimant are covered under the terms and conditions of the Policy?*
> *(d) Whether the claims are payable being outcome of any sort of frauds committed by the Claimants?*
> *(e)Whether the claimant is entitled to any/other relief?"*

16. The learned Arbitrator, after appreciating the oral and documentary evidence, answered issues Nos.1 to 4 in favour of Respondent No.1 and disallowed the claim of Respondent No.1 with respect to Issue No.5. The learned Arbitrator awarded a sum of Rs.63,31,099/- inclusive of interest besides future interest @ 6% per annum, to be paid by the Appellant, under the following heads:

Rice (775.46 Qtls)	Rs.7,79,337/-
Sugar (175.14 Qtls)	Rs.2,10,168/-
Penalty	Rs.9,89,505.30/-
Interest	Rs.43,31,099/-
TOTAL	**Rs.63,31,099/-**

17. The Appellant challenged the award passed by the learned Arbitrator under Section 34(2)(2A) read with Section-13 and 16(6) of the Act before the learned District Judge, Cuttack which was registered as ARBP No.05/2018.

18. By judgment/ order dated 05.07.2019, the District Judge, Cuttack, confirmed the quantum of compensation granted by the learned Arbitrator, holding that the Award did not deserve to be set aside.

19. The Appellant has preferred this appeal on the ground that the impugned arbitral award dated 15.12.2017 as well as the dismissal of its application under Section 34 of the Act by the learned District Judge by way of order dated 05.07.2019 are illegal, arbitrary, perverse and suffer from gross non-application of mind; rendering the award contrary to the public policy.

II. APPELLANT'S SUBMISSIONS

20. Learned counsel for the Appellant submitted that the Learned District Judge has failed to exercise jurisdiction vested with it under Section-34(1)(2-A) of the Act, in as much as the Learned District Judge has failed to refer to the important provision of law under which the appeal was filed. It was also claimed that the District Court had relied upon certain decisions behind the back of the Appellant thereby giving no opportunity to the present Appellant to rebut the same. It is the well-settled

proposition of law that each of the contesting parties shall be given full opportunity to counter the submission of every party and, as such, the award passed by the Learned Arbitrator and the impugned judgment passed by the Learned District Judge are unsustainable and are liable to be set aside.

21. The Appellant has also claimed that the learned Arbitrator lacks jurisdiction to arbitrate the matter as the Arbitrator is an Additional Standing Counsel (A.S.C.) of the Office of the Learned Advocate General, a rank equivalent to that of a Cabinet Minister of the State. Further, it is contended that the Learned Arbitrator is an Officer of the State whereas Respondent No.1 is an instrumentality of the State. The stocks which are alleged to be misappropriated by the alleged delinquent employee, in this case, are stocks of Orissa Civil Supply Corporation which is also an instrumentality of the State. This arrangement, it is stated, reeks bias as the said fact were not disclosed by the learned Arbitrator before presiding over the matter. Therefore, the fact that the learned Arbitrator is professionally associated with the entity which is a party to the proceeding renders the arbitral award null and is, therefore, liable to be set aside.

22. It was further submitted that the District Court has committed an error of law in not interfering with the order of rejection of the application filed under Sections 12 and 14 read with

Section 13(2) by the learned Arbitrator. In terms of the mandate of Section 13 of the Act, since the learned Arbitrator has been made a party to the suit, an appropriate relief could have been granted to the Appellant by setting aside the award. The Appellant vehemently contended that the District Judge, in a cryptic manner, has rejected the same and, as such, the judgment passed by the learned District Judge is unsustainable and is liable to be set aside along with the award passed by the learned Arbitrator.

23. Next, both the sole Arbitrator and the District Judge had failed to consider the fact that the claim of the claimant was repudiated on 13.02.2009 and the claimant filed the ARBP No.16 of 2012 nearly three years after the date of repudiation. So, given the disclaimer clause contained in the Policy, the claim is not arbitrable and as such the award passed by the learned Arbitrator as well as the judgment passed by the learned District Judge are unsustainable and are liable to be set aside.

24. In this context, the Appellant placed reliance on the condition No.15 of the policy, which reads as follows:

> "***Condition No.15***: *If any difference shall arise as to the quantum to be paid under this Policy, (liability being otherwise admitted) such difference shall, independently of all other questions, be referred to the decision of an Arbitrator to be*

appointed in writing by the parties in difference; or if they cannot agree upon a single Arbitrator, to the decision of two disinterested persons as Arbitrators of whom, one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint Arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole Arbitrator and in case of disagreement between the Arbitrator, the difference shall be referred to the decision of the Umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the Arbitrators and preside at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or Umpire of the amount of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall declaim liability to the Insured for any claim hereunder and such claim shall not, within 12 calendar month from the date of such disclaimer been made the subject matter of a suit in a Court of Law, then the claim *shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder*."

25. It is, therefore, submitted by the learned counsel for the Appellant that since Respondent No.1 initiated the Arbitration proceeding after three years, the proceeding is not maintainable. Furthermore, he submitted that the date of cause of action would mean the date on which the alleged incident took place. As per the Appellant, the alleged defalcation happened in the year 1998-1999, making the claim barred by limitation and *ergo*, not arbitrable. Accordingly, the award passed by the learned Arbitrator as well as the judgment passed by the learned District Judge is unsustainable and is liable to be set aside.

26. It was also argued that the bonafide action taken by the Appellant in compliance with the mandate of Section-64 UM of the Insurance Act is genuine and is not opposed to the law. To the contrary, the action of the Learned Arbitrator, it was contended, is a clear case of violation of Public Policy and, as such, the award passed by the learned Arbitratoras well as the learned District Judge is unsustainable and is liable to be set aside.

27. It was submitted that the award is against the terms of the contract as envisaged in the contract of insurance. The policy of insurance only undertakes to pay direct pecuniary loss

suffered by the Claimant insured by the fraud and dishonesty of the insured employee. The policy, it was stated, has no provision to cover/pay any penalty imposed by the non-party uninsured, who is not a party to the contract. The policy also undertakes that the insurer shall not be liable to pay more than one claim in respect of the action of any one employee.

28. However, the learned Arbitrator has awarded continuous loss caused in a series of incidents, caused by both insured and uninsured employees, before adjustment of dues payable to the defaulting employees and also includes penalty as imposed by an entity who is not a party to the contract which is a clear violation of the spirit of Insurance Act, 1938.The Appellant further contended that the learned District Judge has failed to assign any cogent reasons in his order, particularly when it is the specific plea of the Appellant that the learned Arbitrator passed the award by ignoring the substantive evidence available on record and against the weight of evidence available on record, which renders the award perverse.

29. It was also contended that the learned District Judge has also failed to appreciate that since, as per the terms of the contract, no recovery was made from the defaulting employee, the award passed by the learned Arbitrator cannot be sustained and is liable to be set-aside.

30. The Appellant placed reliance on the decision of this Court in ***Samantray Constructions Pvt. Ltd. v. State of Odisha,***[1] wherein it was held that, while exercising jurisdiction to set aside an award under Section 34 of the Act, the court ought to interfere with the award:

> *"(a) Where there is existence of total perversity in the award and the award is based on wrong proposition of law;*
> *(b) Where the award deals with dispute not contemplated or not falling within the terms of submission to arbitrator; or if it contains a decision on matter beyond the scope of submission before the arbitrator;*
> *(c) Where the court finds any error apparent on the face of records;*
> *(d) Where the Arbitrator misconducted himself by going beyond the arbitration reference or acted in a manner which is not in conformity with law taking extraneous materials into account while passing the award; or*
> *(e) Where a party is otherwise prevented to present its case. If there is existence of total perversity in the award and the award is based on wrong proposition of law"*

31. It is submitted that the learned District Judge, having failed to take note of the patent illegality, as canvassed by the Appellant in its petition under Section 34 of the Act, which goes to the root of the matter, the case of the Appellant is squarely covered under the points as stated above. The

[1](2007) 103 CLT 319

Learned District Judge, it was contended, has illegally dismissed ARBP No.05 of 2018 and, as such, the judgment passed by the learned District Judge is unsustainable and is liable to be set aside.

32. It was also submitted that the award is liable to be set aside as it has been passed by an ineligible Arbitrator; exceptions have also been arbitrated upon; there are numerous errors apparent on the face of the award; the opinion of experts appointed under the law having been ignored; and the award is against the terms of the contract and trade usage. Consequently, the award passed by the learned Arbitrator, it is contended, is unsustainable. The Appellant also submitted that the law relating to the award of interest in an arbitral proceeding is no longer res-Integra and, in the instant case, the award of interest is without jurisdiction in the facts and circumstances of the case, but the Learned District Judge acting with material irregularity has mechanically accepted the reasoning assigned by the sole Arbitrator. The impugned order and arbitral award, it was finally contended, was not based on cogent materials, making the same liable to be set aside.

III. RESPONDENTS' SUBMISSIONS:

33. *Per contra*, learned counsel for the Respondent No.1 submitted that the Arbitrator has passed a reasoned arbitral award upon due appreciation of evidence and the awarded amount is as

per the terms of the policy conditions and the investigation made in determining the loss. Arguments were also advanced in favour of the findings rendered by the learned District Judge, Cuttack while upholding the arbitral award.

34. It was submitted that the sole arbitrator, on a detailed analysis of the evidence on record, did not commit any error in returning the finding that the arbitral proceedings are not barred by limitation. The question of limitation was raised by the Appellant before this Court in the petition for appointment of the Arbitrator, and those points have been considered by this Court in ARBP No.16 of 2012. While appointing the learned Arbitrator, this Court held that, as per Clause 15 of the agreement, the claim is within the period of limitation and also held that since the matter involves the question of quantum of compensation only and liability has been admitted, it comes within the purview of the arbitration clause as per terms of policy.

35. Clause 15 of the policy, it is contended, stipulates the following three aspects:

    i. Dispute arises as to the quantum to be paid liability being otherwise admitted, shall be independently of all other questions, be referred to an arbitrator.

ii. No dispute shall be referable to arbitration if the company has disputed or not accepted liability under or in respect of the policy.

iii. If the company disclaims liability and such claim shall not, within twelve calendar months from the date of such disclaimer have been made the subject matter of a suit in court of law, then claim shall for all purpose deemed to have been abandoned.

36. It was submitted that, firstly, the Appellant issued letter to Respondent No.1 on 20.10.2008 stating that the claim has been settled for Rs.1,13,186/- and asked to return the signed voucher for the like amount. But the Respondent No.1 was not satisfied with that amount settled and did not return the vouchers. Ultimately, the insurance company, on 13.2.2009, stated that since the claimant, after several reminders, did not return the vouchers they could not keep the file open indefinitely, and closed the claim as 'no claim'. It was submitted that these facts made it abundantly clear that it was a dispute involving only quantum which squarely comes within the purview of arbitration as per Clause 15 of the Policy.

37. Secondly, the insurance company took their final decision vide letter dated 13.2.2009 that the claim is treated as 'No

Claim'. Thereafter, by letter, dated 06.05.2009, it was stated that if the vouchers would be discharged, they would release the payment. However, the claimant by letter dated 07.02.2012 demanded settlement through arbitration. Accordingly, it was stated that the claim is within three years and the period of limitation.

38. Next, it was submitted that Respondent No. 1 is only the custodian of the goods and the owner is the Civil Supply Corporation. According to the terms of the Civil Supply Corporation, for the loss of their goods, they would charge a penal rate which is double the actual cost of goods. Accordingly, Respondent No.1 submitted the claim before the insurance company for a sum of Rs.23,51,560/-. The Civil Supply Corporation vide letter dated 05.05.1999 demanded their shortage of rice Q.1156.87 and sugar Q.174.14 and estimated the value including a penal charge at Rs.27,43,244/-. Thereafter, in a joint meeting conducted in presence of the Additional Secretary on 24.05.1999, the quantity of loss settled at: rice of Q.945.46 and sugar of Q.174.14. The cost of such shortage of rice and sugar with a penalty amounting to Rs.23,18,310/- has been recovered by the Civil Supply Corp. from the pending bills of the Respondent. Ergo, the claims by Respondent No.1 were reasonable and the learned Arbitrator has also passed a reasoned award for Rs.63,31,099/-

considering the available documentary as well as oral evidence and the awarded amount is as per the terms of the policy conditions and as per the investigation made in determining the loss.

IV. ISSUES FOR CONSIDERATION:

39. After having heard the learned counsels for both sides, this court here has identified the following issues to be determined:

A. Whether the District Court erred by not interfering with the order of rejection of the application filed under sections 12 and 14 read with Section 13(2) by the learned Arbitrator?

B. Whether the arbitration proceeding was barred by limitation?

C. Whether the arbitral award is in contravention of the public policy of State under Section 34(2)(b)(ii)?

V. ISSUE A: Whether the District Court erred by not interfering with the order of rejection of the application filed under Sections 12 and 14 read with Section 13(2) of the Act by the learned Arbitrator?

40. The main contention for the revocation of the authority of the learned Arbitrator is the alleged apprehension in the mind of the Appellant about bias of the sole arbitrator. The counsel for the Appellant argued that, as the arbitration proceeding was

instituted by Odisha State Ware Housing Corporation which is an instrumentality of the State, the learned Arbitrator who was working as an Additional Standing Counsel in the office of the learned Advocate General of Odisha was not eligible to act as an Arbitrator, being hit by Section 12 of the Act.

41. The learned District Judge dealt with this issue by analyzing and determining that Odisha State Ware Housing Corporation is not an instrumentality of the State under Article 12 of the Constitution of India. However, this is not the main question of law here. This Court thinks such an exercise is unnecessary and misdirected. The appropriate test here would be to determine, if any plausible link could reasonably be established to infer an element of bias against the sole Arbitrator.

42. It is trite in law that an Arbitrator has to act in a fair and impartial manner, leaving no room for any apprehension of bias. It is not a question of the effect which misconduct on his part had, in fact, upon the result of the proceeding, but of what effect it might possibly have produced.

43. In this context, *Lord O'Brien in* ***The King (De Vesci) v. The Justices of Queen's Country,***[2] observed as follows:

> *"By bias I understand a real likelihood of an operative prejudice, whether conscious or*

---

[2] [1908] 2 I.R. 285

unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds was reasonably generated and but certainly mere flimsy grounds elusively generated and morbid suspicions should not be permitted to form a ground of decision."

44. On parallel lines of reasoning, the Apex Court of India in ***International Authority of India v. K.D.Bali and Anr.***[3] held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. In this country, it is common for Government contracts to have clauses requiring the Superintending Engineer or some official of the Government as the Arbitrator. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal.

45. In ***Indian Oil Corp. Ltd. & Ors v. M/S Raja Transport (P) Ltd***[4]**,** the Supreme Court observed that:

"34. …There can however be a justifiable apprehension about the independence or impartiality

[3] 1988 (2) SCC 360

[4] (2009) 8 SCC 520

of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute.

35. Where however the named Arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/ public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

36. The position may be different where the person named as the Arbitrator is an employee of a company or body or individual other than the state and its instrumentalities. For example, if the Director of a private company (which is a party to the Arbitration agreement), is named as the Arbitrator, there may be valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an Arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named Arbitrator, then the court has the discretion not to appoint such a person.

37. Subject to the said clarifications, ***we hold that a person being an employee of one of the parties***

(which is the State or its instrumentality) cannot per se be a bar to his acting as an arbitrator*…"*(Emphasis supplied)

46. It is settled law that the fact that a named Arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or lack of independence on his part. This may also be seen in the light of the fact that even arbitration clauses in Government contracts, providing that an employee of the department will be the sole Arbitrator, have also been held to be neither void nor unenforceable. [***ACE Pipeline Contracts (P) Ltd v. Bharat Petroleum***[5]***, Union of India v. M.P Gupta***[6]***, S.P Singla Constructions Private Ltd. v. State of Himachal Pradesh &Anr***[7]***, Aravali Power Co. Pvt. Ltd v. Era Infra Engg. Ltd***[8]**]**.In the present case, apart from the vague averment that Learned Arbitrator is an Officer of the State and that Respondent No.1 is an instrumentality of the State, the applicant has not been able to demonstrate as to how there is any justifiable apprehension about the arbitrator's independence or of his impartiality. There is nothing on record to raise any justifiable doubts about the independence or impartiality of the arbitrator. The fact that the learned Arbitrator is an Additional Standing

[5] (2007) 5 SCC 304
[6] (2004) 10 SCC 504
[7] (2019) 2 SCC 488
[8] (2017) 15 SCC 32

Counsel(A.S.C.) of the Office of the Learned Advocate General would not disqualify him from acting as an Arbitrator and cannot be a reason for the likelihood of bias. The purported apprehension of the Appellant , in absence of substantial evidence to the contrary, is far-fetched. Accordingly, the answer to the first question is that the Appellant was not justified in his assumption of bias.

VI. ISSUE B: Whether the arbitration proceeding was barred by limitation?

47. Article 137 of the Limitation Act, 1963 provides for an outer time limit of three years from the time the "right to apply accrues" to applications for which no exclusive time period of limitation is provided elsewhere in the Limitation Act, 1963. As Section 11 of the Act did not have any specific mention of limitation, consequently, Article 137 of the Act, 1963 was used to guide the section.

48. Now, Section 11 provides for the procedure to initiate arbitration. It can further be divided into two parts. The first part pertains to an application to the Court to appoint an Arbitrator and the other part deals with the issue of claim to a cause of action. For the first issue, the limitation period begins from the date of refusal to appoint an Arbitrator by the other party or on an expiry of thirty days, whichever is earlier. Moreover, for the second issue, the period of limitation begins

from the **"Cause of Action"**.[9] In the case of ***Bharat Sanchar Nigam Limited v. M/s Nortel Networks India Pvt. Ltd.,***[10]the Supreme Court had held that both of the above issues should not be time-barred to allow an application under Section 11.

49. In the case at hand, the first part is quite settled, but, the second part of the limitation has been fiercely contested by the parties to this case.

50. At this point, it becomes pertinent to refer to the Supreme Court judgment in ***Geo Miller v. Rajasthan Vidyut Nigam***[11] wherein the Court was inclined to hold that the "cause of action" arises when the final bill became due. However, after perusing the decision of ***Major (Retd.) Inder Singh Rekhi***[12] and ***Hari Shankar Singhania***[13] the Court clarified the legal position by making the following observation:

> *"Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record.* ***The Court upon careful consideration of such history must find out what was the***

[9]Grashim v. State of Kerala, (2018) 14 SCC 265
[10](2021) 5 SCC 738
[11]2019 SCC OnLine SC 1137
[12]Major (Retd.)Inder Singh Rekhi v. Delhi Development Authority, 1988 AIR 1007
[13]Hari Shankar Singhania&Ors vs Gaur Hari Singhania&Ors., (2006) 4 SCC 658

> ***'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation.*** *The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.".*(Emphasis supplied)

51. In ***Secunderabad Cantonment Board v. B. Ramachandraiah & Sons,***[14] the Supreme Court further explicated the question of law about "cause of action" as under:

> *"Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action,* ***once the applicant has asserted their claim and the Respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration.*** *It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the Respondent in the meanwhile."*

[14](2021) 5 SCC 705

52. In the light of the above observations, it can be deduced that the breaking-point of the present commercial relationship was when the Appellant company declared the claim of the Respondent No.1 as “no-claim” thus giving rise to the “cause of action” in this transaction.

53. The insurance company took their final decision vide letter dated 13.02.2009 that the claim is treated as 'No claim'. Thereafter, by letter dated 06.05.2009 it was stated that if the vouchers would be discharged, they would release the payment. At this juncture, the claimant by letter dated07.02.2012 demanded for settlement through arbitration. Hence the claim is well within three years i.e. within the period of limitation. Accordingly, the question of limitation is answered in favour of the claimant.

VII. ISSUE C:Whether the arbitral award is in contravention of the public policy of the State under Section 34(2)(b)(ii) of the Act?

54. It stated that Section 34 of the Act does not normally permit the courts to review findings of fact made by arbitrators. However, the Supreme Court only clarified and did not restrict, the law concerning public policy. In particular, the Supreme Court said an award can be set aside if it is:[15]

i. contrary to the fundamental policy of Indian law, i.e. it is "arbitrary" or "whimsical", as opposed to being fair, reasonable and objective, or it contains a decision

[15] ONGC Ltd. v. Saw Pipes Ltd., 2003 (5) SCC 705

so irrational that no reasonable person would have arrived at it;

ii. contrary to the interest of India, i.e. it affects India's relations with other countries;

iii. contrary to justice and/or morality, i.e. it "shocks the conscience of the court", or it relates to an immoral contract; or

iv. patently illegal, i.e. it contains a ruling which contravenes the law of India, or it contravenes the provisions of the Act, or it is based on an interpretation of the terms of a contract that no fair-minded or reasonable person would adopt.

55. Further, the Supreme Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***[16]has posited the limited scope of judicial interference while reviewing Arbitral Awards under the Act. It has been held that the public policy of India is now constricted to mean:

(1) An award being contrary to the fundamental policy of Indian law as (understood in paras 18 to 27 of ***Associate Builders v. DDA***[17] (‘*Associate Builders*’))

(2) An award being against basic notions of justice or morality (as understood in paras 36 to 39 of *Associate Builders).*

56. Further, the Supreme Court in ***Dyna Technologies Pvt. Ltd v. Crompton Greaves***[18] observed as under:

[16] (2019) 15 SCC 131

[17](2015) 3 SCC 49

"…arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated…"

57. Against the contentions of the Appellant regarding bias, it has already been found that the Appellant was not justified in his assumption of bias and such unsubstantiated apprehension cannot *per se* be a bar to the appointment of the sole Arbitrator. Further, it has also been established that the arbitral proceeding was not barred by limitation. Therefore, this Court left with the last contention of the Appellant i.e., patent illegality in awarding against the contractual terms. Before dealing with the said submission, it may be relevant to note the following observations made by the Supreme Court in ***Delhi Airport Metro Express Ltd v. Delhi Metro Rail Corporation Ltd***[19]:

---

[18] (2019) 20 SCC 1
[19] (2022) 1 SCC 131

> *“**29.** Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression ‘patent illegality’. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression ‘patent illegality’. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the Arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the Arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the Arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression ‘patent illegality’. “*

58. It is not in dispute that the insurance policy for fidelity guarantee was in force during the relevant time. Fidelity Guarantee is different from contingency guarantee. The

insurance under it is for honesty, against negligence or for being faithful and loyal to its employees. The protection afforded is different from normal insurance policies. Precisely, it is a contract whereby, for a consideration, one agrees to indemnify another, against loss, arising from the breach of honesty, integrity or fidelity of an employee or other person holding a position of trust. In Black's Law Dictionary, fidelity insurance is explained as under: "*Fidelity Insurance- Form of insurance in which the insurer undertakes to guarantee the fidelity of an officer, agent or employee of the assured or rather to indemnify the latter for losses caused by dishonesty or a want of fidelity on the part of such person*."

59. As such, the insurance policy of fidelity guarantee is to be construed as a policy, intended to protect the assured, against the contingency of a breach of fidelity on the part of a person in whom confidence has been placed.

60. The District court, in the impugned judgment, has effectively dealt with this issue. As per the Contract (policy), the petitioner was to indemnify the Respondent No.1 against direct pecuniary loss. The term "direct pecuniary loss" in a literal sense cannot be construed to be confined to only the cost of the shortage of goods or the goods involved in the fraud/misappropriation and not the other pecuniary loss incurred in connection with the same incident of infidelity or

criminality. As it appears, the penalty was directly linked with the incident of defalcation and, hence, the amount paid on that count cannot be excluded from the "direct pecuniary loss" sustained by the Respondent No.1. Hence, in awarding the amount towards penalty, the learned Arbitrator cannot be said to have travelled beyond the contract or to have committed any illegality.

61. This Court agrees with the findings rendered by the learned District Judge. The term "direct pecuniary loss" ought to cover all the immediate losses suffered by the insured in the event, including the penalty in this case.

62. As to the point raised by the Appellant regarding the violation of the policy conditions, the Arbitrator has observed that the present petitioner did not lead any evidence, either oral or documentary, with regard to the alleged violation of the Policy Conditions and that the Appellant -insurer, also, at no point of time after the claim was lodged intimated the claimant regarding violation of any such policy conditions. Ergo, the argument of the Appellant regarding the violation of contractual policy and ensuing patent illegality in the arbitral award does not hold water.

63. At this juncture, this Court turns to the judgment of the High Court of Delhi in ***M/s Pragya Electronics Pvt. Ltd v. M/s***

Cosmo Ferrites Ltd.[20] wherein Kameswar Rao, J. while pronouncing the judgment relied on what was held by Supreme Court in ***Associate Builders v. Delhi Development Authority*** (supra) and observed that:

> *"…A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at…"*

64. Furthermore, in ***Swan Gold Mining Ltd v, Hindustan Copper Ltd.,***[21] the Supreme Court held as under:

> *"…A Court under section 34 is not a court of appeal and errors of fact, if at all present, cannot be corrected by it. An Arbitrator is the final judge of facts and it is not open to challenge that the Arbitrator had reached a wrong conclusion or has failed to appreciate facts…"*

65. In light of the above observations, this Court comes to a conclusion that no interference is called for under Section 34 of the Act, with the impugned judgment or the award. It is reiterated that the Appellant was unable to substantiate any of the three above-mentioned contentions. Ergo, in light of the above-cited cases, this Court does not doubt that there is

---

[20] 2021 SCC OnLine Del 3428
[21] (2015) 5 SCC 739

apparent violation of any terms of public policy in the present case much less any patent illegality.

VIII. CONCLUSION:

66. On a careful consideration of the respective contentions and in the light of the qualitative and quantitative discussions mentioned supra, this Court is of the considered view that the learned Arbitrator acted well within his jurisdiction in awarding the appropriate relief and the learned District Judge rightly upheld the award.

67. Consequentially, this appeal fails and is, accordingly, dismissed. No order as to costs.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 22nd Dec., 2022/B. Jhankar