

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.9 Of 2021
(Through hybrid mode)**

M/S Raghul Construction

....

Appellant

Mr. G.M.Rath, Advocate

-versus-

NTPC Ltd. and another

....

Respondents

Mr. B.S.Tripathy, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
20.04.2022**

**Order
No.**

06.

1. Mr. Rath, learned advocate appears on behalf of appellant and on 11th April, 2022 had submitted, impugned order dated 24th January, 2020, was made by the Court below in setting aside award dated 14th March, 2014. He submitted, two grounds were erroneously accepted by said Court. First is that the arbitrator misconducted himself in adjudicating the plea of respondents that his client's claims were barred by limitation. Second is that there was objection raised by respondents in taking technical assistance from a person of his client.
2. He had submitted, it will appear from the award that there was

analysis made of, inter alia, clauses 52 and 56 of General Conditions of Contract (GCC) for the arbitrator to conclude that his client had a live claim. Clear provision in clause 52 was that upon preparation of final bill, within six months thereafter, admitted amounts were to be paid. His client had 90 days thereafter, to either accept the employer's position on the disputed amounts or challenge the same for adjudication in terms of the contract, by reference to arbitration. On going through the evidence, the tribunal found that final bill had not been prepared and hence, came to the conclusion.

3. Mr. Tripathy, learned advocate appears on behalf of respondents and had earlier submitted that his client had put in objection regarding the person, called to assist the arbitrator on technical issues, thereafter being engaged by appellant to further its case in the reference. Court had, by direction in order dated 11th April, 2022, required appellant to file additional affidavit disclosing the objection put in by respondent employer. The affidavit was filed and, inter alia, the objection disclosed therein.

4. Today, Mr. Rath points out from disclosures in his client's additional affidavit that there was no record in the reference to say the person was appointed, called or required by the arbitrator to report on

any issue. Instead, his client was required by the arbitrator to make formal application regarding its intention to obtain assistance from the person, in furthering its case. He submits further, it will appear from relevant procedural orders that even though the person's appearances were recorded as appearing on behalf of his client but, submissions were made by managing partner of appellant. Hence, this objection cannot be said to be one coming within or covered by section 13 in Arbitration and Conciliation Act, 1996, to thereafter become a ground of challenge to the award.

5. This ground, considered in impugned judgment dated 24th January, 2020 becomes a preliminary issue, to be decided first in the appeal. Hence, respondent is to be heard on the point.

6. Mr. Tripathy, refers to objection dated 6th May, 2013, put in by his client before the arbitrator. He points out from paragraph 2 in it that there was clear statement, of the person having appeared on request of the arbitrator in course of arbitral sitting held on 4th and 5th August, 2012 and that upon request made by the arbitrator, parties had furnished relevant documents to the person, for him to opine as an expert in the next sitting to be held on 16th February, 2013. He then refers to procedural order dated 16th February, 2013 to submit, upon

appellant having submitted that the person would appear on its behalf, the objection was made and noted by the arbitrator. In spite thereof, it was not dealt with by the arbitrator on any order passed prior to or by the award itself. He submits, in the circumstances, the Court below correctly found in favour of his client, to say that the award deserved to be set aside on that ground. Mr. Rath submits, procedural order dated 5th August, 2012 stands disclosed in the additional affidavit and it has no mention of the person, either in the record of appearance or in the text. In the circumstances, the Court below could not have relied upon submissions, made on this aspect, on behalf of respondents.

7. Paragraph 2 in objection dated 6th May, 2013, filed by respondents, is reproduced below.

“So far as Mr. K.K. Vershney is concerned, he was an Ex-employee of NTPC Ltd. and Mr. Vershney was called by the Hon’ble Arbitrator to assist him on certain technical issues and such a course as adopted by the Hon’ble Arbitrator is permissible in terms of Section 26 of the Arbitration & Conciliation Act, 1996 and the course adopted by the Arbitrator was never objected to by the respondent and in fact Mr. Vershney had appeared on the request of the Arbitrator in course of the arbitral sitting held on 4th and 5th August 2012 and

on the request of the Hon'ble Arbitrator the parties have furnished relevant documents to Mr. Vershney to have his say as an expert in the next arbitral sittings, which was held on 16.02.2013”

Mr. Rath points out that this objection was filed after conclusion of hearing. Mr. Tripathy responds that by last procedural order dated 28th April, 2013, the tribunal had given opportunity and liberty for the parties to file further written submission. The referred direction in procedural order dated 28th April, 2013 is reproduced below.

“xx xx xx However, as last opportunity the parties have been given liberty to file their Written Submission, if so advised, within a month by exchanging copies thereof to each other”

8. At appellate stage, appellant's contention that the objection was not covered by section 13 requires this Court to ascertain the facts. Mr. Rath submits, the lower Court had examined one Mr. S.K.Rath, Engineer (C), who had been appearing in the reference along with learned advocate of respondents. Said person had deposed he had no recollection regarding direction made by the arbitrator appointing the person as an expert. A witness, when being examined and asked a

question, replies lack of recollection, Court is likely to appreciate the answer as, at best, evasive.

9. In the objection respondents have clearly stated that in course of arbitral sitting held on 4th and 5th August, 2012, on request of the arbitrator, parties had furnished relevant documents to the person, for him to have his say as an expert in the next sitting held on 16th February, 2013. The objection was filed after conclusion of hearing but before the award was made. The last opportunity and leave granted to the parties to file written submission has been reproduced above. In the circumstances, there ought to have been some reference in the award to the objection, as it was filed with the arbitrator pursuant to last opportunity/leave granted. In event the arbitrator was inclined to reject the objection as not being a written submission, that much should have been said in the award. Nothing was said is the admitted position.

10. This brings us to procedural order dated 16th February, 2013. Relevant paragraph therefrom is reproduced below.

“At the outset Mr. Gopinathan, Managing Partner of the Claimant has submitted that Mr. Vershney would appear for the Claimant as its’

Technical Representative, for which he would file a petition to that effect in course of the next sitting. Mr. Tripathy, Advocate has vehemently objected saying that Mr. Vershney is called to assist the Arbitrator on technical issues. The objection of Mr. Tripathy is taken note of.”

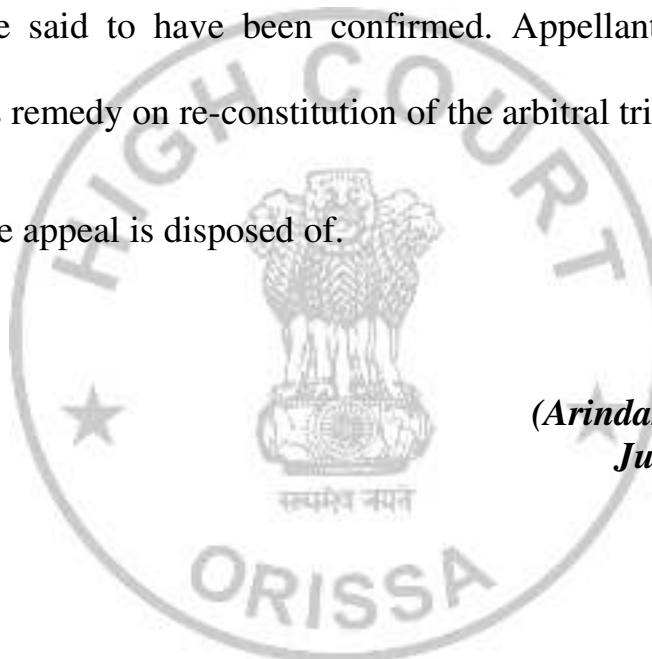
11. On the objection raised by respondents having been noted by the tribunal, there was omission on its part to deal with it. This objection consisted of the statement that the person had been called to assist the arbitrator on technical issues. The objection not having been dealt with gives presumption that it could not be dealt with. The person was allowed by the tribunal to be part of the team representing appellant in the reference. The situation, as it unfolded, became one for respondents to legitimately feel that it became aware of circumstances that gave rise to justifiable doubts as to independence or impartiality of the tribunal. Omission of the tribunal to deal with the objection, by reference or otherwise in the award, is fatal to appellant's contention that the person was never appointed, called or required by the tribunal to assist it as an expert. Court is not inclined to go into whether the apprehension had basis on the parties having had submitted their documents to the person because, justice is not only to be done but also seen to have been done.

12. This ground for setting aside the award appears to satisfy clause (iii) in explanation 1 under clause (b) of sub-section (2) in section 34. As such, Court is not required to proceed further, to the other ground, also on which the Court below set aside the award.

13. Impugned judgment is varied as above. It is made clear that merits of the other ground not having been gone into in the appeal, it cannot be said to have been confirmed. Appellant is at liberty to pursue its remedy on re-constitution of the arbitral tribunal.

14. The appeal is disposed of.

Prasant



(Arindam Sinha)
Judge