A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.21 of 2013

and

ARBA No.40 of 2012

(From the Judgment dated 25.09.2012 passed by the learned District Judge, Khurda at Bhubaneswar in ARBP No.116 of 2010 arising out of the award dated 26.02.2010 passed by the sole Arbitor)

(In ARBA No.21 of 2013)

Union of India .... ***Appellant***

-versus-

M/s. Calcutta Springs Limited, Kolkata .... ***Respondent***

Advocates appeared in the case:

For Appellant : *Mr. Subrat Mishra, Adv.*
Mr. D.P. Sarangi, Adv.

-versus-

For Respondent : *Mr. Sidhant Dwibedi, Adv.*

(In ARBA No.40 of 2012)

M/s. Calcutta Springs Limited, Kolkata .... ***Appellant***

-versus-

East Cost Railway .... ***Respondent***

Advocates appeared in the case:

For Appellant : *Mr. Sidhant Dwibedi, Adv.*

-versus-

For Respondent : *Mr. Subrat Mishra, Adv.*
Mr. D.P. Sarangi, Adv.

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-01.03.2023
DATE OF JUDGMENT:-19.05.2023

Dr. S.K. Panigrahi, J.

1. Since both the ARBAs arose out of the same judment i.e. the judgment dated 25.09.2012 passed by the learned District Judge, Khurda at Bhubaneswar in ARBP No.116 of 2010, this Court proposed to hear both the matters together and pass a common order.
2. Both the aforesaid Appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for brevity) have been filed seeking setting aside of the judgment dated 25.9.2012 passed by the learned District Judge, Khurda at Bhubaneswar in ARBA No.116 of 2010 arising out of award dated 26.02.2010 passed by the learned Sole Arbitrator Mr. Umesh Singh, Controller of Stores, East Coast Railway, Bhubaneswar.

I. FACTUAL MATRIX OF THE CASES:

3. The Respondent in ARBA No.21 of 2013 who is the Appellant in ARBA No.40 of 2012 (hereinafter referred to as "the Company" for brevity) submitted a quotation in response to the Open Tender No.CS-156 of 20015 floated by the Railway Board. A counter offer was issued on 12.12.2005 which was accepted by the Company on 26.12.2005. A detailed letter of acceptance was issued on

10.01.2006 for the manufacture and supply of 1,69,497 numbers of Pre-stressed Mono-block Concrete (PMBC) Sleepers. Bank guarantee of the requisite amount was furnished by the Respondent. Subsequently, the parties entered into an agreement dated 02.11.2006. The period of commencement of the agreement was stipulated to be 10.01.2006, i.e. the date on which the order was placed and the agreement was stipulated to end on 25.01.2008.

4. The Railway Board vide their letter dated 24.09.2007 increased the quantity of PMBC sleepers to be supplied by 30% i.e. 50489 additional PMBC sleepers were requested to be supplied at the price, terms and conditions of the initial order. It was immediately informed to the Board by the Company that they would deliver the initial ordered quantity by the original due date of delivery, i.e. 25.01.2008. However, they requested that proportionate additional time may be granted to supply the additional quantity ordered. By letter dated 22.11.2007, the Board rejected the request and insisted on the supply of the additional ordered quantity within the original delivery period.

5. Apart from being allegedly left in the lurch by the Board's abovementioned actions, the Company vide letter dated 27.12.2007 also requested extension of the Delivery Period by three months – up to 25.04.2008, without imposition of liquidated damage for supply of the originally ordered quantity. The same

was requested on the ground that the item i.e. special cement was not available in the market during the period of supply leading to delay in supply. The Appellant's Railway Board sought production of documents to support the Respondent's request for extension vide their letter dated 24.04.2008. The same was provided to the Board by the Company vide its letter dated 25.06.2008. Vide letter dated 14.07.2008, the Company also brought to the notice of the Board that Clause 19.1. of the Agreement which allows for increase of the quantity ordered by 30% on the same price, terms and conditions but requires proportionate increase in delivery period. The Clause having been invoked properly, it was contended that the Company was not under any obligation to supply the quantity against the additional ordered quantity without proportionate increase in the delivery period. It was also requested that the contract may be closed with supply of original quantity and to refer the matter to arbitration if the same is not acceptable to the Board. The Board vide letter dated 15.07.2008, intimated the Company that the question of fixing the delivery period proportionately for the additional ordered quantity does not arise. While this was the purported stand of the Board, the Company received a fax from the Board on 15/16.07.2008 intimating the Company of the extension of delivery period for additional ordered quantity is granted up to 25.07.2008. However, no formal extension was communicated to the

Company till letter dated 23.07.2008 which was received on 09.08.2008. Furthermore, pertaining to the extension of delivery period for the originally ordered quantity, the Board vide letter dated 26/27.11.2008 intimated the Company that the extension of delivery period has been approved only from 25.01.2008 to 24.02.20008 without liquidated damages.

6. The Company was subsequently asked to withdraw the demand for appointment of arbitrator and vide letter dated 21.08.2008, the Company wrote to the Board in order to document the understanding that the Company would only supply the quantity that was already manufactured against the additional ordered quantity and would not make any further supply against the additional ordered quantity. Subsequently, on 09.09.2008, the Company withdrew its request for appointment of arbitrator.

7. However, after receiving the final bill which included deductions that were not agreeable to the Respondent, the Company renewed its request for appointment of an arbitrator. Shri Umesh Singh, Controller of Stores, East Coast Railway, Bhubaneswar was appointed as sole Arbitrator to adjudicate all the disputes arising out of Agreement dated 02.11.2006.

8. The Company claimed an amount of Rs.2,95,07,818/- under nine different items. *Vide* arbitral award dated 26.02.2010, the learned Sole Arbitrator partially allowed Claim No.3 which pertained to amount recovered from the bills towards 5% liquidated damages

for unsupplied quantity as well as the additional ordered quantity. Of the total amount of Rs.32,72,692/- that was claimed under this Claim, the learned Sole Arbitrator awarded Rs.7,97,452/- to the Company.

9. Aggrieved, the Company approached the learned District Judge, Khurda under Section 34 of the Act vide ARBP No.116 of 2010 seeking setting aside of the arbitral award dated 26.02.2010 passed by the sole Arbitrator. After hearing both the parties, the learned District Judge vide order dated 25.09.2012, while upholding the amount awarded under Claim No.3 as aforementioned, remanded the matter back to the learned Sole Arbitrator on the limited question of the Company's entitlements under Claim No.1 (amount recovered as 5% liquidated damages for supply of 9217 sleepers beyond the original ordered quantity).

10. Being aggrieved, the Union of India has filed ARBA No.21 of 2013 under Section 37 of the Act seeking setting aside of the judgment dated 25.09.2012 passed by the learned District Judge, Khurda in Arbitration Petition No.116 of 2010 arising out of arbitration award dated 26.02.2010 passed by the learned Sole Arbitrator.

11. So also, being aggrieved by the said judgment partially setting aside the award dated 26.02.2010 passed by the sole Arbitrator, the Company has filed ARBA No.40 of 2012.

12. Before this Court delves into the submissions of the parties, it is pertinent to mention that the Union of India *vide* two cheques

dated 10.08.2010 and 11.08.2010 has released the principal award amount of Rs.7,97,542/- to the Company.

13. Now, the facts leading to the instant Appeals have been laid down, this Court shall make endeavour to summarise the contentions of the Parties and the broad grounds on which they have approached this Court seeking exercise of this Court's limited jurisdiction available under Section 37 of the Act.

II. SUBMISSIONS OF THE UNION OF INDIA:

14. Learned counsel for the Union of India assailed the impugned judgment dated 25.09.2012 passed by the learned District Judge in ARBP No.116 of 2010 mainly on the ground that the learned District Judge has ignored that the claim for liquidated damages falls under the scope of excepted matters and hence was not arbitrable as per the terms of the contract. Furthermore, it is also vehemently alleged that the learned District Judge could not have upheld the award limited to a certain extent while also remanding it for fresh determination of a certain claim. The same purportedly amounts to modification of the award which is not permissible in law. The counsel for the Union of India submitted that the award had to be either set aside in its entirety or upheld entirely. The learned District Judge has, therefore, transgressed the settled position of law.

III. SUBMISSIONS OF THE COMPANY:

15. *Per contra*, learned counsel for the Company contended that the learned District Judge was well within his powers to uphold the award while remanding Claim No.1 pertaining to amount recovered as 5% liquidated damages for supply of 9217 sleepers beyond the original ordered quantity. It was submitted that the learned District Judge has correctly held that Claim No.3 pertaining to amount deducted as 5% liquidated damages for unsupplied quantity as well as the additional ordered quantity is related to Claim No.1 which also deals with liquidated damages. After coming to the conclusion that in order to exercise the option of ordering an additional quantity, it was imperative to obtain the consent and concurrence of the Company, the learned Sole Arbitrator could not have contradicted himself by saying that the imposition of liquidated damages was justified for non-fulfillment of the additional ordered quantity. Furthermore, it was contended that the learned Sole Arbitrator had not given any reasoning as to why Claim Nos.1, 2, 4, 5, 6, 7, 8 and 9 were not arbitrable and had not provided any justification for the same.

IV. ISSUE FOR CONSIDERATION:

16. Having heard the learned counsel for the parties and perused the materials available on record, this Court has identified the following issue to be determined:

A. Whether the learned District Judge erred in directing the parties to approach the learned Sole Arbitrator to the limited extent that the learned Sole Arbitrator would decide as early as possible after giving due opportunity to the parties as regards the Company's entitlement, if any, on Claim No.1 basing on his own finding as recorded regarding imposition of liquidated damage as at para-11.2 and 11.3 of the award?

V. A. Whether the learned District Judge erred in directing the parties to approach the learned Sole Arbitrator to the limited extent that the learned Sole Arbitrator would decide as early as possible after giving due opportunity to the parties as regards the Company's entitlement, if any, on Claim No.1 basing on his own finding as recorded regarding imposition of liquidated damage as at para-11.2 and 11.3 of the award?

17. In the matters, this Court concerns with Section 37(1)(c) which states that an appeal lies under Section 37 of the Act from an order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. This Court has had the occasion to recently deal with this question in its judgment dated 09.01.2023 in ARBA No.39 of 2018 titled as ***United India Insurance Company Ltd., Bhubaneswar v. Suryo Udyog Ltd.***

18. The Supreme Court has confined the supervisory role of the Courts when it comes to testing the validity of an Arbitration Award. It is trite law that this Court under Section 37 of the Act

cannot travel beyond the scope of what is provided under Section 34 of the Act. The Supreme Court in ***UHL Power Co. Ltd. v. State of H.P.***[1], recently held as follows:

> *"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. ...."*

A similar view, as stated above, has also been taken by the Supreme Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***[2].

19. It is trite law that a Court cannot modify an award while adjudging its propriety under Section 34 of the Act. The Supreme Court in ***NHAI v. M. Hakeem***[3] has reiterated this as follows:

> *"31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in GayatriBalaswamy v. ISG Novasoft Technologies Ltd. [GayatriBalaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim*

[1](2022) 4 SCC 116
[2](2020) 12 SCC 539
[3](2021) 9 SCC 1

> *for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally."*

20. While the scope of judicial scrutiny under Sections 34 is narrow, it is further restricted under Section 37 of the Act, as it is in the nature of a second appeal. In this regard, in ***Mcdermott International Inc.* v. *Burn Standard Co. Ltd.***[4], the supervisory role of the Courts has been circumscribed by the Supreme Court in the following manner:

> *"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators,*

[4](2006) 11 SCC 181

> *violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

21. Further, in ***MMTC Ltd. v. Vedanta Ltd.***[5], the following was observed by the Supreme Court:

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

22. It is in the parameters as laid down by the Apex Court *vis-a-vis* the scope of judicial intervention that the appeals impugning the order dated 25.09.2012 passed by the learned District Judge,

[5](2019) 4 SCC 163

Khurda in Arbitration Petition No.116 of 2010 arising out of arbitration award dated 26.02.2010 passed by the learned Sole Arbitrator shall be dealt with.

23. The facts of the case indicate that Claim No.1 and Claim No.3, both pertain to the deduction from the final bill and it is related to liquidated damages for supply of sleepers after completion of the original ordered quantity or in simpler terms, the additional ordered quantity. The Claims, therefore, arise out of the same subject matter and are not separable *per se*. If the learned Arbitrator was of the opinion that the Company was entitled to relief pertaining to Claim No.3, it flows as a natural corollary that Claim No.1 should also have been adjudicated upon based on the same reasoning. Instead, the learned Arbitrator has merely held *"…this claim is not within the purview of Arbitral Agreement and not established, therefore, nil amount is awarded."*. This Court agrees with the learned District Judge's conclusion that if the learned Arbitrator felt that upon consideration of the relevant clause of the Agreement, adjudicating on claims of liquidated damages were within his domain, by non-consideration of Claim No.1, the learned Arbitrator has failed to exercise the jurisdiction vested on him, which is an error apparent on the face of the record. The same is also patently illegal.

24. In the considered opinion of this Court, the learned Arbitrator has committed a manifest error in not coming to any finding on Claim

No.1. However, the power of the learned District Judge and this Court to interfere with the arbitral award halts at this juncture, considering the limited scope of Sections 34 and 37 of the Act as discussed above.

25. Considering the limited scope of judicial review under Section 34 of the Act, the court exercising power under Section 34 of the Act could not have rendered any decision on Claim No.1 as that would amount to modification of the award which is impermissible keeping the position of law in mind as has been laid down by the Supreme Court in ***NHAI v. M. Hakeem*** (supra) ***and McDermott International Inc. v. Burn Standard Co. Ltd.***(supra), ***KinnariMullick v. Ghanshyam Das Damani***[6] and ***Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd.***[7]***.***

26. Any attempt to render a decision on Claim No.1 would also necessitate entering into the merits of the dispute as well as reappreciation of evidence, which exercises are also not permissible in law. The Supreme Court in ***P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd***.[8] has held that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. This view was reiterated by the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan***

[6](2018) 11 SCC 328
[7](2021) 7 SCC 657
[8](2012) 1 SCC 594

Copper Ltd.[9]***, K.V. Mohd. Zakir v. Regional Sports Center***[10] and ***State of U.P. v. Ram Nath Constructions***[11] and the High Court of Delhi in ***M/S Pragya Electronics Pvt. Ltd. v. M/s Cosmo Ferrites Ltd.***[12].

VI. CONCLUSION:

27. Therefore, in light of the discussion, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the learned District Judge has rightly left it open to the parties to pursue legal remedies in accordance with law, and refrained from taking a decision on the claim by itself.

28. The parties are, therefore, at liberty to pursue legal remedies in accordance with law including any remedies available to them under the Act.

29. In light of the aforesaid, both the appeals stands disposed of, along with pending application(s), if any. No order as to costs.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 19th May, 2023/B. Jhankar

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[9](2015) 5 SCC 739
[10] AIR 2009 (SCW) 6217
[11](1996) 1 SCC 18
[12]2021 SCC OnLine Del 3428