
**State Of Jharkhand Vs Texmaco Rail & Engineering Ltd. (TREL) P.O.
Belgharia**

Miscellaneous Appeal No.105, 106, 107 Of 2003

Court: Jharkhand High Court

Date of Decision: Jan. 28, 2025

Acts Referred:

Arbitration Act, 1940 " Section 17, 30, 30(1), 39, 39(1)(vi)#Evidence Act, 1872 " Section 92

Hon'ble Judges: Gautam Kumar Choudhary, J

Bench: Single Bench

Advocate: Praveen Akhouri, Vishal Kumar Tiwari, Mahesh Pd. Sinha, Sunil Kumar Mahto,
Ranjeet Kumar Choudhary

Final Decision: Partly Allowed

Judgement

Gautam Kumar Choudhary, J

1. All these three miscellaneous appeals have been preferred against the arbitral awards which were made Rule of Court in Misc. Case No.1/2001

corresponding to Misc. Case no.40/2000.

In Misc. Case Nos.2/2001, 3/2001 and 4/2001, objection raised by the State/present appellants against the arbitral award under Section 30 of

Arbitration Act, 1940. Learned Court below by the impugned order dismissed the Misc. Case preferred by the State and made the award Rule of

Court, aggrieved by the order, the instant Miscellaneous Appeals have been filed.

2. For better appreciation list of dates not in dispute is set out as under: -

I 31.01.1986 Global Tender was issued by the State for design construction of Galudih Barrage gate.

II 22.12.1987 Pre-bid conference with pre-qualified bidders held in office of Chief Engineer.

III 28.01.1988 Minutes of meeting were issued vide Letter No.SMP/IGC/4074/85 which formed part of agreement.

IV 13.05.1988, Corrigendum and addendum to pre-bid meeting minutes regarding Galudih Barrage gate price to pre-qualified bidders including

Texmaco Ltd. (the present respondent), was issued.

V 01.06.1988 Texmaco Ltd. submitted bid vide letter no.SP/PKR/PH-4055/297 dated 01.06.1988.

V 29.07.1988 Bid letter dated 01.06.1988 submitted by the respondents was accepted and agreement was entered.

VI, 10.09.1992, Vide, Letter, No.1045, dated, 10.09.1992, of, Executive Engineer, was, intimated, that, bills, regarding,

price adjustment on fabrication item is not tenable in view of corrigendum and addendum of pre-bid meeting of letter dated 13.05.1988. It was also

intimated that bills pertaining to price adjustment already paid on fabricated materials and labour are also being recovered along with interest as per the

terms of agreement.

VII 19.11.1992 Vide Letter No.RCC/AV/Cal/Arbn/1992, contractor demanded price adjustment from Superintending Engineer and requested to notify

his decision within 30 days as envisaged under Clause 56.

VIII 01.12.1992 Appeal was preferred on 26.12.1992 to Chief Engineer against the decision of Superintending Engineer, which was dismissed.

IX 13.03.1993 Contractor nominated Sri P.L. Agrawal, Advocate as their Arbitrator and requested Chief Engineer to nominate his Arbitrator for

deciding claims noted in Schedule of the letter.

3. Three members Board of Arbitrators was constituted by the order no.696 dated 30th May 1994 issued by the Joint Secretary, State of Bihar.

4. It is submitted by the learned counsel that appointment of Arbitrator was in derogation of Clause 5, 6 and 7 of the General Conditions of Contract

which specifically provides that if any dispute is referred to Superintending Engineer and the Contractor is aggrieved by order of the Superintending

Engineer, appeal is to be preferred before the Chief Engineer, only thereafter, the Arbitrator can be appointed. If the matter has not been agitated

before the Superintending Engineer and Chief Engineer these issues cannot be raised before the Arbitrator.

5. The second ground on which the present appeal is preferred is that as per the addendum dated 13.05.1988 pursuant to pre-bid minutes regarding

Galudih Barrage Gate price bid to pre-qualified bidders, debarred the escalation of fabrication cost and it formed part of the main agreement. Despite

the express bar in the terms of agreement claim no.V has been allowed by the Board of arbitrators and affirmed by the learned Court below.

6. The Contractor raised altogether nine claims which are as under: -

I. The claim on account of escalation as per the formula given in the contract for Rs.1,05,28,223/-.

II. The claim on account of bank commission and charges for furnishing the bank guarantee amounting to Rs.3,09,870/- till the date of filing of the

claims.

III. The claim for idle site establishment incurred by the claimant for Rs.1,39,92,500/-.

IV. The claim for erection of the gates special methods under adverse conditions as on extra item of work for Rs.9,83,000/-.

V. The claim on account of additional price and above the contract, price for items which could not be dispatched as the work had to be suspended for

breach of contractor by the respondent for

VI. The claim of principal amount for the unpaid bills by the respondent for Rs. 1,05,96,290.

VII. The claim of interest of Rs.27,32,570/- on account of delay in payment of the bills.

7. It is argued that Claim No.(v) for a sum of Rupees Twenty Seven Lakhs was with respect to fabrication which was expressly barred by

corrigendum.

8. Learned Court below dismissed the objection in view of the fact these pleas were not raised before the Arbitrators.

9. It is argued that Arbitrator could not have travelled beyond the terms of agreement which included the addendum and expressly prohibited the

admissibility of cost against fabrication and other related issues. As far as other claims are concerned, since they were also not raised before the

Engineer, therefore, Arbitrator had no jurisdiction to adjudicate on the other claims.

10. I find force in the argument advanced by the learned counsel on behalf of the respondent that the appellants cannot raise the issue of jurisdiction of

arbitrator after having submitted to the arbitral proceeding. Learned court below has noted in the impugned order that no objection in terms of Sections

56 and 57 of the GCC, regarding jurisdiction of the arbitrator, was ever raised before the arbitrator, therefore, such an objection was barred at the

stage of hearing under Section 30 of the Arbitration Act before the Court. Thus, this plea is not sustainable and is accordingly rejected.

11. With respect to the specific ground regarding the arbitrator having allowed Claim No. 5, which was prohibited in terms of addendum, it is argued

by learned counsel for the respondents that in an appeal under Section 39 of the Act 1940, the scope of scrutiny is a limited one. Arbitral award having

been made the rule of Court under Section 30, becomes a decree and the appellate court in exercise of power under Section 39 has to see if the

decree was in excess of, or otherwise not in accordance with the award. Reliance in this regard is placed on Union of India Vs. B.C. Basu & Anr.,

(1982 SCC Online (Pat) 81. In this case, a preliminary objection was raised in an appeal before the Single Judge under Section 39(1)(vi) of the

Arbitration Act that from perusal of Section 17, it was manifested that it contemplated two different situations (i) making of an order refusing to set

aside an award; and (ii) pronouncement of the judgment according to the award upon which a decree follows. If no objections are filed by either party

under any of these sections, or, if filed, having been disallowed, the Court has to pronounce the judgment according to the award and the decree will

follow the judgment and the appeal will be restricted to scrutiny as to whether the decree was in consonance with the award.

12. It is further argued that the objection to Claim No. 5 on the ground that it was beyond the terms of agreement cannot be taken at this stage as the

same was not taken at the stage of arbitral proceeding. This plea is foreclosed in view of the ratio laid down by the Hon'ble Supreme Court in

State of A.P. Vs. Chandrasekhara Reddy & Others, (1998) 7 SCC 141 (para 9)

13. Having considered the submissions advanced on behalf of both sides and on perusal of the materials on record, there cannot be two views on the

legal position that an arbitrator is a creation of the contract and, therefore, he cannot travel beyond the terms of agreement. Appellate Court cannot

enter into construction of the term of contract, or on factual findings of the arbitrator. Nevertheless, when the award is beyond the terms of the

agreement it is liable to be set aside. It has been held in Food Corporation of India Vs. Surendra, Devendra, and Mahendra Transport Company

(Civil Appeal No. 1577 of 1994) that if the award is in excess of jurisdiction of an arbitrator, the same is liable to be set aside to that extent. It has

been held in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705,

“12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is DEHORS the said provisions, it

would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In

exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.”

MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the

contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute

is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the

award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the

dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved

by evidence extrinsic to the award.” (emphasis supplied)

Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :

“27. Arbitration being a matter of contract, the parties are entitled to fix boundaries as to confer and limit the jurisdiction and legal authority of the

arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or could be confined to specific disputes. The issue of

scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for

exclusions as in case of “excepted matters”. The arbitration agreement may be valid, but the Arbitral Tribunal in view of the will of the parties

expressed in the arbitration agreement, may not have jurisdiction to adjudicate the dispute. The will of the parties as to the scope of arbitration is a

subjective act and personal to the parties.”

14. In the present case, from the perusal of the impugned order, it is evident that objection was taken before the learned Court below vide objection

no.(f) that by addendum dated 13th May, 1988 escalation on fabrication was debarred, despite this it was allowed by the arbitrator. No specific reason

has been assigned in the impugned order for overruling this objection regarding escalation cost on fabrication which was barred by the addendum.

15. On perusal of the award, it is apparent that altogether 18 issues were framed by the Board of Directors which included the following:

Issue no.12, Whether the claimants are entitled to claim escalation over all items of work?

Issue No.13, Whether the claimants acknowledged addendum bearing no. 3A on 01.06.1988 and to what extent they are bound by it?

16. These two issues have been dealt in the award at page 17 & 21 of the award. The addendum at the time of entering into contract, has not been

disputed. However, on ignorance about it, oral evidence of the claimant was accepted by the arbitrators that he had received the letter without

addendum. Addendum was the result of meeting which took place prior to contract and that it was a pre-bid amendment. It was also assailed for

being iniquitous, applying only to Indian bidders and not to foreign bidders. All these cumulatively established that addendum was the part of the

contract and could not have been ignored on the basis of oral evidence by the Arbitrator in view Section 92 of the Evidence Act.

17. This Court is of the view that Claim No.5 which was escalation on fabrication was barred by the addendum and the Arbitrators over stepped the

boundaries of the contract by passing award under this item and thereby misconducted themselves within the meaning of Section 30(1) of the

Arbitration Act, 1940. The award so far as Claim No.5 is concerned, is set aside.

Miscellaneous Appeals are accordingly, partly allowed.