

HIGH COURT OF ORISSA: CUTTACK.

MISC. APPEAL NO. 250 OF 1991

From the judgment and order dated 23.2.1991 passed by Sri E.V. Rao, Subordinate Judge, Rourkela in Misc. Case No. 99 of 1989 and T.S. No. 36 of 1989.

M/s. Asia Enterprises represented
by its Managing Partner Sri A.K. Mandal,
Narasingh Dutta Road, Howrah (W.B.) Appellant

-Versus-

Steel Authority of India Ltd., Rourkela
Steel Plant, Rourkela and another Respondents

For Appellant : M/s. G. Mukherji and
J.P. Choudhury

For Respondents : M/s. Bijan Ray, B. Bal,
C. Choudury, A. Mohanty,
& B. Mohanty.

Date of Judgment : 31.01.2014

P R E S E N T:

THE HONOURABLE SHRI JUSTICE M.M.DAS

M.M. Das, J. This appeal has been preferred against the judgment and order dated 23.2.1991 passed by the Subordinate Judge, Rourkela in Misc. Case No. 99 of 1989 and T.S. No. 36 of 1989 setting aside the award made in favour of the appellant on the ground that the Arbitrators have mis-conducted the proceedings as they had not attended to the question of limitation, which was brought to their notice from time to time.

2. The appellant has challenged the impugned order as perverse and not sustainable.

3. It is submitted that the award in question is a non-speaking award. The court below held that (a) the Arbitrators had jurisdiction to pass a non-speaking award (b) the Arbitrators have considered the cases of both the parties and passed an award after taking into account the counter claim (c) the Arbitrators have delivered the award within the scope of reference.

4. Having held all the above issues in favour of the claimant, the court below in paragraph-13 held as follows:

“..... Had a limitation prime been considered by the Arbitrators, the possibility of passing award in favour of opposite party no. 1 may be remote and this possibility is not ruled out”

And set aside the award basing on the above finding which is not sustainable either in facts or in law.

5. A few dates which are relevant and borne out from the lower court records, are available on record. Exhibits 11, 13, 14 and 18 go to establish that the claimant's dues was not settled and as late as in July, 1985, the security furnished in the form of Bank Guarantee was released. On 29.10.1986, the claimant had issued notice for payment of dues and there was no response, on 31.8.1987, the claimant sought for resolving the dispute through arbitration. In November, 1987, the respondents nominated their Arbitrator in terms

of the contract and thereafter the claimant nominated his arbitrator. The arbitration clause is extracted hereunder for ready reference.

“If at any time, any dispute or differences whatsoever shall arise between the purchaser and the contractor upon, or in relation to, or in connection with the contract, either party may forthwith give the other, notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of two arbitrators, one to be nominated by the purchaser and the other to be nominated by the contractor”

6. Both the Arbitrators entered upon reference. The appellant filed his statement of facts claiming for an award of Rs. 22,00,329.08. The respondent no. 1 filed an application questioning the maintainability of the claim, status of the partner of the firm to make reference, question of limitation and praying for a preliminary hearing. The respondent no. 1 was directed to file its counter. The Arbitrators passed an order that they would consider the preliminary issues along with other issues. Thereupon the respondent no. 1 filed its counter/statements denying the claim of the appellant. The Arbitrators passed a non-speaking order directing payment of Rs. 3,88,000/- to the appellant without deciding and considering the preliminary issues.

7. When the award was filed for making it a rule of the court, the respondent no. 1 filed an application under Sections 30 and 33 of the Arbitration Act (for short ‘the Act’), 1940, which was

registered as Misc. Case No. 99 of 1989 and T.S. No. 38 of 1999, to set aside the award on the following grounds:

- (i) Award not supported by reasons though respondent no. 1 filed petition pressing for reasoned award.
- (ii) Arbitrators ignored respondent no.1's counter claim.
- (iii) Though the Arbitrators reserved order on the point of limitation, maintainability of claim and status of the partner to refer disputes for Arbitration, no orders were passed.

8. By the impugned order, the then learned Sub-Judge, Rourkela, now Civil Judge (Senior Division), Rourkela on 23.2.1991 returned the following findings.

- (i) Application under Sections 30 and 33 of the Arbitration Act is within time.
- (ii) Arbitrators have jurisdiction to pass non-speaking award and failure to do so does not vitiate the award.
- (iii) Award for lump sum amount not bad in law.
- (iv) Award of allowing the petitioner to retain machineries, tools and surplus materials in and around the site is not beyond the scope of reference.
- (v) Arbitrators did not consider the points of limitation and competency of the partner to refer the matter to Arbitrators, though it was stated that the said points were to be considered along with other issues.

Had the limitation point been considered passing of award in favour of opposite party no. 1 would have been remote? By not deciding point of limitation, the Arbitrators have mis-conducted the proceeding and thereby committed error apparent on the face of award.

9. With the above findings, the court below set aside the award. Being aggrieved by the impugned order, the appellant has filed the present misc. appeal.

10. It appears that the court below while upholding the award in all respect arrived at Finding No. V as stated above that by not deciding the point of limitation, the Arbitrators have mis-conducted the proceeding and thereby committed error apparent on the face of the record. On the above findings in the impugned order, the award is set aside. The only question arises for determination in this appeal is whether the courts below could have set aside the award holding that had the Arbitrators considered the question of limitation, the question of passing of the award in favour of the appellant would have been remote. Law on the 1940 Act is well settled in various judgments of the Hon'ble Supreme Court. In the case of ***Raipur Development Authority etc. etc. -v- M/s. Chokhamai Contractors etc. etc.***, (1989) 3 SCR 144, where the Hon'ble Supreme Court relying upon the decision in the case of ***Champsey Bhara and Co. -v- others -v- Jivraj Balloo Spinning and Weaving Company Ltd.***, AIR

1923 PC 66, held that the ratio of the said decision of the Privy Council has been approved by the Supreme Court in an earlier judgment where the ratio was laid down that an error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as per the instances, a note appended by the Arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. In ***Jivarajbhai Ujamshi Sheth and others –v- Chintamanrao Balaji and others***, (1964) 5 SCR 480, the court held that an award can be set aside on the ground of error of law apparent on the face of the record under Section 30 of the Act, but it qualified the above legal position by saying that the court while dealing with the application for setting aside an award has no power to consider whether the view of the Arbitrator on the evidence so justified according to the Court. The Arbitrators' justification was generally considered binding between the parties for it was a tribunal selected by the parties and the power of the court to set aside the award was restricted to the cases set out in Section 30 of the Act. The Court further observed that it was not open to it to speculate, where no reasons are given by the Arbitrator, as to what impelled the Arbitrator to arrive at his conclusion. The Court declined to recognize the power of the court to attempt to probe the mental process by which the Arbitrator had reached his conclusion, where it was not disclosed by the terms of his award. This view has been subsequently

reiterated in subsequent decisions of the Apex Court. In the case of ***Rajasthan State Mines & Minerals Ltd. -v- Eastern Engineering Enterprises and another***, AIR 1999 SC 3627, the Apex Court held that in a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside, if the Arbitrator acts beyond his jurisdiction. It is not open to the Court to speculate, where no reasons are given by the Arbitrator, as to what impelled the Arbitrator to arrive at his conclusion. It is not open to the Court to probe into the mental process by which the Arbitrator has reached his conclusion, where it is not disclosed by the terms of the award. If the Arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication, then the Court cannot interfere. If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however, much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the Arbitrator was referred for the decision of the Arbitrator by the parties, then the decision of the Arbitrator on the said question between the parties may be binding.

11. In the instant case, the Arbitrators were arbitrating on the entitlement of the appellant on his claim and while doing so, though a question of limitation was raised by the respondents, but the Arbitrators having passed a non-speaking award, a presumption

arises that question of limitation was also considered by them. The Court exercising power under Section 30 of the Act could not have surmised that had the Arbitrators decided the question of limitation, passing of the impugned award would have been remote. This Court, therefore, finds that the court below has acted contrary to law in setting aside the award by entering into the question whether the reference was barred by time when the award was a non-speaking one and the parties agreed before the Arbitrators to arbitrate the dispute. The said findings, therefore, appear to be a basis of adjudication which was not open to be made after the award was passed by the Arbitrators, which is binding upon the parties.

12. In the result, therefore, the impugned order dated 23.2.1991 passed by the learned Sub-Judge, Rourkela setting aside the award on the ground of misconduct on the part of the Arbitrators is set aside and the award passed by the Arbitrators stands confirmed which is made a rule of the court.

13. The Misc. Appeal is accordingly allowed, but in the circumstances, without cost.

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M.M. Das, J.

Orissa High Court, Cuttack.
Dated the 31st, January, 2014/bks

