ORISSA HIGH COURT: CUTTACK

ARBA NOS. 21 AND 22 OF 2010

In the matter of Appeals under section 39 of the Arbitration Act, 1940.

In ARBA 21/2010

State of Orissa and another ..... Appellants

-Versus-

United Construction Works, represented by Shri G.K. Mohanty. ..... Respondent

In ARBA 22/2010

State of Orissa and another ..... Appellants

-Versus-

United Construction Works, represented by Shri G.K. Mohanty. ..... Respondent

For Appellants : Addl. Government Advocate.
(In both)

For Respondent. : M/s. Akhil Mohapatra, R.C. Sahoo, J.M. Rout, S.C. Nayak & B.P. Behera.
(In both)

Decided on 19.05.2011.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. DAS, J. The aforesaid appeals have been filed by the State of Orissa under section 39 of the Arbitration Act, 1940

(hereinafter referred to as "the Act") against the judgment dated 29.04.2010 by which the learned Civil Judge (Sr. Division), Bhubaneswar disposed of I.A. No.778 of 2009 filed by the State under sections 30 and 33 of the Act and made the award passed by the learned arbitrator a Rule of the Court by decreeing the suit, being C.S. No.1454 of 2009 filed by the respondent with the following order:

> " The suit be and the same is hereby decreed to contest against the O.Ps. without cost in the circumstances. The award is hereby made the Rule of the Court. The interlocutory Application filed by the O.Ps., is hereby dismissed on contest. The O.Ps. are hereby directed to pay the awarded amount and the interest within a period of one month from the date of passing of the judgment. In case of default, the O.Ps. are liable to pay 6% additional interest per annum from the date of the passing of the judgment till payment. "

2. The factual matrix of the case leading to these appeals are:

A notice was published inviting tender for the work of construction of spillway and Left Head Regulator for Kuanria Irrigation Project by the appellants. The bid offered by the respondent-United Construction Company was accepted. An agreement was executed on 27.03.1981 between the parties specifying scope of the work and the date of completion of the said work. The value of the work was Rs. 93,02,724.55. After commencement of execution of the work by the respondent, the scope of the work was changed by the appellants thereby causing

delay in completion of the work and requirement of execution of additional quantities of work. As per Clause-23 of the said agreement, which contained a term of referring any dispute arising from the contract to the arbitrator, the respondent filed O.S. No.84 of 1985 in the court of the learned Sub-Judge, Bhubaneswar [now Civil Judge (Sr. Division)], raising a claim against the appellant. In view of the arbitration clause in the agreement, the matter was referred to the State Government for appointment of a Special Arbitration Tribunal. The State Government appointed Hon'ble Mr. Justice B.K. Behera, a former Judge of this Court as Special Arbitrator to arbitrate the claim of the respondent between the parties. In the interregnum, the respondent challenged the virus of the Arbitration (Orissa amendment) Act, 1989 in the Supreme Court of India. The Supreme Court disposed of the matter on 21.03.1996 giving liberty to the respondent to make an application under Articles 226 and 227 of the Constitution of India before the High Court. Accordingly, O.J.C. No.4433 of 1996 was filed by the respondent before this Court. The matter was disposed of by a Division Bench of this Court on 21.11.2008. The said Division Bench referring to the decision of the apex Court came to the conclusion that there is no scope to proceed with the matter before the State Arbitration Tribunal. Taking into account that the matter is being

persuaded since 1985 and it was not disputed that the arbitration proceeding was about to be completed and 48 sittings were held in which evidence has been recorded, which indicates that Hon'ble Mr. Justice B.K. Behera was in seisin of the matter, this Court, therefore, ultimately allowed the writ petition allowing Justice Behera to proceed with the arbitration proceeding from the stage, where it was, within a period of three months from the date of communication of the said order. Parties were directed to take steps to transmit the record from the Arbitration Tribunal to Justice Behera.

3. Pursuant to the said order, Justice Behera proceeded with the matter and passed an award amounting to Rs.78,59,150/- (Rupees seventy-eight lakhs fifty-nine thousand one hundred fifty) with interest at the rate of 7% per annum from 15.09.1988, i.e., the date of the claim before the Special Arbitration Tribunal till the date of the award and at the rate of 18% per annum from the date of the award till recovery of the amount. The award was passed on 15.11.2009. The respondent thereupon filed C.S. No.1454 of 2009 along with the award to make the award a Rule of the Court. The appellants filed I.A. No.778 of 2009 under sections 30 and 33 of the Act alleging misconduct on the part of the Arbitrator and seeking a relief of setting aside the award. In I.A. No.778 of 2009 the appellants,

inter alia, contended that the respondent after receiving the final bill without protest having raised the dispute, such dispute was not maintainable in the eye of law, since once final bill is accepted without protest, the agreement comes to an end. As out of 21 items of claim raised by the respondent before the learned Arbitrator, he allowed claim item nos.1 to 9, 11 and 14 to 16, the appellants with regard to the said items allowed by the learned Arbitrator, stated in the application that the conclusion of the Arbitrator in respect of those claims are incorrect and erroneous being beyond the terms and conditions of the agreement. Bias on the part of the Arbitrator was also alleged. With regard to award of interest by the Arbitrator, it was only pleaded by the appellants in the application that the learned Arbitrator awarded interest in favour of the claimant/contractor, which is not sustainable in the eye of law, because the Arbitrator passed the award for interest for pre-reference period.

4. In the impugned judgment, the learned court below dealing with each of the allegations made specifically by the appellants and placing reliance on various decision of the apex Court, came to the conclusion that the Court has no jurisdiction to investigate into the merit of the case and to examine the documentary and oral evidence on record for the purpose of finding out whether or not, the Arbitrator has

committed an error of law. The Court does not sit in appeal over the award and review the reasons. It cannot reappraise the evidence and materials placed before the Arbitrator and come to a different finding of fact. It also found out that the learned Arbitrator has arrived at the findings after examining the documentary and oral evidence adduced by both the parties, with reasons. The learned court below also examined the item-wise objection raised by the appellants and found that the learned Arbitrator has arrived at a conclusion by considering all materials produced before him and assigning reasons in respect of his findings. Hence, it found that the award does not call for any interference.

5. With regard to the objection raised in respect of the interest awarded by the Arbitrator, the learned court below referring to the decision of the Supreme Court in the case of ***Bhagbati Oxygen Ltd. V. Hindustan Copper Ltd*****,** AIR 2005 SC 2071 held that the Arbitrator had power to award interest for pre-reference period, post-award period and pendency period. Thus, it concluded that there is no infirmity in the award, which can be termed as legal misconduct or improper procurement and in-validness of the award and the award is not to be set aside. Basing on the above findings, the learned court below passed the impugned judgment/order.

6. In these appeals, learned counsel for the appellants raised the following contentions:

(i) The learned court below has committed an error in confirming the award with regard to Issue No. 6 framed by the learned Arbitrator, which was as to whether the claimant (respondent herein) accepted the final bill in full and final settlement of his claim.

(ii) The learned Arbitrator awarded interest contrary to the agreement and such award of interest has been erroneously and illegally confirmed by the learned court below **?**

With regard to the first question, learned counsel for the State vehemently urged that the claimant (respondent) accepted the final bill in full and final settlement of the work and, therefore, he was not entitled to any further claims.

Mr. Mohapatra, learned counsel for the respondent, however, contended that the stand of the respondent before the learned Arbitrator was that the bill on which he has given an endorsement of full and final settlement of the work, was not the final bill, but was the 28th Running Bill on which the words “Final Bill” was added by hand and the claimant was made to give such endorsement under financial compulsion. He further submitted that the learned Arbitrator on

scrutinizing the materials produced before him by giving cogent reasons arrived at a finding in the award that the bill is not on yellow paper as per the Central Public Works Account Code and is in a running bill form and on the top of the bill "Final Bill" has been written by hand alongside 28th R/A Bill. There is no endorsement of any kind by any official as to non-availability of the yellow form. The learned Arbitrator further found that the bill has been prepared hurriedly as the same has been prepared after nearly two years of the completion of the work and non-availability of yellow form is not convincing. He, therefore, expressed his view that he is unable to accept the stand of the State in not complying with the requirements of the Code and thus, the claimant's contention that it was not the final bill, but converted into one, appears to be correct. Referring to the other documents produced before him, the learned Arbitrator, for the reasons assigned, concluded that the plea of the opp. parties-State before him that the said 28th Running Account Bill was the final bill (in hand) cannot be accepted. He further found that this conclusion is also corroborated from the fact that the bill showed payment of a lesser value than the admitted value of the work executed by the claimant and also did not include escalation cost, which are admitted by none other than the Chief Engineer of the

Department. The learned Arbitrator has elaborately discussed the issue while arriving at the above findings.

The learned court below also in the impugned judgment and order accepted the conclusion of the learned Arbitrator on this issue, relying upon the judgment of the Supreme Court in the case of ***N. Chellapan –v- Secretary, Kerla State Electricity Board***, AIR 1975 SC 230 wherein it was held that the court has no jurisdiction to investigate into the merit of the case and examine the documentary or oral evidence on record for the purpose of finding out whether or not the learned Arbitrator has committed an error of law, as the court does not sit in the appeal over the award and review the reasons (See ***Gujarat Water Supply and Swerage Board –v- Unique Erectors***, AIR 1989 SC 973). In AIR 1995 SC 2423 in the case of ***Trustees of the Port of Madras –v- Engineering Constructions Corporation Ltd.***, the Supreme Court held that in an application under Section 30 of the Act, the Court cannot reappraise the evidence and materials before the umpire and come to a different finding. The power of the appellate court under Section 39 of the Act has also been well defined in the decision in the case of ***Union of India –v- Kalinga Constructions Co***., AIR 1971 SC 1646 where the Supreme Court laid down that in proceeding to set aside the

award, the appellate court cannot sit in appeal over the conclusion of the learned Arbitrator by re-examining and re-appraising the evidence considered by the learned Arbitrator and hold that the conclusion reached by the learned Arbitrator is wrong. As a matter of fact, in this regard, law is well settled by now by series of pronouncements of the Apex Court.

In view of the above decision, this Court is not inclined to interfere with the finding of the learned court below confirming the award with respect to the findings on Issue No. 6.

In regard to second question enumerated above, learned counsel for the State drew the attention of this Court to the agreement executed by the parties where, by way of amendment, it was brought into Clause -23 of the agreement that in no case shall the Tribunal award interest in respect of any claim for any period prior to the date of the award as well as for the period from the date of the award till the date of the decree and under no circumstances, interest is chargeable for the dues or additional dues, if any, payable for the work.

On the basis of the above clause, it was submitted on behalf of the **appellant** that the learned Arbitrator could not have awarded interest which was barred under the agreement. Strong reliance was placed by him on the decision in the case

of ***State of Rajasthan and another –v- Phero Concrete Constructions Pvt. Ltd***., (2009) 12 SCC 1. In the said case, the Supreme Court relying upon the decision in the case of ***State of Rajasthan –v- Puri Constructions Co. Ltd.,*** (1994) 6 SCC 485 reiterated its views that the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, can be very rightly construed as legal misconduct, rendering the award as invalid. It reaffirmed the view expressed in the earlier decision in the case of State of Rajasthan (supra) that it is necessary to put a note of caution that in the anxiety to render justice to the party to Arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the Arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. With regard to question of award of interest, it relied upon the decision of the Constitution Bench in the case of ***Irrigation Department, Government of Orissa -v- G.C. Roy***, (1992) 1

SCC 508 wherein it was held that the Arbitrator has the jurisdiction and authority to award interest for all the three periods i.e. pre-reference, pendente lite and future. Finding that in the said case, there was no express bar in the contract in regard to interest, the Supreme Court held that the Arbitrator could award interest. (*Emphasis supplied*).

Mr. Mohapatra, learned counsel for the respondent in reply to the contention of the appellant, submitted that it was never raised before the Arbitrator that there is any bar in the contract for award of interest by him. He further submitted that the learned Arbitrator taking note of the Clause-23 of the agreement concluded that the said clause prescribed that the nature of the disputes mentioned therein shall be referred to the sole Arbitrator of a Superintending Engineer of the State, Public Works Department unconnected with the work at any stage, nominated by the concerned Chief Engineer and if there is no such Superintending Engineer, it should be referred to the sole arbitration to the Chief Engineer concerned. But, in the instant case, such an Arbitrator was never appointed and therefore, the learned Arbitrator rightly held that the procedure laid down in Clause-23 of the agreement with regard to the sole Arbitrator is not applicable to him. Further, a relevant question was raised by Mr. Mohapatra that with regard to

payment of interest, in the reply to the claim of the respondent filed before the Arbitrator, the Department has stated in one line that the claims having been denied, payment of interest on the claims is also denied. He therefore submitted that the said question was never raised before the Arbitrator. To appreciate the above question, it is necessary to refer to the claim and reply to the claim filed by the parties before the learned Arbitrator as well as the statements made by the **appellant** in the interim application filed under Section 30 of the Act as well as the finding thereon by the learned Arbitrator and the court below.

In the claim statement under the Claim Item No. 20, the respondent claimed as follows:

> "That the work was completed by 31.7.1983. As per clause of the agreement, the final bill including above dues for Rs. 1,16,28,377.55 (Rupees one crore sixteen lakhs twenty eight thousand three hundred seventy seven and paisa **thirty** five) only would have been paid to the claimant by 30.8.1983. As the respondent-II has not paid this amount so far, the claimant is entitled to receive interest @ 18% per annum on this amount from 1.9.1983 till amount in full is paid to the claimant b y the respondent-II. The amount of interest up to 15.9.88 on the principal amount is Rs. 1,05,52,745.77 and further interest @ 18% per annum from 16.9.1980 till day of payment is to be paid by the Respondent-II."

In reply thereto, the **appellant** stated thus:

> "COUNTER TO CLAIM ITEM NO. 20.
>
> As the claims have been denied in the aforesaid paras, the payment of interest on claims is also denied"

In I.A. No. 778 of 2009 filed by the **appellant** before the court below under Sections 30 and 33 of the Act with regard to the award of interest, the **appellant** has stated as follows:

> "That the learned Arbitrator awarded interest in favour of the claimant/contractor is not sustainable in eye of law because the Arbitrator passed the interest on pre reference period."

From the above pleadings of the parties, it is clear that the issue raised before this Court with regard to award of interest by the learned Arbitrator was neither raised before the learned Arbitrator nor before the learned court below. Further, on perusal of the original agreement from the record of the learned Arbitrator, it is seen that the original Clause-23 has been struck out and the alleged bar for payment of interest by the learned Tribunal was introduced by way of amendment. Therefore, the question with regard to existence of such a bar for the learned Arbitrator, who was appointed by the State Government as a Special Arbitration Tribunal, with regard to award of interest, appears to be a mixed question of law and the fact, which was, as stated above, never raised before either the learned Arbitrator or the learned court below.

The question, therefore, arises as to whether a ground not taken before the learned court below in an

application under Section 30 of the Act, can be agitated for the first time before this Court in **appeal** jurisdiction under Section 39 of the Act. On the above question, law is well settled that new question of law or fact or a mixed question of law and fact cannot obviously be taken up for the first time in the appellate court, if it appears that no specific issue was raised on that question earlier and parties did not get full opportunity to adduce all available evidence bearing that issue. When there is no pleadings as to the misconduct of the Arbitrator alleged in the application under Section 30 of the Act and a decree is based on the award with regard to any question, which was not raised in the pleadings, such question cannot be taken in the appeal for the first time. (**Se**e AIR 1984 NOC 44). This Court is also astounded to find out that in the memorandum of the appeal, though grounds have been set-forth with regard to each of the claim items, no ground has been taken with regard to Claim Item No. 20 in which the respondent claimed award of interest. As a matter of fact, the memorandum of appeal is totally silent with regard to the aforesaid alleged bar for award of interest. This Court, therefore, has no hesitation to hold that the above objection/ground taken at the time of hearing of the appeal with regard to the bar of award of interest, having not been

raised before the learned Arbitrator nor in the application under Section 30 of the Act before the learned court below or in the memorandum of appeal before this Court, the contention of the learned counsel for the **appellant**-State in this regard becomes wholly untenable, unacceptable and un-entertainable.

In view of the above conclusion, this Court finds that there is absolutely no reason to interfere with the impugned judgment and order passed by the learned court below rejecting the application filed by the **appellant** under Sections 30 and 33 of the Act and making the award a rule of the court. These appeals being wholly devoid of merit are, therefore, dismissed, but in the circumstances, without cost.

The interim order with regard to undertaking given by Mr. Mohapatra, learned counsel for the respondent for not proceeding with the Execution Case No. 17 of 2010 pending before the learned Civil Judge (Senior Division), Bhubaneswar during pendency of this appeal also stands vacated and the execution case shall proceed in accordance with law. All pending misc. cases stand disposed of.

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M.M. Das, J.

Orissa High Court, Cuttack.
Dated the 19th May, 2011/bks

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M.M. Das, J.

Orissa High Court, Cuttack.
May , 2011/Himansu