IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.16 of 2021
(Through hybrid mode)

M/s. Jindal Steel and Power Ltd. .... ***Appellant***

Mr. Sudarshan Nanda, Advocate

-versus-

M/s. Modern Builders .... ***Respondent***

Mr. S.S. Das, Senior Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
28.03.2022

Order No.
05.

1. Mr. Nanda, learned advocate appears on behalf of appellant. He submits, impugned in the appeal is judgment dated 22nd September, 2021 rejecting his client's challenge to award dated 16th May, 2018. He submits, the proceeding was conducted in a manner that raised apprehension of bias against the Tribunal. He refers to paragraph 4 in the petition under section 34, Arbitration and Conciliation Act, 1996. Therein allegations were made regarding grant of adjournments to respondent claimant. There are other allegations regarding procedure adopted in the reference, to be biased in favour of respondent, its witness. He refers to paragraph 10 in impugned judgment and submits, the allegations were not at all considered but simply the Court said that the Tribunal nowhere resorted to any unfair means or relied on unexhibited documents. He submits, letter dated 15th July, 2013 (page 44) was considered in the award, not being an exhibit.

2. The second ground is, the finding respondent is entitled to compensation by reason of termination of contract is perverse. This has been summarily dealt with at paragraph 9 of the judgment, reproduced below.

> *"9. In this case, the work order was terminated by JSPL on 27.9.2011 during the extension of time period in favour of MBC to complete the work vide Ext-C/11 and R/4. The letter dtd.27.9.2011 of JSPL Ext-R/7 expressing termination without prior notice to MBC, within the extension time period till 31.10.2011, cannot be construed as a legally-sound decision. So, the clause-10.8 of the work order cannot come its rescue, as JSPL had extended the time to MBC for completion of work. Hence, the decision of learned Arbitrator in treating such premature termination of work order as illegal cannot be interfered with."*

3. His third contention is that his client's counter claim was rejected by the Tribunal as barred by limitation. This finding in the award was also perverse but confirmed by impugned judgment. The Tribunal held against his client saying that counter claim was not raised soon after issuance of termination of contract. It was raised before the Tribunal by pleading. It was barred by limitation. He draws attention to letter of termination dated 27th September, 2011 and points out that there was direction upon respondent to raise full and final bill after reconciliation of free issue material/equipment/damages for final settlement/adjustment. It was only after reconciliation, counter claim arose and thereby cannot be said to be barred by limitation."

4. On query from Court Mr. Nanda submits, his client filed petition dated 28th July, 2017 praying that the proceeding be terminated. His client was compelled to do so on becoming aware of circumstances given rise to apprehension of bias.

5. Mr. Das, learned senior advocate appears on behalf of respondent and draws attention to the award, wherein extension of time granted and thereupon termination before expiry of it was dealt with by the Tribunal. He also draws attention to claim no.6, on which the Tribunal awarded Rs.8,16,842/- in favour of his client with interest at 8% per annum from the date of termination, pursuant to the Tribunal finding the termination to be illegal. On the other contentions he has not been called upon to answer.

6. The petition dated 28th July, 2017 cannot be said as made under section 13, Arbitration and Conciliation Act, 1996. The petition says it was made under rule 32(4) of High Court of Orissa Arbitration Centre (Arbitration Proceeding) Rules, 2014. The petition relates to matter of procedure. What is important is that the reference was concluded by the award and appellant mounted challenge against it. Procedural errors or lapses in the reference itself cannot be said to be patent illegality on face of the award.

7. Regarding rejection of the counter claims reliance was placed in the award on decision of the Supreme Court in **State of Goa v. Praveen Enterprises** reported in **(2012) 12 SCC 581**. Paragraph-20 declared the law to be, where a party had itself required arbitration, its cause of action regarding limitation, would be reckoned from the commencement notice issued by it. However, where a party in the reference for the first time raises a counter claim by way of counter statement, the reckoning on limitation regarding the cause on the claim has to be from when it arose/accrued and when made. In impugned award there is clear finding that the termination was on 27th September, 2011 and counter claims were lodged by counter statement filed in the Tribunal on 5th August, 2016. Here too, there does not appear to be any patent illegality.

8. Clause-10.8 in the agreement between the parties is reproduced below.

> *"10.8 JSPL reserves the right to disengage the Contractor and engage another Contractor in case it is found that the Contractor is unable to maintain desired work progress in terms of quality/quantity & project schedule & time"*

. Relevant text of termination letter dated 27th September, 2011 is also reproduced below.

> *"The chronology of the events are as narrated below.*
>
> - *It is observed that the progress far below the required pace. Despite of repeated persuasion and extending all supports you have falled to meet all the commitment made by you regarding completion of work.*
>
> - *The quantity of erection and fabrication work has not been up to the mark, due to reasons as stated below*
>
>   - *Unavailability of skilled manpower for erection and alignment.*

- *Delay in fabrication due to lack of manpower and machinery at site.*

- *Improper supervision at site and improper planning and documentation etc.*

- *Overall the quality of work has not been up to the mark and needed a lot of rework, due to reasons given below:*

  - *Using of transformers instead of rectifiers for welding in work place.*

  - *Poor quality of Fit up, assembly, welding & plaintings etc and wrong Orientation of fittings frequently done by them after several instructions and it was rectified by instruction of JSPL/BVIL Engineers etc.*

- *There have been frequent stoppage of work due to frequently internal strike carried out by sub contractors due to lack of control by M/s Modern Builder and non-payment of wages. To decrease the frequency of strike and carry out the work in harmony M/s Iindal Steel and Power had made payment thrice directly to your labours. This has disturbed industrial peace of the plant resulting in total disturbing environment.*

- *Unsafe work practices and wastage of free issue materials due to improper planning.*

In view of the above your contract as per the work Order No: 4561502245, dtd 27.08.10, stands terminated and you are advised to discontinue the work, vacant the premises & labour hutment with immediate effect and raise your full and final bill after reconciliation of free issue material/equipment/damages for final settlement/adjustment."

9. It appears from the award that extension was granted up to 31st October, 2011. There was post facto approval of it by respondent on 26th August, 2011. The termination was by letter dated 27th September, 2011 i.e. one month and 3 days before expiry of extended period of work. The Tribunal held the termination to be illegal. It went on to award loss of profit on claim no.6 at Rs.8,16,842, being 10% of value of unfinished work. The figures are, total value of work was Rs.1,73,50,487.50, admitted value of work done Rs.91,82,065/- and balance work outstanding of value Rs.81,68,422.50. Value of outstanding work is approximately 47% of the total work. The termination was made, as aforesaid, one month and 3 days before expiry of the extended time. In this time respondent (claimant) could not have executed, at the rate it was going, any substantial value of work, for being entitled to award of 10% on its value. No reasonable person would have, in the circumstances, come to conclusion that a substantial value of work, let alone the remaining work could have been performed by respondent (claimant) in one month and 3 days, when it could only achieve admittedly value of work of Rs.91,82,065/-, till then. This finding in the award is perverse. The award on claim no.6 is severable. It ought to have been and is set aside in appeal.

10. In the connected application, since disposed of, there was direction to put in cash security of Rs.54,00,000/- with Registrar (Judicial) of this Court and consequential direction for investment thereof. The condition was fulfilled by appellant and there operated stay of award till disposal of the appeal. The appeal is being disposed of. Registrar (Judicial) is directed to encash the short term deposit along with the interest and transmit the same to the executing Court, since substantial award for money has been confirmed in appeal and the security was put in for performance of the award as a decree of Court.

11. Impugned judgment is modified to above extent. The appeal is partly allowed and disposed of.

(Arindam Sinha)
Judge

Sks