IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.7 of 2020

In the matter of an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 assailing the order dated 18.10.2019 passed by the learned District Judge, Cuttack in Arbitration No.87 of 2013.

Union of India, represented by Deputy Chief Engineer (CON), East Cost Railway, Bhubaneswar .... ***Appellant***

-versus-

B.B. Senapati .... ***Respondent***

Appeared in this case by Hybrid Arrangement (Virtual/Physical Mode):

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For Appellant - Mr. P.K. Parhi,
Deputy Solicitor General
Mr. J. Nayak,
Central Government Counsel

For Respondent - Mr. D. Acharya, Advocate

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 06.11.2023 : Date of Judgment: 08.01.2024

D.Dash, J. The Appellant, by filing this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the A&C Act' 1996), has called in question the order dated 18.10.2019 passed by the learned District Judge, Cuttack in ARBP No.87

of 2013. The Respondent as the Petitioner had filed the above numbered application under section-34 of the A & C Act, 1996 for setting aside the award dated 01.02.2013 passed by the Arbitral Tribunal constituted as per the Contract Agreement No.32/CE/C/HQ/BBS/SER/2000 dated 05.05.2000 executed between the Respondent (Petitioner therein) and the Appellant (Opposite Party therein).

The learned District Judge has passed the following orders:-

> "That the petition u/s 34 of the Arbitration & Conciliation Act, 1996 by the Petitioner is allowed on consent against the Opp. Party, however, in the peculiar facts and circumstance without cost. The impugned arbitral Award dated 01.02.2013 is hereby set aside. The matter is remitted back to the Arbitral Tribunal for fresh adjudication at an early date preferably within a period of three months from the date of receiving back the matter keeping in mind the observation made in this order and also the observation made in the order dated 20.04.2012 in ARBP No.205/2008 of this Court.
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> A copy of this order along with the LCR be returned back to the Railway Authority, i.e., the East Coast Railway from whom the same was received, at the earliest."

2. Brief facts leading to the instant Appeal are as follows:-

The Appellant had taken up the project work relating to execution of the earthwork, minor bridges and other allied

work in Sector-V between Km. 481.694 to Km. 484.160 in connection with Rahama-Paradeep Patch doubling of Cuttack-Paradeep section in Khurda Road Division of South Eastern Railway having inviting open/limited tenders for the purpose, the Appellant after negotiation. Pursuant to the acceptance of the tender, the agreement came into being which contained the arbitration clause. The period of completion of work was fifteen (15) months from the date of acceptance of the letter, i.e., 02.03.2001.

According to the Respondent, he was given to understand that the site where he was to work was free from all obstructions. It is also said that it was the obligation of both sides to discharge their obligations without causing any delay for completion of the work within the agreed time period. The Respondent's case is that he was always sincering to complete the work within the time frame by mobilizing sufficient number of man and machineries and collecting the required materials for the purpose. However despite all these above being in readiness the work could not be completed in time due to various other intervening factors, mainly due to devastation on account of Super Cyclone. After the Super Cyclone, there was abnormal rise in the diesel rate as also other materials. The Respondent despite all these started the work with all promptness. But he

was not provided with work site free from all obstructions as agreed for which he was compelled to make alternative arrangements by constructing an approach road crossing the railway lines after writing to the Appellant on 07.10.2000 with the knowledge and supervision of the Appellant. Major part of the work was completed by end of June, 2000. However, rest work could not progress due to monsoon followed by heavy rain coming to intervene. So, as per the decision taken in the Progress Review Meeting, the time period to complete the rest of work was extended by further period. Be that as it may to the misfortune of the Appellant, the execution of the rest of work was seriously hampered due to the miscreants creating mischievous activity. The Appellant in this matter totally remained silent and unmoved on being requested by the Respondent to intervene. The Appellant, on the other hand, on 06.11.2000 wrote a letter as to the inaction of the Respondent in completing the work since July, 2000 and then threat was given for termination of the contract. On 28.11.2000 when another notice was served by the Appellant upon the Respondent, the Respondent had given the reply on 0712.2000 explaining all these situation standing as impediment on the way of completion of work. Despite that the Appellant issued notice of termination of contract. The period of completing of work although was

extended after negotiation, the same could not be finished for the reason beyond the care and control of the Respondent and it is said that the Appellant without looking those in their proper prospective have abruptly gone for termination of the contract.

3. The Respondent having thus suffered loss demanded the payment of the same from the Appellant. The Appellant instead of settling the dispute raised a counter demand in asserting that the termination of the agreement at the end was just and proper.

The Respondent finally advanced the claims as under:-

1.	**Claim No.1** Final bill amount held up with the Railway Administration	Rs.3,50,000/-
2.	**Claim No.2** Release of Security Deposit in custody of Railway Administration	Rs.3,00,000/-
3.	**Claim No.3** Loss sustained due to idling of men, machinery and establishment. a) Idling of men Rs.18,62,350 b) Idling of machinery Rs.94,38,000 c) Idling of establishment Rs.9,28,000	Rs.1,22,28,350/-
4.	**Claim No.4** Abnormal increase in cost of diesel	Rs.15,18,977/-
5.	**Claim No.5** Loss of Profit	Rs.29,59,000/-
6.	**Claim No.6** Interest	As judged by the Arbitrators
	Total claim	Rs.1,73,56,347/-

4. Insofar as the claim Nos.1 and 2 are concerned, those were not disputed. The Arbitral Tribunal had accepted the claims on those two counts. With regard to Claim No.3, the Arbitral Tribunal while calculating the loss sustained by the Respondent in keeping the man, machineries idle and incurring the establishment expenses/charges has taken those to have occasioned for eight months and there was below consideration of the labour component. In respect of Claim No.4, in the absence of any provision of price variation as a clause in the contract although such a clause is very much there in the agreement, the Arbitral Tribunal has rejected the same. So far as the loss of profit under Claim No.5 and interest under Claim No.6 are concerned, there has been no award and it is said that the rejection of those two items of claim par without any valid reasons. Thus it is said that the award is the outcome of non-application of mind and oppose to public policy.

5. The Respondent being aggrieved by the award passed on 05.08.2008 at the first instance had carried application under section 34 of the A &C Act. The learned District Judge by judgment dated 20.04.2012 having set aside the award dated 05.08.2008 had remitted the matter for fresh adjudication. Accordingly, the Tribunal set over to re-adjudicate the dispute afresh keeping in view the observation

made in the judgment and finally passed the award on 01.02.2013 which has been impugned in this Appeal.

6. The Respondent has then again filed an application under section 34 of the A & C Act for setting aside the award as patently illegal having conflict with the public policy of India in further attacking the same as arbitrary, anomalous and against the material available on record.

It is the stated that again on Claim No.3, the Tribunal has taken that eight months period despite seeing that a period of thirteen months the portion of **title** was occupied by another agency, which caused hurdles for the Respondent to execute the work. It is contended that without another valid and justifiable reason the Tribunal has arbitrarily reduced the award by 50% though it has taken cognizance of the fact that the Respondent sustained loss for keeping his man and machinery idle with the materials kept nearby. Rejection of the Claim No.5 has been challenged to be arbitrary and so also the non-award of interest under Claim No.6. When the Tribunal has erroneously accepted the stand of the Appellant that it has not received any interest from the Bank to the Fixed Deposit Receipt (FDR) of Rs.2,50,000/- and only received the interest for the fixed deposit of Rs.50,000/-

7. The Appellant objected to the said application filed by the Respondent under section 34 of the A &C Act in setting

aside the there is absolutely no ground to challenge the award within the preview of the provisions contained under section 34 of the A & C Act.

8. Learned District Judge having gone for a detail discussion as to the acceptance/rejection of the claims advanced by the Respondents has finally concluded as under:-

> "So, as per the above discussion, it is found that the Award made by the learned Tribunal in respect of Claim Nos.3,4,5 & 6 of the impugned Award dated 01.02.2013 are patently illegal and no based on materials on record besides being against the public policy of India. Further, the findings in respect of Claim Nos.3 to 6 are found not be in consonance with the observation of this Court vide ARBP No.205/2008 in its order dated 20.04.2012. Hence the impugned Award dated 01.02.2013 passed by the learned Arbitrators being found to be unsustainable in law is required to be set aside on the foregoing reasons and since the major part of the Award are not in accordance with law and not sustainable, the entire Award dated 01.02.2013 is liable to be set aside and the matter is to be remitted back to fresh adjudication by the Tribunal within a reasonable period of time as the dispute relates to the year 2000 and in the meantime already nineteen years have elapsed. Hence it is ordered."

9. Heard Mr.P.K. Parhi, learned Deputy Solicitor General assisted by Mr. J. Nayak, learned Central Government

Counsel at length and Mr. D. Acharya, learned counsel for the Respondent.

Perused the impugned order and have carefully gone through the award passed by the Arbitral Tribunal.

10. Keeping in view the submissions made and on going through the impugned order passed by the learned District Judge, at the outset, the question arises that once the award passed by the Arbitral Tribunal was set aside was it permissible for the learned District Judge to remit the matter to the Arbitral Tribunal for fresh adjudication mainly pointing out the observations made in the earlier round application under section 34 of the A &C Act have not been scrupulously followed while considering the Claim Nos.3 to 6.

11. It be stated that section 34 of the A & C Act deals with the application for setting aside arbitral award and that reads:-

> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
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> An arbitral award may be set aside by the Court only if—
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> (a) the party making the application furnishes proof that—
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> (i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

12. The above provision contained in section 34(4) of the A & C Act makes it clear that on receipt of an application under sub-section (1), the Court may, where it is appropriate and it

is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

13. It has been held in case of I-Pay Clearing Services Private Ltd. Vrs. ICICI Bank Ltd., *2022 (I) Live Law, (SC) 2* that:-

> It is true that Section 34(4) of the Act is couched in a language, similar to Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration. In the case of AKN & Anr. v. ALC & Ors., by considering legislative history of the Model Law, it was held by Singapore Court of Appeals that remission is a 'curative alternative'. In the case of Kinnari Mullick and Anr. v. Ghanshyam Das Damani [1], relied on by learned senior counsel for the appellant, the question which fell for consideration was whether Section 34(4) of the Act empowers the Court to relegate the parties before the Arbitral Tribunal after setting aside the arbitral award, in absence of any application by the parties. In fact, in the said judgment, it is held that the quintessence for exercising power under Section 34(4) of the Act is to enable the Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award, by curing the defects in the award. In the judgment in the case of Dyna Technologies Pvt. Ltd. v.

> Crompton Greaves Ltd.[2], it was a case where there was no inquiry under Section 34(4) of the Act and in the said case, this Court has held that the legislative intention behind Section 34(4) of the Act, is to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. It was not a case of patent illegality in the award, but deficiency in the award due to lack of reasoning for a finding which was already recorded in the award. In the very same case, it is also clearly held that when there is a complete perversity in the reasoning, then the same is a ground to challenge the award under Section 34(1) of the Act. The case of Som Datt Builders Limited v. State of Kerala[3] is also a case where no reasons are given for the finding already recorded in the award, as such, this Court held that in view of Section 34(4) of the Act, the High Court ought to have given Arbitral Tribunal an opportunity to give reasons.

14. Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of

the Act and the reply thereto. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. Under guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the Arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award. A harmonious reading of Section 31, 34(1), 34(2A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is

already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings. Further, as rightly contended by the learned counsel appearing for the respondent, that on the plea of 'accord and satisfaction' on further consideration of evidence, which is ignored earlier, even if the arbitral tribunal wants to consciously hold that there was 'accord and satisfaction' between the parties, it cannot do so by altering the award itself, which he has already passed.

15. In the present case, with the obtained facts and circumstances, the learned District Judge having set aside the award is not right in remitting the matter to the same Arbitral Tribunal for fresh adjudication.

16. In the wake of aforesaid, the Appeal stands allowed and the impugned order is hereby set aside.

(D. Dash),
Judge.