IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.56 of 2018
(Through hybrid mode)

Union of India and others .... ***Appellants***

Mr. P. K. Parhi, ASGI
Mr. P. P. Behera, CGC

-versus-

Suman Sundar Patra .... ***Respondents***
Mr. N. Jujharsingh, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
22.09.2022

Order No.
07. **1.** Mr. Behera, learned advocate, Central Government Counsel led by Mr. Parhi, learned advocate and Assistant Solicitor General appear on behalf of appellants and submit, impugned is judgment dated 30th August, 2018, whereby three points of challenge to award dated 28th April, 2014 were rejected. He submits, the three points were challenge to the award on excepted matters, directing refund of Earnest Money Deposit (EMD) and grant of future interest.

2. He submits, there can be no dispute regarding award made on matters that were excepted by the contract. In awarding all those items of claim, the arbitrator transgressed terms of the contract and was therefore in violation of mandate in sub-section (3) in section 28,

Arbitration and Conciliation Act, 1996. Since his client, employer had given extension of time to do the work without imposing penalty and respondent did not execute it, same resulted in closure of the contract. There could not have been award on claim for refund of EMD. He submits further, by clause 16 (3) of General Conditions of Contract (GCC) there was prohibition on claim of interest. The arbitrator having granted interest at 15% again went beyond terms of the contract and was in violation of aforesaid mandate by sub-section (3) of section 28. He submits, on these three counts the Court below erred in appreciating appellants' case. In awarding those claims, there was patent illegality.

3. Mr. Jujharsingh, learned advocate appears on behalf of respondent. He supports reasoning given in impugned judgment. He draws attention to paragraph 6 in it to submit, the Court below found that by application dated 4th March, 2013, made at stage of argument in the reference, appellant had taken the point of some matters had been excepted as excluded from arbitration. He relies on judgment of the Supreme Court in **Narayan Prasad Lohia vs Nikunj Kumar Lohia**, reported in **AIR 2002 SC 1139**, paragraph 16. He submits, there was waiver.

4. Regarding award for refund of EMD he submits, original contract was worked out by his client. Deviations were required.

Extension of time granted was for purpose of working out the deviation/extra works. The deviations could not be worked out. The contract was closed. He submits, refund of earnest money/security deposit was dealt with under issue no.6 in the reference. The arbitrator found as many as five supplementary agreements were executed containing deviations and extending the time. Delay in completion of work was not entirely attributable to his client. It was also found that claim for escalation was pending before the concerned authority, when there was decision to close the contract on imposing penalty as forfeiture of security deposit. On these facts the arbitrator found the imposition to be unjustified.

5. On grant of interest Mr. Jujharsingh submits, the arbitrator has the power under clause-(b) in sub-section (7) of section 31.

6. Matters excepted by the contract, as not covered by the arbitration agreement, would be a bar on adjudication in respect thereof, in the reference. It would mean that dispute on excepted matters have to be otherwise adjudicated, as may be by proceeding initiated in a civil Court. Section 4 provides for waiver. Clause-(b) says, a party, who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit provided for stating that

objection, within that period of time, said party shall be deemed to have waived his right to so object. Appellant in objecting to arbitrability on excepted matters had a preliminary point of jurisdiction. It is well settled that such a point must be taken at the earliest opportunity. Sub-section (2) under section 16 requires such a plea to be raised not later than submission of defence. Facts are that this plea on arbitrability of excepted matters was taken long after filing statement of defence. It was taken by an application made, when arguments were being made in the reference. Clearly appellant had waived its right to object in respect of excepted matters. Reliance by respondent on **Narayan Prasad Lohia** (supra) is well placed.

7. Security deposit was dealt with under issue no.6 in the reference. Submission made on behalf of respondent regarding facts of the original contract being supplemented by five further agreements, in extending scope and time for performance without imposing penalty, are undisputed. It also transpires that though the scope of work and time were enlarged, respondent's plea for escalation or revision in rates was pending. In those circumstances, respondent wanted closure of the contract and appellants closed it by deeming fit to impose penalty as forfeiture of security deposit at Rs.3,00,000/-. In this context, following extract from the award is reproduced below.

> *"... In the facts and circumstances, it is highly inappropriate, unjust and unsupportable in law that the claimant contractor suffers a forfeiture of his security deposit. In the said communication a No Claim Certificate was also called for from the claimant. In the evidence in chief of the claimant he has supported his version regarding the deposit of Rs.3,00,000/- as security deposit. The claimant notwithstanding delay in execution could not be denied the refund of the security deposit as no fault is attributable to him. The evidence adduced is preponderant that the respondent did not cooperate in the matter resulting in delay. ... "*

There is no patent illegality found either on appreciation of facts or decision thereon made by the arbitrator.

8. Clause-(a) under sub-section (7) in section 31 empowers the arbitral tribunal to include in the sum awarded, interest on the whole or any part of the money, for the whole or any part of the period between, date on which the cause of action arose and date on which the award is made. There cannot be controversy that award for interest was on future interest. Section 31(7)(b) provides for power of arbitrator to grant future interest. It appears from the award, the contract was closed on 28th February, 2002. Respondent had claimed payment, fallen due thereunder on 1st March, 2002 and claimed interest till date of realization. The arbitrator relied on judgment of the

Supreme Court in **Executive Engineer, Dhenkanal Minor Irrigation Division v. N. C. Budhraj**, reported in **AIR 2001 SC 626**. Such reliance was on fact that the contract provided for payment of interest in case payment was not made by due date for work done. Thus, the arbitrator found that there could be award for interest reckoned for pre reference and pendente lite period at 10% per annum with effect from 1st March, 2002 but directed interest at 15% of awarded amount from date of award till payment, to ensure expeditious compliance. The arbitrator has also noted that said rate of 15% is within the explanation given under clause-(b) in sub-section (7) of section 31. In the circumstances, here too no illegality is found.

9. The appeal is without merit. Impugned judgment is confirmed.

10. The appeal is dismissed.

(Arindam Sinha)
Judge

Prasant