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IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No.229 of 2024
(old no. AP No.464 of 2021)
IA NO: GA 1 of 2021

Haldia Development Authority
Vs
M/s. Konarak Enterprise

With

AP-COM No.255 of 2024
(old no. AP No.95 of 2022)

M/s. Konarak Enterprise
Vs
Haldia Development Authority

For the petitioner in AP-COM No.229 of 2024 and For the respondent in AP-COM No.255 of 2024	:	Mr. Swarajit Dey, Adv. Ms. Debarati Das, Adv.
For the respondent in AP-COM No.229 of 2024 and For the petitioner in AP-COM No.255 of 2024	:	Mr. Subhabrata Dutta, Adv. Ms. Munmun Tiwary, Adv.
Hearing concluded on	:	13.12.2024
Judgment on	:	17.01.2025

Sabyasachi Bhattacharyya, J:-

1. Both the above applications under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"), having arisen out of

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the self-same award, as subsequently corrected under Section 33 of the 1996 Act, are taken up together for analogous hearing.

2. The genesis of the case is a work order awarded to the contractor, M/s. Konarak Enterprise (hereinafter referred to as the 'claimant') by the Haldia Development Authority (hereinafter referred to as the 'respondent'), on the basis of a tender in which the claimant came out successful, for construction of a road from Gholpukur to Tekhali Bridge via Amdabad High School, Haldia and maintenance of the said road.

3. Disputes having arisen between the parties arising out of the said contract, the claimant referred the matter to arbitration, seeking refund of security deposit and earnest money which was deposited at the inception by it, whereas the respondent filed a counter claim before the Arbitral Tribunal for recovering the risk and cost expenses, which was the balance amount paid to the subsequent contractor for completion of the work left unfinished by the claimant.

4. The Tribunal directed the earnest money and security deposit to the tune of Rs.9,06,091.44p to be refunded to the claimant. The risk and cost claim of the respondent was partially allowed, to the tune of Rs.18,00,163/-.

5. Learned counsel appearing for the respondent argues that the refund of security deposit and earnest money as directed by the Tribunal was not permissible, since the work was not completed by the claimant. The completion certificates issued to the claimant at various stages of the work, it is argued, were restricted to the partial work completed

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upto each such stage and did not pertain to the completion of the entire work.

6. It is further argued that in view of the three additional years of maintenance of the construction of road having not been completed, the claim of refund was premature.

7. Thirdly, it is contended that the claim of refund of security deposit was barred by limitation, since the work was completed on September 24, 2010 and the claim was made sometime in the year 2016.

8. Learned counsel also contends that the risk and cost expenses awarded by the Tribunal ought to have been enhanced. The value of the total work was calculated to be Rs.1,96,49,202/-. The work actually done by the claimant and paid for was subsequently corrected under Section 33, on the application of the claimant, and increased from the original awarded amount of Rs.1,41,39,493/- to Rs.1,74,05,144/-. As a logical corollary thereto, the work left unfinished should have been decreased to Rs.22,44,058/-, in view of the same being the difference between the total contract value and the work actually done. However, such prayer of the respondent was refused by the Arbitral Tribunal on the ground that no independent application under Section 33 of the 1996 Act had been filed by the respondent, overlooking that no further application by the respondent was necessary in that regard, since the enhancement of the value of work done would automatically entail a decrease of the work left unfinished. Instead of decreasing the said amount, which would require mere mathematical calculation, to Rs.22,44,058/-, which is

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the difference between the total contract value and the enhanced value of work done, the Tribunal retained the value of the unfinished work at Rs.55,09,759/-, thereby committing a patent error of law apparent on the face of the corrected award.

9. In support of his contentions, learned counsel cites *Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar*, reported at *(2022) 4 SCC 463*, for the proposition that if the Arbitral Tribunal passes an award contrary to the specific terms of the contract between the parties, the same is tainted by patent illegality and can be set aside under Section 34 of the 1996 Act.

10. Learned counsel for the respondent next relies on *Associate Builders v. Delhi Development Authority*, reported at *(2015) 3 SCC 49*, for the proposition that perverse and patently illegal judgments, overlooking vital evidence and/or contrary to the materials on record, can be set aside under Section 34 of the 1996 Act.

11. Learned counsel next places reliance on *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*, reported at *2024 SCC OnLine SC 522* for the self-same proposition.

12. The respondent next cites *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*, reported at *(2014) 9 SCC 263* and *Madhya Pradesh Power Generation Company Limited and another v. Ansaldo Energia SPA and another*, reported at *(2018) 16 SCC 661*, in both of which cases the Supreme Court had modified the award. Accordingly, it is submitted that it is well within the powers of this Court under Section 34 to modify the award. It is further contended

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that the parts of the award which are impugned herein by the respondent are segregable from the rest of the award, and thus may be interfered with by this court.

13. Learned counsel appearing for the claimant argues that the risk and cost claim made by the respondent in its counter claim ought not to have been granted. It is contended that the respondent/employer did not impose any penal measure on the claimant for non-completion of the work. Furthermore, the Tribunal itself directed security deposit to be refunded to the claimant, thus accepting the argument that the work was duly completed by the claimant.

14. It is contended that the probative value of the measurement books override that of the letters issued by parties. Hence, proceeding on such premise, the inevitable conclusion is that the work was duly completed by the claimant.

15. Moreover, it is submitted that the work awarded to the subsequent contractor on March 3, 2016 was six years after completion of the contractual work done by the claimant in the year 2010. That apart, the said work awarded to the subsequent contractor was merely in the nature of repair, as opposed to constructional work covered by the contract with the claimant. Hence, it is argued that the work awarded to the second contractor was different from that awarded to the claimant and an entirely new work. As such, the respondent's claim that the same constituted the unfinished work left by the claimant is not tenable and, accordingly, the respondent is not entitled to any risk and cost expenses on such score.

16. Learned counsel for the claimant also controverts the argument of the respondent on limitation regarding the claim of refund of security deposit. It is submitted that since the final bill was prepared and passed on May 18, 2016, whereas the demand for refund of security deposit with interest was raised on November 11, 2016, the claim was well within the limitation period as stipulated in Article 137 of the Limitation Act.

17. It is further argued on behalf of the claimant that none of the measures as contemplated under Section 3 of the Conditions of Contract were taken by the respondent, which might have rendered the claimant liable to pay compensation. Hence, the respondent was not entitled to compensation on account of risk and cost principle as envisaged under Section 3(c) of the Conditions of Contract.

18. It is argued that it is a well-settled proposition of law that an award cannot be modified in exercise of jurisdiction under Section 34 of the 1996 Act.

19. Lastly, it is argued that the counter claim component of the award is severable and, as such, can be set aside.

20. Upon hearing learned counsel for the parties, the following **issues** fall for consideration:

(i) Whether the claimant is entitled to refund of security deposit;

(ii) Whether compensation can be awarded to the respondent on the risk and cost principle;

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(iii) Whether the Arbitral Tribunal could enhance the amount of risk and cost liability component payable to the respondent by modifying the same even in the absence of any independent application to such effect being filed by the respondent for correction of the award under Section 33 of the 1996 Act.

21. The above issues are decided as follows:

(i) <u>Whether the claimant is entitled to refund of security deposit</u>

22. The respondent has argued that the claim for refund of security deposit is barred by limitation. However, such contention is contradictory with the arguments of the respondent itself. On the one hand, the limitation ground is taken on the premise that the work was completed in the year 2010 but the claim was made only in 2016 and on the other, the respondent argues that the claim for refund of security deposit is premature, as the three years maintenance period after the completion of the work has not elapsed after the final bill was raised in the year 2016.

23. Even apart from such inherent contradiction in the limitation argument raised by the respondent, the claim for refund of security deposit cannot be held to be barred by limitation, since the final bill was admittedly prepared and passed only on May 18, 2016 whereas the claim for refund of security deposit was made on November 11, 2016, that is, well within the limitation period for making such a

money claim. Thus, the objection as to limitation taken by the respondent is turned down.

24. The next objection taken by the respondentto the claim of refund of security deposit is premised on the ground that the claimant did not complete the work awarded under the concerned contract and as such, Clause 3(a) of the Conditions of Contract could have been invoked, thereby forfeiting the security deposit.

25. Such argument, however, cannot be accepted for several reasons.

26. First, there was no termination of the contract at any point of time. Clause 3(a) provides that the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Authority only upon the Authority rescinding the contract. There is nothing on record to indicate that the contract was ever rescinded. Hence, the forfeiture provision under Clause 3(a) could not have been invoked by the respondent at all.

27. On the contrary, instead of terminating the contract, the respondent went on passing bills till the final bill on May 18, 2016 and continued to make payments to the claimant from time to time at the different phases of the work, upon bills being raised for such work by the claimant.

28. Secondly, completion certificates were issued for different phases of the work and payments were also made accordingly by the respondent. Thus, the respondent is estopped from arguing that the entire work was not done, only in which case the security deposit could have been forfeited.

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29. The letters issued by the claimant, which are sought to be relied on by the respondent, were only restricted to a part of the work having not been completed. However, the measurementbooks, which aredocuments admitted by both parties, clearly indicate that a substantial portion of the work was actually completed and final bills raised, passed and paid for such components of the work.

30. Hence, Clause 3(a) of the Conditions of Contract could not be invoked at all. Thus, the principle laid down in *Indian Oil Corporation Limited (supra)* is not applicable to the present case, as the Tribunal did not act contrary to the contract between the parties in directing refund of security deposit.

31. The proposition enunciated in*Associate Builders (supra)* is also not applicable, as the impugned award, to the extent of granting refund of security deposit, is not perverse. The letters of the claimant, even if considered, would not make a difference since they only reflected that a part of the work was not completed. Thus, it cannot be said that vital evidence was overlooked by the Tribunal.

32. Insofar as the argument of the respondent that the claim for refund of security deposit is premature, we find from the materials on record that the work was completed in several phases, for which completion certificates were issued at different stages. Moreover, since the work was substantially completed, the claim for refund of security deposit was justified.

33. Another aspect of the matter ought also to be considered. Clause 3, in sub-clauses (a), (b) and (c), provides different alternative measures

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which could have been taken by the respondent in case of non-completion of the work by the claimant. Since the respondent has invoked Clause 3(c) by awarding the work to a second contractor, it cannot be said that it would be entitled to forfeit the security deposit as well. Such an approach would defeat the claim of the risk and cost expenses made by the respondent in its counter claim. The above view being one of the plausible ones, the Arbitral Tribunal cannot be faulted for directing refund of security deposit to the claimant while granting the risk and cost expenses to the respondent.

34. Accordingly, this Court comes to the conclusion that the claimant was entitled to refund of security deposit along with earnest money and the Tribunal was justified in granting the same.

35. This issue is, thus, decided in favour of the claimant.

(ii) Whether compensation can be awarded to the respondent on the risk and cost principle

36. The claim of the respondent on the principle of risk and cost has been sought to be resisted by the claimant on three grounds.

37. First, it is argued that no penal measure was imposed on the claimant to justify the risk and cost component.

38. However, Clause 3 of the Conditions of Contract makes it a pre-requisite for imposition of risk and cost composition merely that the "contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit". Thus, no imposition of penalty has been contemplated as a pre-requisite of such liability.

In the present case, security deposit of Rs.9,06,091.44p has been directed to be refunded. The claim of compensation on the risk and cost principle made by the respondent far exceeds the said amount. Hence, the contractor made himself liable to pay compensation amounting to the whole of security deposit and as such, the respondent-Authority acted well within its jurisdiction to invoke Clause 3(c) on the principle of risk and cost liability. Non-imposition of penal measure is, thus, a non-issue in the context.

39. The second ground on which the risk and cost claim has been resisted it that security deposit was directed to be refunded, indicating that the work was completed by the claimant.

40. However, the remedy of refund of security deposit under the contract is independent of the claim of risk and cost compensation. In any event, under Clause 3, any of the alternative measures under sub-clauses (a), (b) and (c) could be invoked. Even if security deposit was not forfeited under clause (a) but directed to be refunded, the same could not be sufficient ground to defeat the claim of risk and cost liability made by the respondent under clause (c).

41. The claimant thirdly argues that the work awarded to the second contractor was on March 3, 2016, that is, six years after completion of the claimant's work on 2010 and, thus, such work was a new project unconnected with the work awarded to the claimant.

42. Yet, such argument is mutually contradictory, since the respondent's argument of limitation for the claim of refund of security deposit is resisted by the claimant on the ground that the final bill was passed

on May 18, 2016. It is evident, thus, that the work was not completed at the juncture when the second contractor was awarded the balance work on March 3, 2016.

43. Furthermore, from both the measurement books and the letters written by the claimant itself, it is evident that the total work awarded to the claimant/contractor was not completed. Hence, the respondent was justified under Clause 3(c) of the Conditions of Contract to measure up the work of the contractor and to hand over the unexecuted portion of the work to a subsequent contractor. The materials on record sufficiently show that such measuring up was duly done by the respondent and, as such, the award of the work to the second contractor attracted the risk and cost principle under Clause 3(c) of the Conditions of the Contract.

44. The claimant argues that the work awarded to the second contractor pertains to repair work and is not constructional in nature. However, the tender on the basis of which the original work was awarded to the claimant was not restricted to construction of the road but also included subsequent maintenance work for three years and the work awarded to the subsequent contractor was primarily for repair of the road, which comes under the broader purview of 'maintenance'. That apart, it is evident from the nature of the work awarded to the subsequent contractor (including repair work) that the same also pertained to construction of the balance portion of the road contemplated by the contract between the claimant and the respondent. Hence, there is no occasion for this Court, under Section

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34 of the 1996 Act, to enter into a re-appreciation of evidence and interfere with the view of the Arbitrator that the respondent is entitled to the risk and cost claim. Since the ratio of the impugned award for grant of the risk and cost expenses was one of the plausible views on the facts of the case and clause 3 (c) of the Conditions of Contract permitted the respondent to claim the same, there is no scope for this Court to substitute its own views for that of the Arbitral Tribunalin the factual matrix of the case.

45. Hence, this issue is decided against the claimant and in favour of the respondent, by holding that the Tribunal was justified in awarding risk and cost compensation to the respondent.

(iii) Whether the Arbitral Tribunal could enhance the amount of risk and cost liability component payable to the respondent by modifying the same even in the absence of any independent application to such effect being filed by the respondent for correction of the award under Section 33 of the 1996 Act

46. The respondent has raised a vital question as to whether, in the absence of an independent application by the respondent under Section 33 of the 1996 Act, the Arbitrator had the power to enhance the risk and cost component payable by the claimant to the respondent.

47. The Arbitral Tribunal proceeded on the premise that it did not, since the respondent had not filed any such independent application under

Section 33 of the 1996 Act, and restricted its correction to the prayer made by the claimant in its application under the said provision.

48. However, such view of the Arbitral Tribunal is patently illegal, being in contravention of Section 33(3) of the 1996 Act. The said provision empowers the Arbitral Tribunal to correct any error of the type referred to in Clause (a) of sub-section (1) *on its own initiative* within 30 days from the date of arbitral award.

49. Clause (a) of sub-section (1) of Section 33 provides inter alia that the Arbitral Tribunal may correct any computation errors and the error pointed out by the respondent pertains to simple calculation.

50. Admittedly, in the present case, the Tribunal allowed the application of the claimant under Section 33 and altered the second component of the risk and cost claim. This Court is required to delve a bit more into the said aspect of the matter.

51. For considering the risk and cost counter claim, the Tribunal enumerated three components.

52. The first of such components was the total contract value, which was assessed at Rs.1,96,49,202/-, to which there is no demur from either side.

53. The second component was the work actually done by the claimant and paid for. In the initial award, the said amount was computed by the Tribunal to be Rs.1,41,39,493/-. Subsequently, on the application of the claimant, the second component was enhanced to Rs.1,74,05,144/-, to which the respondent did not have any objection.

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54. Notably, the third component, that is, the unfinished work of the claimant, for which he was obviously not paid, was retained by the Tribunal at Rs.55,09,759/-, as calculated in the original award.

55. However, such approach is perverse, since, even by a logical deduction on application of rudimentary arithmetic, the third component ought to have automatically decreased upon the second component being increased, since the third component was the difference between the first and the second.

56. If the first component, that is the total contract value, is taken to be of value 'A' and the second component, that is, work done by the claimant as 'B',then the third component, that is, the unfinished work of the claimant is of value 'C', which is equal to the figure: (A – B).

57. The value of 'A' was an agreed and fixed amount and remained the same as the original award even after correction. However, 'B' was increased from Rs.1,41,39,493/- to Rs.1,74,05,144/- after the original award was corrected under Section 33 at the behest of the claimant.

58. By basic mathematics, if figure C = (A – B), and 'B' is increased, 'C' automatically comes down.

59. As per the original award, C = (1,96,49,202 – 1,41,39,493) = Rs.55,09,759.

60. However, after correction of the award, 'B' was changed to 1,74,05,144. Accordingly, C should have been equal to (1,96,49,202 – 1,74,05,144) = Rs. 22,44,058.

61. For arriving at such figure, no further correction on merits or reappreciation of any legal or factual facet of the matter was

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necessary. The said change was a logical and inevitable corollary of the correction effected to component 'B' by the Tribunal.

62. The Tribunal had proceeded to calculate the risk and cost compensation payable to the respondent by deducting the figure 'C' from the total amount paid to the subsequent contractor that is Rs.73,09,922/-.

63. Accordingly, the amount payable to the respondent on such count was calculated to be Rs.18,00,163/- = (73,09,922 – 55,09,759).

64. However, since the figure 'C' would have to be reduced upon the correction from Rs.55,09,759/- to Rs.22,44,058/-, the automatic effect of the correction would be that the amount payable under the head of "Risk and Cost Liability" by the claimant to the respondent would become Rs.(73,09,922 – 22,44,058) = Rs.**50,65,864/-**.

65. Accordingly, even if the Tribunal merely allowed the Section 33 application of the claimant, as a logical result thereof, the risk and cost amount payable to the respondent would increase to Rs.50,65,864/- even without any further application by the respondent being necessitated.

66. Even otherwise, as discussed above, Section 33(3) empowers the Tribunal to *suo moto* correct any computation error as envisaged under Section 33(1)(a). Having not done so within the statutory 30 days, it was incumbent upon the Arbitral Tribunal to *suo moto* correct such error, at least as a resultant effect of the correction done by it on the application of the claimant under Section 33 of the 1996 Act.

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67. Thus, the refusal of the Arbitral Tribunal to correct the award insofar as the risk and cost element of the award was concerned and to enhance the risk and cost compensation payable to the respondent to Rs.50,65,864/- is patently illegal and perverse, being contrary to its own corrected award and as such, amenable to being set aside under Section 34 of the 1996 Act. The proposition laid down in *Delhi Metro Rail Corporation Ltd. (supra)* is apt in the context.

68. In *Oil and Natural Gas Corporation Limited (supra)* and *Madhya Pradesh Power Generation Company Limited (supra)* the Supreme Court had modified the respective awards therein. In the present case as well, the refusal to enhance the risk and cost counter claim can be segregated from the rest of the claims. Hence, by the own correction effected by the Tribunal itself, the risk and cost awarded to the respondent ought to have been enhanced to Rs.50,65,864/-. Since such patent illegality hits at the root of the counter claim, the said refusal can very well be set aside under Section 34 of the 1996 Act by this Court, which would not tantamount to or be restricted merely to a modification of the award.

69. Hence, this issue is decided in favour of the respondent and against the claimant.

70. In fine, on the basis of the considerations above, this Court is of the opinion that the component of the award of the claim for refund of security deposit and earnest money to the claimant does not call for any interference under Section 34 of the 1996 Act.

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71. However, insofar as the risk and cost counter claim is concerned, although the Tribunal was justified in granting the same, the quantum of such counter claim amount ought to have been Rs.50,65,864/-.

72. Accordingly, AP-COM No.255 of 2024 (old no. AP No.95 of 2022), preferred by the claimant M/s Konarak Enterprise, is dismissed on contest.

73. AP-COM No.229 of 2024 (old no. AP No.464 of 2021) is allowed on contest in part, thereby granting the respondent its counter claim on account of risk and cost principle to the tune of Rs.50,65,864/-. Hence, the balance amount, after deducting the amount of claim of security deposit and earnest money awarded to the claimant from the counter claim awarded to the respondent to the tune of Rs.50,65,864/-, comes to Rs.41,59,772.56p, which shall be paid by the claimant to the respondent/Haldia Development Authority within February 28, 2025.

74. IA No. GA 1 of 2021 is also disposed of accordingly.

75. There will be no order as to costs.

76. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)