

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.A. No.13 of 2022

State of Tripura represented by the Deputy Executive Officer (Works-III),
Tripura Housing and Construction Board, P.N. Complex, P.O. Kunjaban,
Agartala.

..... Appellant (s)

V E R S U S

1.(a). Smt. Basana Banik, W/o Late Sudhir Chandra Banik, resident of Old
Kalibari Lane, Krishnanagar, P.O- Agartala, P.S. West Agartala, District West
Tripura-1.

2. (b). Shri Samar Banik, S/o Late Sudhir Chandra Banik, resident of Old
Kalibari Lane, Krishnanagar, P.O- Agartala, P.S. West Agartala, District West
Tripura-1.

3.(c). Shri Amalendu Banik, S/O Late Sudhir Chandra Banik, resident of Old
Kalibari Lane, Krishnanagar, P.O- Agartala, P.S. West Agartala, District West
Tripura-1.

..... Respondent(s)

For Appellant (s) : Mr. K.C. Bhattacharjee, Advocate.

For Respondent (s): Mr. N. Majumder, Advocate,
Mr. S. Roy, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

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28/02/2024

Heard Mr. K. C. Bhattacharjee, learned counsel for the appellant and
Mr. N. Majumder, learned counsel together with Mr. S. Roy, learned counsel for
the respondents.

[2] The appellant is aggrieved by the dismissal of the Section 34
application under Arbitration and Conciliation Act, 1996 as amended by
impugned judgment dated 28th June, 2022 passed by the learned District
Commercial Court, West Tripura, Agartala in Civil Misc. (Arbitration) No.12 of

2019. The Section 34 application was directed against the award made in arbitration proceeding No. ARB/SRB/2018(1) by the sole arbitrator whereby the learned Arbitrator had proceeded to render the following award:

Summary of Award

“Issue No.1. Whether the claim petition of the claimant contractor is maintainable?

It is declared by the sole arbitrator that claim petition of the claimant contractor is maintainable for the reason as discussed under issue No.1.

Issue No.2 Whether the rescission of contract by the Engineer-in-charge is legally valid?

It has been declared by the arbitral tribunal that the rescission of contract by the respondent is not legally valid in the fact and circumstances of the case.

Claim No.3 Whether the claimant is entitled to get the value of the work already executed as per instruction of the Engineer-in-charge and measured and recorded in the concerned M.B.

The claim under this issue is established. An amount of Rs.2,69,011/- is awarded under this issue with interest as stated in relevant place while disposing the issue.

Claim No.4 Whether the claimant contractor is entitled to get refund of money against earnest money/SD-Rs.1,00,000/-

The claim is established. The respondent has been directed to refund the amount earnest money/ security deposit of Rs.1,00,000/- as claimed by the claimant. No interest.

Claim No.5 Whether the claimant is entitled to get Rs.19,32,997/- being 15% profit on the unexecuted work/ balance work of Rs.1,28,86,651/- of estimated cost?

An amount of Rs.12,84,513/- is awarded under this claim-5 with interest as mentioned under the detailed discussion on issue/ claim.

Claim No.6 Whether the claimant is entitled to get Rs.5,00,000/- being the cost of material like cement, bricks, stone chips, sand, steel, wages of labour, centering, shuttering and cost of earth cutting?

The claim is not established. Nil award.

Claim No.7 Whether the claimant is entitled to get Rs.1,00,000/- as cost of arbitration?

Rs.55,000/- is awarded under this claim. No interest.

Claim No.8 Whether the claimant is entitled to get interest @12% w.e.f. 26.12.2010 till realization?

Interest has been dealt with separately under each and every issue where interest is applicable. Hence no separate award is given under issue No.-8.

Claim No.9 Whether the respondent is entitled to get the excess amount of Rs.12,17,788/- more or less for execution of balance work by employing another agency under a separate agreement after rescission of contract?

The counter claim is not established. NIL award.

The stamp duty of Rs.100/- has been borne by the claimant.”

[3] The appellant being aggrieved by dismissal of the application under Section 34 of the 1996 Act has preferred this appeal under Section 37 (1) (c) of

the Arbitration and Conciliation Act, 1996 *inter alia* raising number of grounds. Apart from laying a challenge to the impugned judgment on merits due non consideration of the grounds raised against the impugned award, the appellant had also taken a plea that the original claimant/defendant Sudhir Chandra Banik had died prior to the passing of the judgment dated 28th June, 2022. Therefore, the impugned judgment became infructuous since the deceased was not substituted by the legal heirs. On this plea alone, we find the matter fit to be remanded to the learned Commercial Court as for the following reasons:

(i) That, no prayer for substitution of the 3(three) legal heirs of the deceased defendant was made on behalf of the said defendant. It appears from the application under Order XXII Rule 4 of the CPC that the prayer for substitution of only one respondent, Sri Amalendu Banik, Attorney, son of Late Sudhir Chandra Banik was made though the averments in the application do name the other 2(two) legal heirs namely, Smt. Basana Banik, widow of the deceased defendant and Sri Samar Banik, son of the original defendant.

(ii) The schedule to the application for substitution also refers to the name of Sri Amalendu Banik, Attorney, son of Late Sudhir Chandra Banik. The certified copy of the impugned judgment contained only the name of Sudhir Chandra Banik, the original defendant, but later on, a correction was made by the learned Court substituting Sri Amalendu Banik alone as the legal heir of the deceased original defendant by endorsement dated 29.11.2021.

[4] Learned counsel for the claimant/respondent has referred to the order dated 29.11.2021 passed by the District Commercial Court, West Tripura, Agartala which has allowed the application under Order XXII, Rule 4 of the CPC. He submits that the legal representatives were thus substituted.

[5] However, this assertion is incorrect on facts as noticed hereinabove. Neither was the prayer for substitution made for all the 3(three) legal heirs nor the substitution of the other 2(two) legal heirs was made. The application only sought impleadment of Sri Amalendu Banik, one son of the deceased respondent as he was said to be the authorized representative of deceased defendant and also the remaining 2(two) legal heirs. However, it is beyond cavil that a representative can be authorized to represent a party only if that party has been impleaded in the proceeding. In the absence of the impleadment of the other 2(two) legal heirs, Sri Amalendu Banik could have represented himself and not the other 2(two) legal heirs. Therefore, the impugned judgment is a nullity so far as the other 2(two) legal heirs are concerned, as they were not substituted despite knowledge of death of the original respondent. In this regard reference is made to the decision of the Apex Court rendered in the case of *Rita Lal versus Yamuna Das Sharda(Dead) Thr. in Civil Appeal No.2283 of 2017*, reported in *2023 SCC Online SC 358*. Therefore, the matter is remanded to the learned Commercial Court to decide the suit afresh, after proper substitution of the legal heirs of the original deceased respondent, within a time bound manner since the arbitration proceedings were initiated in 2018 itself.

[6] Let it be made clear that we have not gone into the merits of the case of the parties. Therefore, it would be open for the learned Commercial Court to

decide all grounds raised by the appellant on merits in accordance with law preferably within a period of 3(three) months from the date of receipt of copy of this order. The substitution petition should be made within a period of 2(two) weeks from the date of receipt of copy of this order along with an application for condonation of delay. Pending application(s), if any, also stands disposed of.

(ARINDAM LODH), J

(APARESH KUMAR SINGH), CJ



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