

Simplex Concrete Piles (India) Ltd. Vs. National Projects Construction Corpn. Ltd.

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Court : Delhi

Decided On : Mar-10-2000

Reported in : 85(2000)DLT738; 2000(54)DRJ497; (2000)126PLR5

Judge : J.B. Goel, J.

Acts : [Arbitration Act, 1940](#) - Sections 30 and 33

Appeal No. : I.A.No. 11011/95 & S.No. 4029/92

Appellant : Simplex Concrete Piles (India) Ltd.

Respondent : National Projects Construction Corpn. Ltd.

Advocate for Def. : Mr. S.K. Taneja, Adv.

Advocate for Pet/Ap. : Mr. V.P. Chaudhary, Sr. Advocate and; Ms. Saroj Bidawat, Adv

Judgement :

ORDER

J.B. Goel, J.

1. M/s. National Projects Construction Corporation Ltd. (hereinafter called 'the respondent') has challenged the award dated 15.9.1992 passed by Shri C. Rama Rao, retired Director General of Works CPWD as Arbitrator under Sections 30 and 33 of the [Arbitration Act, 1940](#).

2. The work of 'Pile Design and construction of Piles, Pile caps, etc. for BALCO Captive Power Plant at Korba (M.P) was awarded by the respondent to M/s. Simplex Concrete Piles (India) Ltd. (hereinafter called 'the petitioner') by means of letter of award No. 700565/Projects dated 17.11.1984. The estimated value of the work was Rs. 1,32,33,000/- and the work was to be completed within 7 months, i.e., 30.6.1985 commencing from 30.11.1984. Parties had entered into an agreement on 12.3.1986. (However the date of completion was by addenda No. 7123202/6203 dated 4/5.3.1987 was changed to 31.10.1986). Disputes arose between the parties as petitioner's claim were disputed and remained unpaid. In pursuance of authority vested in him by the contract, the Chairman-cum-Managing Director (for short 'CMD') of the respondent by his letter dated 5.10.1990 first nominated Shri Vir Amar Prakash as the Arbitrator, however, on his resignation after some time in his place the CMD by letter No. 7123403/Arb/550 dated 28.8.1991 appointed Shri C. Rama Rao as the Arbitrator. In the letter appointment, the Arbitrator was directed to give a reasoned award, though not so provided in the arbitration agreement.

3. Petitioner submitted their statement of claims. Respondent in reply contested the claim and also filed two counter claims. Both the parties led documentary evidence and the arbitrator gave the award in dispute.

4. The petitioner had made claims under 8 heads with sub heads (a) to (m) in respect of claim No. 4 Claim No. 7 is for interest while claim No.8 is for costs of arbitration. Claims No. 4(a), 4(b), 4(c), 4(f), 4(i), 4(j), 4(m), 5,6,8 and both the counter claims were disallowed. Claims No. 2, 4(d), 4(e), 4(g), 4(k) and 4(1) have been partly allowed. In respect of claim No.1 for Rs. 3,52,791.93 towards payment of 21st final bill, an amount of Rs. 18,842/- has been awarded to the respondent; Claim No.3 for release of security deposit, Claim No.3 for release of security deposit, claim No. 4(h) and under claim No. 7, interest at the rate of 15% p.a.w.e.f.

10.1.1989 as against claim of 20%. w.e.f. 10.6.1988 have been awarded.

5. In the objections, the award on claims No.1, 3, 4(d) and 7 only has been challenged. Claim No. 3 is for recovery of Rs. 7,17, 150.25 towards refund of security deposit and earnest money of Rs. 20,000/- has been allowed in full. Against claim No. 4(d) for recovery of Rs. 1,06,361/- towards extra lead for transportation of surplus excavated earth, a sum of Rs. 1,05,180/- has been awarded to the petitioner. Under claim No. 7, against interest claimed @ 20% per annum, interest @15% p.a has been allowed w.e.f. 1.1.1989. Respondent's two counter claims (1) for recovery of Rs. 4,49,947.27 alleged to have been overpaid which was disallowed; (2) for recovery of Rs. 8,78,594.30 on account of liquidated damages have been disallowed.

The net result is learned Arbitrator has awarded in all Rs. 21,08,468/- with interest thereon @ 15% p.a. w.e.f. 1.1.1989 .

Petitioner has not filed any objections and only the respondent have filed objections under Sections 30 and 33 of the Act in respect of award on claims No.1,3,4(d) and 7.

I have heard learned counsel for the parties.

6. In the objections, the award on these claims is being challenged on the grounds: (1) that the arbitrator has misconducted himself and the proceedings; (2) that the award on claim No.1 is not based on material placed on record; the learned arbitrator has wrongly stated that the recovery was corrected by the respondent and has not correctly determined the recoveries for cement and steel nor on correct basis, (3) award on claim No.3 is without proof inasmuch as (i) royalty clearance certificate and (ii) sale of empty cement bags were not proved as original documents were not produced and only copies thereof were produced and only proved as original documents were not produced which could not have been taken in evidence; (4) award on claim No. 4 (d) is contrary to the terms of the contract between the parties; (5) the arbitrator had no jurisdiction to award interest nor there is justification for awarding interest in the circumstances, nor w.e.f. 1.1.1989; (6) the award is otherwise invalid; (7) there are errors on the face of the

award.

7. The petitioner in reply has refuted these objections as not tenable; that the award is virtually a non-speaking award; there is no legal infirmity nor any error of law or fact on the face of the award; that since there are no allegations of mala fides or bias against the arbitrator, there is no ground for interference in the award; even otherwise, the grounds are vague; and that the award is based on the material on record which could not be interfered in law.

8. The arbitration clause 30 contained in the contract does not provide that the arbitrator will give reasons for his award. However, the nominating authority in the letter of appointment of the arbitrator has directed the arbitrator to give reasons for the award. The Supreme Court in Raipur Development Authority Vs . M/s. Chokhamal Contractors has observed:

'The Arbitrator or Umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submissions he is required to give reasons and if the arbitrator or umpire chooses to give reasons in support of his decision, it is open to the Court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the Court has directed that reasons should be given or where the Statute which governs an arbitration requires him to do so.'

9. Explaining the ratio in Raipur Development Authority (supra), in Food Corporation of India Vs . Jagdish Chander Saha : AIR 1994 SC219 , it has been laid down that :

'What this Court had in contemplation in the above passage was that reasons are obligatory on the arbitrator only where the arbitration clause contains such a requirement or where both the parties agree that the reasons should be given in a deed of submission or by a letter addressed by both the parties to the arbitrator. We do not see how one of the parties to the arbitration agreement can restrict the scope of the arbitrator's powers as envisaged in the arbitration

agreement by mentioning certain terms in a unilateral letter of appointment of the arbitrator.'

10. The arbitrator has, given reasons for his award obviously in pursuance of the directions of the appointing authority which he was not required to give under the agreement. However, both the learned counsel have not raised any objection on this aspect and have addressed argument on the basis of the award as it is .

11. The scope of the power of the Court to the interfere in an award is circumscribed by Section 30 of the Act. In *Jivarajbhai Ujamshi Sheth & Ors. Vs . Chintamanrao Balaji & Ors. : [1964]5SCR480* , it was held as under:-

'An award made by the arbitrator is conclusive as a judgment between the parties, and the Court is entitled to set aside an award if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceeding have become invalid under Sec. 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid (S.30 of the Arbitration Act An award may be set aside by the Court on the ground of error on the face of merely because by a process of inference and agreement (sic: argument) it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. As observed in *Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.* 50 Ind App 324 : Air 1923 PC 66;

'An error in law on the face of the award means, in their Lordships view, that you can find in the award or a document actually incorporated thereto, as for instance 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. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to contract on which the parties right depend to see if that contention is sound.'

The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's

adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Sec. 30. 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. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

12. This view has been followed in later decision including in *State of Rajasthan Vs . M/s. R.S. Sharma & Co.*, : (1988)4SCC353 .

Again in *Delhi Municipal Corpn. Vs . M/s. Jagan Nath Ashok Kumar* : [1988]1SCR180 , it was laid down that:-

'Appraisalment of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisalment of evidence The arbitrator is the sole judge of the quality as well as quantity of the evidence and it is not for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator. It may be possible that on the same evidence the Court might arrive at different conclusions than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator.

13. Further that Section 1 of the Evidence Act, 1872 in its rigorous is not intended to apply to proceedings before an arbitrator.

The following observations made by Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* (1948) 2 All E.R. 186 were also referred to with approval:-

'..... The day has long gone by when the Court looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more

especially in commercial arbitrators, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside the award.'

14. In *New India Civil Erectors Pvt. Ltd. Vs . Oil and Natural Gas Corporation* : [1997]2SCR86 , also it was held that normally the Court would not interfere and the attempt of the court should always be to support the award within letter of law where the arbitrator has acted within the terms of his submission and has not violated any rules of natural justice. However, the arbitrator being a creature of the agreement must operate within the four corners of the agreement and cannot travel beyond it. He cannot award any amount which is rule out or prohibited by the terms of the agreement. In other words, he cannot enter upon excepted matter. If he acts in manifest disregard of the contract, his action will be without jurisdiction.

15. Thus, the jurisdiction of the Court to interfere in an award made by the arbitrator chosen by the parties is circumscribed by the provisions of the Act.

16. Petitioner in claim No.1 had made the following claim:-

'CLAIM NO.1; (PAYMENTS AGAINST 21ST RA & FINAL BILL INCL. EXTRA ITEMS ETC)

The details of Claim of Rs. 3,52,791.93 are furnished at Annexure A-6. It would be seen from the annexure that the outstanding amount pertains to short payments received due to part rates admitted, arbitrary deductions, excess recovery on account of issue of steel and cement etc. effected by the Respondent. The claims are based on the duly accepted measurements by the respondents and, hence, are payable.'

17. The respondent in reply, disputed this claim as under:-

'CLAIM NO. 01 : PAYMENT AGAINST 21ST R.A. & FINAL BILL:-

The details of the gross amount and recoveries of the 21st R.A. and final bill are furnished at Annexure 'A-1'. It can be seen from the annexure that the net amount of the final bill works out of the 21st R.A. & final bill as a token of acceptance of measurements and other recoveries as such the passing of the final bill is held up. Some works like Sand Filling etc. have not been executed by the Claimant as per specifications. For such works payment has been allowed at part rate. The recoveries against the excess generation of scrap and shortages in steel and cement have been affected at commercial/penal rate depending upon the merit of the case. Since no amount is due to the claimant and on the contrary claimant has to pay us back Rs. 4,49,947.27 the question of releasing any payment does not arise. In this connection our Ltr. No. 7123202/Simplex/03-11-1987 may please be seen.'

The respondent thus denied the claim of the petitioner and has claimed that overpayment has been made to the extent of Rs. 4,49,947.27.

18. The matter was considered/discussed by the learned arbitrator in second hearing held on 13.11.1991 when the parties took time to go through the measurement books and various indents at Korba from 9.12.1991 and to reconcile the disputed quantities. In the 4th hearing held on 26.12.1991, the respondent had filed a statement showing the details of recovery of steel and cement as worked out by them. The matter was again considered/discussed in the 9th, 11th, 12th and 13th hearings held on 15.2.1992, 15.5.1992, 16.5.1992 and 27.6.1992 respectively when both the parties addressed oral submissions. The learned arbitrator after considering the pleadings, material placed before him by the parties, discussions held during various hearings and the contentions raised before him gave the following award:-

'1.3. AWARD :

The final bill prepared by the Respondent (P-15-16 of Respondent Folder) has been scrutinised. The gross amount of the work done in the final bill, shown as Rs. 1,99,264/- is in order.

Since a common site store has been maintained for Contracts I and II and since several materials are transferred from one contract to the other, the issues and theoretical requirements of cement and steel are considered for both the contracts together. Cement and steel consumed in rebuilding the top portions of the piles and other incidental works, is considered as a genuine use on the work. Cement has been issued in bags. Hence, the permissible variation has been taken as 3% for working out the penal rate recovery.

However, the recoveries have been corrected (at page 16 of respondents Folder), based on the discussions held in 9th to 13th Hearing.

The broad details are given below: Rs.(1) Gross value of work done in final bill 1,99,264.00 (2) Recoveries:(i) Cement (8.226 M at Rs. 780/- MT) 6,416.28(ii) torn steel 51.4455 MT at 2,43,851.674,740/- M.T.(iii) torn steel penal recovery 4.17 M.T. at Rs.4,740/- 19,765.80(iv) Structural steel(Penal rate recovery)0.354 MT x 2 x 4030 2,853.24-----2,72,886.99(3) Credit for excess recoveries made in 20th R/A Bill:(i) Excess recovery of mild steel 10.6797 MT at Rs. 4010/-per Tonn. 42,825.60(ii) -do- M.S. Flat (As per Respondent Calculations). 11,956.0054,781.60Net recovery: Rs. 2,18,105.39 2,18,105.39Net overpayment: Rs.(-) 18,841.30Say: Rs.18,842/-

And accordingly awarded to the Respondent Rs. 18,842/- against the petitioner.

19. The objection taken by the respondent is that the learned arbitrator has not taken into consideration the correct recoveries brought on record inasmuch as actual recovery including shortage worked out at Rs. 2,19,827/- as against the recovery of Rs. 19,765.80 allowed for the steel.

20. As already noticed, the arbitrator was not bound to give reasons for his award. However, where reasons are given, an award could be set aside by the Court on the ground of error apparent on the face of the award but an award would not be invalid merely because by a process of inference and arguments it might be demonstrated that the arbitrator had committed some mistake in arriving at his conclusions.

21. The arbitrator being a retired Director General of Works, CPWD is highly experienced person in the line. He has considered the material placed before him and heard the oral submissions made by the parties during several hearings held by him before he made his award. This Court is not sitting in appeal and cannot find any fault with the appraisal of evidence by the arbitrator who is the sole judge of the quality and quantity of the evidence. The arbitrator has not traveled beyond his jurisdiction. It is not the case that the respondent was not heard. It thus cannot be said that the arbitrator has misconducted himself or the proceedings.

There is no error apparent on the face of the award and as such this part of the award could not be interfered with. Award on claim No.1 is thus upheld.

Claim No.3

22. Claim No.3 pertains to release of security deposit and in the claim petition, it was pleaded as under:-

'CLAIM NO. 3: (RELEASE OF SECURITY DEPOSIT)

As per Clause 3.2.4 of the Award Letter, '50% of the Security Deposit shall be released after 6 months of successful completion of the work and balance shall be refunded after preparation of the final bill by the Respondent or after the defect liability period of 12 months, whichever is later.' In spite of repeated approaches, the Respondent have not even refunded 50% of the Security Deposit which was due as back as April, 1987 in spite of the fact that the project has been successfully completed and the generating units have been commissioned and are under operation. The agreement has also been signed and unconditional time extension for completion of the project has also been received by the Claimant. In the meantime, full amount of Security Deposit has become due for payment. The respondent for reasons best known to them, have been refusing to pay this long outstanding dues.'

The respondent has disputed this claim as under:-

'CLAIM NO: 03:- RELEASE OF SECURITY DEPOSIT;-

50% of the Security Deposit was not released as the Contractor had not ensured successful completion of the work in as much as the recoveries has to be done on account of sub-standard works and also on account of excess consumption of steel and cement. As the final bill was coming in negative the recoveries had to be adjusted to some extent with the Security Deposit only.

Similar is the position with respect to refund of the balance 50% that is to be released after the defect liability period. More- over, the claimant had also not attended to the various require- ments of the contract such as:

01. Submission of performance bank guarantees by the claimant as provided in the letter of award.

02. Proof of selling 90% of the empty cement bags to the autho- rised cement bags dealer as stipulated in the contract.

03. Non-submission of Royalty clearance certificate by the Claimant.

In view of the above reasons, the entire amount of security deposit has to be adjusted against the recoveries due from the claimant. x x x x x x x x

23. This claim was considered/discussed before the learned arbitrator during 2nd, 3rd, 4th and 9th hearings held on 13.11.1991, 14.11.1991, 26.12.1991 and 15.12.1992. The learned arbitrator has held as under in his award:-

(i) The work was completed within the stipulated period of 31.10.1986 and there is no breach of contract on the part of the petitioner;

(2). The claimant had submitted:

(a) Royalty Clearance Certificate; and

(b) Proof of sale of empty cement bags to the authorised bag collecting agent, M/s. Satyanarayan Ashoka Kumar (page 21 of Claimant Folder Vol. II).

And awarded refund of security deposit of Rs. 7,17,150/- including Rs. 20,000/- earnest money against the respondent.

24. The objection of the respondent is that only photocopy of the royalty clearance certificate dated 3rd February 1990, and not original certificate, was filed during proceedings which could not be looked into. Proof in original of sale of empty cement bags also was not produced. As such these two documents were not duly proved and this claim has been allowed without any basis or proof and the award suffers from infirmity and error apparent on the face of the award.

25. It is contended on behalf of the respondent that royalty clearance certificate was required to be submitted/proved by the petitioner under the agreement and the copy of the certificate without proper proof could not be used in proof of this requirement. Learned counsel for the petitioner has contended that this is not a case of the finding based on no evidence. The learned Arbitrator has accepted this evidence led before him and the evidence cannot be reappraised by this Court.

Clause 3.2.2.3 of the contract which provided for furnishing of proof of payment of royalty reads as under :-

'3.2.2.3 - The sub-contractor is further required to submit the proof of royalties and taxes from time to time failing which the estimated amount on this account can be retained or recovered from his account bills.'

26. Petitioner had produced before the learned Arbitrator copy of letter No. 412305/1562 dated 27-8-88 (Page 175 Folder 3) written by the respondent to the Mining Officer, Office of the District Collector, Bilaspur (M.P.) (copy of it is endorsed to the petitioner) for issuance of royalty clearance in respect of stone, sand and bricks used by the petitioner in this work. Correctness of this letter does not appear to have been disputed before the learned Arbitrator nor is disputed here. The petitioner had also placed before the learned Arbitrator a photostat copy of reply dated 29.1.1990/3.2.1990 addressed to the respondent (Ex.C-3/4) - (page 174 - folder 3) issued from the Office of the Mining Department to the effect that royalty had been paid by the petitioner for stone, sand and bricks used in this work. Quantities of each item is also mentioned. This certificate has been noticed by the learned arbitrator in the proceeding held on 13.11.1991 and 14.11.1991. Respondent had taken time to search this certificate in their records. No evidence was led by the respondent that they had not received the reply (Ex C3/4)

from the Mining Officer. Had it not been received one expected that the respondent would have pursued the matter further with the Mining Department, which in this case is not shown to have been done. Provisions of Evidence Act are not strictly applicable to proceedings before an Arbitrator. The learned Arbitrator has accepted these documents in evidence. This Court cannot question the correctness of the award on the quality and quantity of the evidence accepted by the Arbitrator. In the circumstances it cannot be said that there was no evidence before the Arbitrator in this respect. It is also not the case of the respondent that any demand on account of royalty was made on the respondent or was outstanding against the petitioner. The award thus cannot be challenged on this aspect.

Regarding sale of empty cement bags

27. Clause 35.1(d) of the Special Conditions of Contract provided as under:-

'(d) The sub-contractor shall have to return at least 90% of the empty cement jute bags in good and acceptable condition to the bag collecting agency and furnish proof of the same. In case the percentage of serviceable empty jute bags returned is less than 90% the Engineer-in-charge shall effect recovery at the rate of rupees two per bag falling short of aforesaid limit from the sub-contractor's bills or any other dues under the contract.'

28. The petitioner's stand is that proof of sale of empty bags was furnished as is also noticed in the proceedings of the hearing held before the arbitrator on 13.11.1991. The petitioner had relied on their letter Ex.C- 3/6 (available at pages 179-181 in Folder No. 3). This letter shows that the petitioner had furnished Xerox copies of 12 receipts of sales of 1,20,500 empty bags made to five persons. A certificate dated 18.1.1992 issued by M/s . Satyanarayan Ashok Kumar of Korba having purchased 73750 bags from the petitioner is also available in the record of the learned arbitrator (page 21 of Folder 4). Due to long time gap, original documents were stated to be not available. There was no denial nor any evidence was led by the respondent that they had not received the letter dated 18.1.1992 and the receipts of sale of empty bags annexed thereto. The work was completed on 31.10.1986 and the petitioner had submitted the 21st and final bill on

10.6.1988. The respondent had not pointed out during arguments either before the arbitrator or here as to what steps they had taken with the petitioner in this respect if such proof had not been furnished. The learned arbitrator accepted the material placed on record before him.

29. This also is a matter of appraisal of evidence and of its quality and sufficiency of which the arbitrator was the sole judge. It is also not the case of the award being based on no evidence in this respect. There is no error on the face of the award in this regard also.

No interference is thus called for against award on claim No.3.

Claim No. 4 (d) :

Claim No.4(d) submitted by the petitioner reads as under:-

'4(d). Payment towards extra lead for transporting excavated earth to a distance of 7 KM from the site:

The amount pertains to transportation of 10.636.10 Me of excavated earth to a distance of 7 KM from site at the respondent's demarcated place at Jeminipally. Since the rate of transportation of earth beyond 5 KM was not stipulated in S.O.R., the Claimant submitted a rate analysis @ Rs.5/- Per KM vide letter No. BCPP/834 dated 10-1-86 (Annexure A-11). The Claimant's contention is that there is no scope for resorting to radial measurements of distances beyond 2 KM.'

The respondent in reply to this had stated as under:-

'CLAIM NO: 04(d) : Payment TOWARDS EXTRA LEAD FOR TRANSPORTING EXCAVATED EARTH TO A DISTANCE OF 7 KMS. FORM THE SITE:

The item No.8(ii) of schedule of items provides for the carriage of excavated earth up to a lead of 5 Kms. Further clause No. 3.5.2. for measurement for carriage of earth (Page No. T8-7) stipulates as below:-

'All distance for the purpose of payment of leads shall be measured along the radial distance irrespective of the route actually taken and the decision of the

Engineer-in -charge in this regard shall be final'.

The claimant's claim that the excavated earth has been transport- ed to distance of 7 Kms. is completely incorrect and baseless. Actually no earth has been transported beyond the lead of 5 kms. measured radially as provided in the specification. The claimant's contention that distance beyond 2 kms. is also incor- rect. The mode of measurements for measuring distance radially up to 2 Kms. cannot change for the lead beyond 2 kms. cannot change for the lead beyond 2 kms. The mode of the measuring distance for the purchase of payment of lead within 2 kms. or beyond remains same for any further lead provided in the item 8 (ii) of the schedule of quantities.

In view of above no further lead is payable to the claimant and the learned arbitrator is requested to reject the claim.'

30. Relevant clauses of the contract are clause 39 of Special Conditions of Contract (Folder 6, page 108) and clause 3.5.2 of the Technical Specifications for Excavation (page 121 of Folder 6). These clauses read as under;-

'39.0 DISTANCE FOR LEAD

Distance for purpose of payment of lead shall be measured along the radial distance irrespective of the route.

3.5.2 Measurement for Carriage

(i) The disposal and lead payable shall be intimated by the Engineer-in -Charge. Payment for carriage shall be made per cubic metre of excavated material to be carried to any location.

(a) from the initial lead of 50 metres up to a distance of 500 metres.

(b) 500 metres to 1 Kilometer.

(c) 1 Kilometer to 2 Kilometers. x x x x x x x x

31. In Clause 8 of Schedule of 'Items of Works and rates for piling and pile caps'(Annexure `A' to the Letter of Award dated 17.11.1984, different rates have been given for leads- (a) up to 500 meters.; (b) 500 mtrs. to 1 km.; (c) 1 km. to 2 kms.; and (d) 2 kms. up to 5 kms. There is no provision in case of lead exceeding 5 kms.

This claim was considered/discussed in the 5th hearing held on 27.12.1991 by the Arbitrator. Both the parties had repeated their contentions as pleaded in their claim and counter claim. Both the parties had filed site plans of the area indicating the place of excavation (at BCPP Plant) and the place of dumping of earth at Jamana Palli. The plan filed by the petitioner is available at page 24 of Folder No.2 whereas the plan filed by the respondent is available at page 168 of respondent's folder No. 5. The learned arbitrator has given reasons as under:-

'4(d).3 AWARD

..... A study of these plans (page 168 of Respondent Folder and Page 24 of Claimant Folder Volume-II), indicate that the Trucks, could not travel by the radial distance route, due to several obstructions enroute and the Trucks had to travel along the specified alignment of the roads, and the distance measured more than 7 Kms. The Claimant had submitted the basis for extra rate payable at Rs. 5/- per every additional 1 km. lead in their letter dated 10.01.1986 at Annexure 11 (page-75 of Claimant Folder Volume-1). Para 3.5.2 of Technical Specifications specifies the method of payment of lead up to 2 kms. Only and does not indicate the method of payment for a route of 7 kms. travelled by the Trucks. Keeping the above factors in view, the claim of the Claimant is justified for payment of extra lead of 2 Kms. at Rs.5/- per Km./Cum. and for a quantity of 10, 518.05 Cum. (as per the final bill), and the amount would work out to Rs. 1,05,180.50 (10,518.05 x 25/-) or say Rs. 1,05,180/-.

32. The objection of the respondent now is that this award is without jurisdiction and is invalid as the same is against the agreement, inasmuch as (1) the lead was to be measured along the radial distance irrespective of the route actually taken and in this way, the lead thus comes within 5 kms. and so nothing was payable; (2) the learned arbitrator has wrongly mentioned that there is no rate for payment

beyond 2 kms. He has overlooked the contract documents; (3) this claim falls under the excepted matters under clause 3.5.2 of the Technical Specifications of the Agreement and this claim was rejected by the Engineer-in-Charge vide his letter dated 27.6.1987; the arbitrator has acted without jurisdiction and thereby has misconducted himself; the award is thus bad on the face of the award.

The respondent had not taken specific plea either before the arbitrator or in objections filed against award that it was an excepted matter. The agreement did not provide for payment in case lead was more than 5 kms. In his case, it is found/held that the lead was more than 5 kms.

33. Petitioner has referred to respondent's letter No.7128202/Simplex/3581 dated 3.11.1987 (placed on record before the arbitrator - available at pages 46-50 of Folder 5) where it is admitted as under at page 49:-

(iii) Claim of M/s. Simplex towards extra lead for disposal beyond 5 kms. and up to 7 kms.

Strictly as per the contract, the distance has to be measured only radially. Payments had already been released according to this. However, as a special concession, it was decided subsequently that the measurements of lead radially will be restricted to 2 kms. and the rest shall be measured as per the actual route taken. The payment shall be released according to this decision.'

34. It is also admitted at the end at page 50 that they had released payment to the petitioner for similar items of claims on contract No. 1. The arbitrator has also awarded the amount in respect of lead beyond 5 kms. distance. This ground has been taken at the time of argument which obviously is otherwise an afterthought and not bona fide. The arbitrator has thus not acted beyond his jurisdiction. There is no error in this respect also. The objection thus has no merit.

Claim No. 7

35. This claim relates to award of interest. Interest has been awarded for pre-reference period, pendente lite and post award period. The amounts due/claimed were certain and payable on certain date(s). The arbitrator is competent to award

interest for all these periods as held in State of Orissa v. R.N. Agarwalla (1977) 2 SCC 469. There is no error apparent on the face of the award in this respect also. This also calls for no inter-ference.

36. The objections of the respondent thus have no merit and objection petition being I.A. 11011/95 is dismissed.

S.No. 4029/92

In the result, the award dated 15.9.1992 is made rule of the court. Petitioner is also awarded further interest from today till realisation on the amount of Rs. 2108468/- @ 15% p.a. Petitioner will also get costs of these proceedings.

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