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BHARAT COKING COAL LTD.

v.

M/S L.K. AHUJA AND CO.

FEBRUARY 21, 2001

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[S. RAJENDRA BABU AND S.N. PHUKAN, JJ.]

Arbitration Act—Section 30—Award—Setting aside of—Non speaking award, speaking award—Scope of challenge—Claim of Parties not referred by Arbitrator—Award not clear—Error apparent—Award set aside.

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Arbitrator erstwhile officer of employer—Had correspondence with contractor earlier—Cannot act as an arbitrator.

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Limitation Act, 1963—Section 5—Delay in filing objections—Application for condonation can be filed.

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The Appellant placed two work orders to the respondent on certain terms and conditions mentioned therein and two separate agreements were executed by the parties. The schedule dates for completion of the respective works were fixed as 24.3.1983 and 19.3.1983. The respondent sought for extension of time which was granted by the appellant. Disputes arose between the parties, the matter was referred to the sole arbitrator. The arbitrator made two awards in respect of the two contracts which were filed in the court of the Civil Judge in two Title (Arbitration) Suits. The arbitrator made the two awards after making elaborate reference to the pleadings on either side but not deciding any one of the claims except the claim relating to payment of material escalation in the two claims. Civil Judge held that the objections for Title (Arbitration) Suit No. 37/86 was filed in time. In Title (Arbitration) Suit No. 40/86, the objections in question were filed after a delay of five days beyond the period of limitation prescribed under Article 119 of the Schedule to the Limitation Act, 1963, and hence they were not considered. Decrees were passed in terms of awards. Appeals filed in the High Court by Appellant were dismissed.

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Disposing of the appeals, the Court

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HELD : 1. The arbitrator's awards are neither speaking awards nor non-speaking—partly speaking and partly non-speaking awards. The law is

well settled that if the award made by the arbitrator is a non-speaking one the difficulty of showing that there is an error apparent on the face of the award becomes insurmountable and ordinarily such award cannot be challenged at all unless it is shown that the arbitrator has wholly travelled outside the contract which give him the jurisdiction. The law is equally well settled that in cases of speaking awards the court can interfere if there is an error apparent on the face of the award itself; it could also be shown that the arbitrator has misconducted himself in arriving at certain conclusions which are either plainly contrary to law or to the terms of the contract or ignored the provisions of contract or the evidence on record and such other similar matters. [1159-H; 1160-A-B]

2. It is not clear from the pleadings whether the claim made by the respondent is in respect of escalation in the costs of material such as plants, tools, appliances, implements, ladders, cordage, tackle, scaffolding, and tempers, works, etc. in as much as the appellant has the obligation to supply the most essential building materials such as cement, steel and such other building material. It is also not clear either from the pleadings or from the award as to whether the escalation claim is in respect of the material provided by the respondent or in respect of escalation arising from delay in non-supply of materials which was due to be supplied by the appellant. So far as the plant and other equipment are concerned, they had already been provided for the purpose of the execution of the work and how the delay in non-supply of building materials such as cement, steel, etc. caused escalation so far as the building materials provided by the appellant is concerned is not clear. The arbitrator has not applied his mind to this aspect of the matter at all. Having lost sight of the importance of clause 17 and application of the same to the circumstances of the case will clearly disclose that there is an error apparent on the fact of the award. [1161-D-F]

3. The entire award in respect of both the agreements made by the arbitrator is set aside and the matter is remitted back. A new arbitrator be appointed in place of the old arbitrator because the arbitrator has dealt with the matter himself as an officer who had correspondence with the contractor at the time when he was an officer of the appellant. Therefore, it is fair neither to the appellant nor to the respondent to continue him as an arbitrator in the proceedings. [1161-H]

4. An application for condonation of delay is permissible to file objections under Section 30 of the Arbitration Act by resorting to Section 5 of the

- A** Limitation Act, Section 5 of the Limitation Act, 1963 provides that any application, other than those contemplated under Order XXI CPC could be admitted after the prescribed period if the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. It is clear that Section 5 of the Limitation Act is applicable within such period. It is clear that Section 5 of the Limitation Act is applicable to all applications other than those under Order XXI CPC. Hence scheme of an enactment cannot be availed of to defeat such a right conferred under the statute of limitation in clear terms. [1162-H; 1163-A]

Madan Lal v. Sunderlal & Anr., [1967] 3 SCR 147, referred to.

- C** The objections filed on 18.8.1990 are in the nature of an application under Section 30 of the Arbitration Act to set aside the award and is an application under Article 119 of the Schedule to the Limitation Act. Therefore, Section 5 necessarily would get attracted to such a situation.

- D** 5. In this case, the notice of filing of award was served upon the appellant on 13.7.1990 and the appellant filed objections on 18.8.1990 and those objections have shut out from the consideration on the ground that the same have been filed beyond the period of limitation prescribed under the relevant provisions of the Limitations Act. On the totality of the circumstances, the court is satisfied that there was a sufficient cause of delay in making the application and the time should be extended till 18.8.1990 when the application was made. The delay in filing such objections upto that date is condoned.

[1163-D-E]

- F** 6. There is a clear lapse on the part of the Advocate appearing in the case in neither making a proper application for enlargement of time in the civil court nor pursuing this aspect of the matter in the High Court. In this Court too even, at the time of arguments, no application was forthcoming. However, to meet the ends of justice, the court adopted this course, but this indulgence shown by this Court cannot be taken advantage of by the appellant without paying appropriate costs to the respondent which is quantified to be a sum of Rs. 40,000 which shall be paid before the new arbitrator commences the arbitration proceedings. [1163-F-G]

- H** [The court named Shri Justice Uday Sinha, former Judge, High Court of Patna, as the new arbitrator who is at liberty to fix his terms as he deems fit and proper to adjudicate the matter in dispute. The new arbitrator should consider the pleadings and evidence on record already placed by the parties and shall not permit either of the party to raise further or fresh pleas or

evidence. It would be appropriate for the arbitrator to make an award within a period of four months from the date of the receipt of this judgement and submit the same to this court after publishing the same to the parties.]

[1164-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal NOS. 5489-5490 of 1995.

From the Judgment and Order dated 28.9.94 of the Patna High Court in Appeal from original order Nos. 68-69 of 1993 (R)

M.L. Verma, Ajit Kumar Sinha, Rajendra Kumar Singh and Dhanjay Kumar Singh for the Appellant.

S.B. Upadhaya, Ms. Shweta Verma, Tathagat H. Vardan, Sujeet Kumar and Santosh Mishra for the Respondent.

The Judgment of the Court was delivered by

RAJENDRA BABU, J. Two works were assigned by the appellant for construction of 108 and 72 units of B Type quarters at Karmik Nagar, Dhanbad pursuant to a tender notice dated 4/13.7.1981. After certain negotiations between the parties, two work orders were issued by the appellant to the respondent on certain terms and conditions mentioned therein valuing at Rs.86,49,730 and Rs.57,64,368 for the said two works on 14.3.1982 and two separate agreements were executed by the parties. The schedule dates for completion of the respective works were fixed as 24.3.1983 and 19.3.1983. The respondent sought for extension of time which was granted by the appellant. Disputes having arisen between the parties, the matter was referred to the sole arbitrator, Shri M.P.Sharma, the then Additional Chief Engineer. The arbitrator made two awards in respect of the two contracts on 14.5.1989, which were filed in the court of the Civil Judge on 12.6.1990 in two Title [Arbitration] Suits Nos. 37/86 and 40/86. The learned Civil Judge held that the notice for Title [Arbitration] Suit No.37/86 had been served upon the appellant on 28.8.1990 and the objections filed on 14.9.1990 could be examined as they had been filed in time. So far as Title [Arbitration] Suit No.40/86 is concerned it appears that the service of notice on the respondent was made on 13.7.1990 of the filing of the award and the objections in question were filed on 18.8.1990 and thus apparently there being a delay of five days in filing the objections beyond the period of limitation prescribed under Article 119 of the Schedule to the Limitation Act, 1963 were not considered. On decrees being passed in terms of awards appeals filed in the High Court having met with failure, these appeals have been preferred by special leave.

A The parties filed elaborate pleadings before the arbitrator in respect of both the agreements.

The claim made in the first agreement is as follows:

B	1. Claim for payment of the final bill amount	Rs. 3,10,000.00
	2. Claim for payment of PLO escalation	Rs. 20,000.00
	3. Claim for compensation for making late payment of running account bill	Rs. 8,00,000.00
C	4. Claim for payment for labour escalation	Rs. 4,12,000.00
	5. Claim for refund of sales tax	Rs. 60,000.00
	6. Claim for payment of extra items	Rs. 10,31,350.00
	7. Claim for payment of material escalation	Rs. 40,00,000.00
D	8. Keep Back Amount	Rs. 8,000.00
	9. Claim for payment of compensation to loss arising out of turnover due to prolongation of work	Rs 10,00,000.00
E	10. Claim for payment on account of loss of reputation etc.	Rs. 2,00,000.00

Rs. 78,41,350.00

F	11. With interest @ 18 % per annum from 31.5.84 till date of actual payment of awarded amount or court decree whichever is earlier.	Rs. 20,000.00
G	12. Arbitration Cost	Rs. 20,000.00"

Claim made in the dispute arising out of second agreement is as follows :

	1. Claim for payment of the final bill amount	Rs. 2,00,000.00
H	2. Claim for payment of PLO escalation	Rs. 15,000.00

3. Claim for compensation for making late payment of running account bill	Rs. 5,00,000.00	A
4. Claim for payment for labour escalation	Rs. 3,00,000.00	
5. Claim for refund of sales tax	Rs. 40,000.00	B
6. Claim for payment of extra items	Rs. 6,54,000.00	
7. Payment of material escalation	Rs. 25,00,000.00	
8. Keep Back Amount	Rs. 28,000.00	
9. Claim for payment of compensation to loss arising out of turnover due to prolongation of work	Rs. 7,00,000.00	C
10. Claim for payment on account of loss of reputation etc.	Rs. 2,00,000.00	
	Rs. 51,27,000.00	D
11. With interest @ 18 % per annum from 30.4.84 till date of actual payment of awarded amount or court decree whichever is earlier.		E
12. Arbitration Cost	Rs 20,000.00"	

He passed two separate awards.

In addition to these pleadings, it appears that the arbitrator asked both the parties to file certain joint statements and in this regard stated as follows: F

".....Before going into the merits of the case the parties were advised to file joint statement signed by them, showing the quantities, rates and the payments made for various items and balance payment due to the claimant under various heads and other particulars on 26.4.89. The parties submitted the joint statements duly signed by them containing details of bricks and cement supply statements, bill statements with details of delay in payment of R/A bills alongwith relevant dates of measurements and other particulars, including payable amounts under various heads and measurements for extra items, rolling margin etc." G H

A The arbitrator noticed in the course of his award that the joint statements signed by both the parties is the backbone of the award. The arbitrator rather strangely made the two awards after making elaborate reference to the pleadings on either side but not deciding any one of the claims except the claim relating to payment of material escalation in the two claims. On that aspect of the matter, the arbitrator, after adverting to the pleadings, stated as follows:

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“.....Since the prices of building materials and labour cost sky rocketting and the value of rupee going down, the refusal to compensate increase in material cost on some ground or the other would lead to total financial disaster to the claimant. The payment of advances like mobilisation has been made against rebate of 1½% claimed by the O.P. and was meant for mobilising resources before commencing work. On the other hand very partly sum is payable against secured advance without hardly giving any financial assistance. The planning of procurement of material is linked with progress at site. Whereas during contract period the work hardly progressed 50% and the payment for work done was restricted to 16% how could the planned procurement availing secured advance could be made in such solution. The payment of material escalation for the increase in cost during the extended period of the contract would give some relief to disaster already caused financially to the claimant.

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On examination of the contract provision I find that the claimant had undertaken to complete the work at agreed rates within the stipulated period with the provision for extension of time to execute at the agreed rates till completion. This contention shall hold good provided the extended period is within a reasonable limit. In this case the original stipulated period is 12 months and actual completion is 26 months having extension element of 14 months which cannot be termed reasonable by any yardstick. The grant of extension of time is a poor consolation. It is not remedy for losses suffered on account of delay in supply of building materials committed to be supplied by the O.P.”

But after setting out the other claims of the respondent and the rebuttals to them by the appellant, the arbitrator concluded as follows:

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“NOW, THEREFORE, I, the said M.P. Sharma, Sole Arbitrator after hearing the parties at length examining and carefully considering the

evidence adduced the arguments advanced by them, the discussions made above, scrutinising the joint statement signed by the parties and written arguments filed by O.P. DO HEREBY MAKE AND PUBLISH MY AWARD AS FOLLOWS: A

1. The Opposite Party M/s Bharat Coking Coal Ltd., Dhanbad, shall pay the claimant i.e. L.K.Ahuja & Co. a lump sum amount of Rs.24,27,686.12 (Rupees Twenty four lacs twenty seven thousand six hundred eighty six and paise twelve only). B

I am dividing the period in three years for calculation and payments of interest.

(a). The aforesaid amount will carry interest @ 15% per annum for the following periods: C

I. From 1.1.85 to 3.10.88 when the claimant submitted the claim.

II. From 4.10.88 to 14.5.90 when the award is published.

III. From 14.5.90 till the date of payment or court decrees whichever is earlier. D

2. A sum of Rs. 15,000 (Rupees fifteen thousand) only towards the cost of arbitration proceedings along with the interest @ 15% p.a. w.e.f. 14.6.90 till its date of payment or the date of court decree whichever is earlier. E

It may be made clear that the power to order award of interest on all above amounts vests in the Hon'ble Court from the date of decree till the decretal amount is paid to the claimant as provided under S.29 of the Arbitration Act which empowers the Hon'ble Court deems reasonable from the date of decree till payment of decretal amount to the claimant. F

He similarly awarded in respect of second agreement a lump sum of Rs. 16,74,197.29 with interest at certain rates and costs of the arbitration. G

We cannot but describe the arbitrator's awards as hybrid which are neither speaking awards nor non-speaking - partly speaking and partly non-speaking awards. The law is well settled that if the award made by the arbitrator is a non-speaking one the difficulty of showing that there is an error apparent on the face of the award becomes insurmountable and ordinarily such award cannot be challenged at all unless it is shown that the arbitrator H

A has wholly travelled outside the contract which gives him the jurisdiction. The law is equally well settled that in cases of speaking awards the court can interfere if there is an error apparent on the face of the award itself; it could also be shown that the arbitrator has misconducted himself in arriving at certain conclusions which are either plainly contrary to law or to the terms of the contract or ignored the provisions of contract or the evidence on record and such other similar matters. When a lumpsum award is made, it is all the more difficult to find out as to what went into the mental process of the arbitrator in fixing the same particularly when a part of the award is a speaking award and determines the portion of the claim in a particular manner and in respect of other claims merely refers to the pleadings but not decided the matter but gives the award. The position of the appellant before the court is unenviable and bristles with too many complexities to get over the awards.

Realising these difficulties, Shri M.L.Verma, learned senior Advocate and Shri Ajit Kumar Sinha, learned Advocate for the appellant, very cautiously treaded their path to put forth before us the difficulties in upholding the award. Shri S.B. Upadhyay, learned counsel for the respondent, with equal astuteness and competence contended as to the manner in which the award made by the arbitrator could be maintained though it is bristles with many difficulties.

We have adverted in detail to the consideration of the claim on payment of material escalation earlier. The terms of the contract in this regard indicate as follows:

“Clause 17: The contractor shall supply at his own cost all materials (except such special materials, if any, as may be in accordance with the contract be supplied from the Engineer-in-Chief’s stores), plants, tools, appliances, implements, ladders, cordage, tackle, scaffolding, and tempers, works requisite or proper for the proper execution of the work whether original, altered or substituted and whether included in the specification or other documents forming part of the contract or referred to in these conditions or not or which may be necessary for the purpose of satisfying or complying with the requirements of the Engineer-in- Chief as to any matter as to which under these conditions he is entitled to be satisfied, which he is entitled to require together with carriage therefore, to and from the work. The contractor shall also supply without charge the requisite number of persons with the means and materials necessary for the purpose of setting out works, and counting, weighing and assisting in the measurement or examination

at any time and from time to time of the work or materials. Failing his so doing, the same may be provided by the Engineer-in-Chief at the expense of the contractor and the expenses may be deducted from any money due to the contractor under the contract from his security deposit or the proceeds of sale thereof, or of a sufficient portion thereof. The contractor shall also provide all necessary fencing and lights required to protect the public from accident, and shall be bound to bear the expenses of defence of every suit, action or other proceeding at law that may be brought by any person for injury sustained owing to neglect of the above precautions, and to pay any damages and costs which may be awarded in any such suit, action or proceeding to any such person or which may with the consent of the contractor be paid to compromise any claim by any such person.”

It is not clear from the pleadings whether the claim made by the respondent is in respect of escalation in the costs of material such as plant, tools, appliances, implements, ladders, cordage, tackle, scaffolding, and tempers, works, etc. inasmuch as the appellant has the obligation to supply the most essential building materials such as cement, steel and such other building material. It is also not clear either from the pleadings or from the award as to whether the escalation claim is in respect of the materials provided by the respondent or in respect of escalation arising from delay in non-supply of materials which was due to be supplied by the appellant. So far as the plant and other equipments are concerned, they had already been provided for the purpose of the execution of the work and how the delay in non-supply of building materials such as cement, steel, etc. caused escalation so far as the building materials provided by the appellant is concerned is not clear. The arbitrator has not applied his mind to this aspect of the matter at all. Having lost sight of the importance of clause 17 and application of the same to the circumstances of the case will clearly disclose that there is an error apparent on the face of the award. The claim under this head is Rs. 40 lacs with reference to the first agreement and Rs. 25 lacs with reference to the second agreement which is the major chunk being nearly half the claim made by the respondent. In what manner this aspect has gone into in fixing the lumpsum by the arbitrator is not discernible. Therefore, we have no option but to set aside the entire award in respect of both the agreements made by the arbitrator and remit the matter. We propose that a new arbitrator be appointed in place of the old arbitrator because the arbitrator has dealt with the matter himself as an officer who had correspondence with the contractor at the time when he was an officer of the appellant. Therefore, it is fair neither to the appellant

A nor to the respondent to continue him as an arbitrator in the proceedings.

B In so far as the other appeal is concerned, certain additional contentions have been addressed by the respondent and they are based on Article 119 of the Schedule to the Limitation Act which provides that an application for setting aside an award or getting an award remitted for reconsideration, the period of limitation is fixed as 30 days from the date of the service of the notice of the making of the award. As stated earlier, the award had been filed in the court and the notice of which had been served upon the appellant in Title [Arbitration] Suit No.40/86 and the objection had been filed. Service of notice has been made on the appellant on 13.7.1990 and the objection in question had been filed on 18.8.1990, while it should have been filed on or before 12th August, 1990. The learned counsel for the respondent in this regard relied on the following observations made by this Court in *Madan Lal v. Sunderlal & Anr.*, [1967] 3 SCR 147:

D “It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.” [p.151]

E It is obvious from these observations that even an objection setting out the grounds specified in Section 30 of the Arbitration Act would amount to an application as contemplated under Article 119 of the Schedule to the Limitation Act and, therefore, such objection will have to be filed within the period of limitation. Courts have taken the view that inasmuch as agreement of reference to arbitration is an instrument of solemn character, which is binding on the parties, and so is the award; if, therefore, a party desires to avoid the effect either of the agreement or the award, he must strictly comply with the provisions of the law and an objection to the award must be filed within the time which cannot be extended. In certain circumstances, courts have taken the view that by granting time to file objection the Court had impliedly extended the time even without a formal application under Section 5 of the Limitation Act. An application for condonation of delay is permissible to file objections under Section 30 of the Arbitration Act by resorting to Section 5 of the Limitation Act. Section 5 of the Limitation Act, 1963 provides that any application, other than those contemplated under Order XXI CPC could be admitted after the prescribed period if the applicant satisfies the

court that he had sufficient cause for not preferring the appeal or making the application within such period. It is clear that Section 5 of the Limitation Act is applicable to all applications other than those under Order XXI C.P.C. Hence scheme of an enactment cannot be availed of to defeat such a right conferred under the statute of limitation in clear terms. A

In the instant case, it is set out in the course of the order made by the Civil Judge that the award was filed in the sealed cover and presented to the court and unless the same was made available to the parties, they could not file the objections. The object of filing the objections is to question the validity of the award on the grounds mentioned in Section 30 of the Arbitration Act. If such a course is not possible for want of copy in respect of award, certainly the circumstances, as arising in the present case, should be taken note of. The objections filed on 18.8.1990 are in the nature of an application under Section 30 of the Arbitration Act to set aside the award and is an application under Article 119 of the Schedule to the Limitation Act. Therefore, Section 5 necessarily would get attracted to such a situation. In this case, the notice of filing of award was served upon the appellant on 13.7.1990 and the appellant filed objections on 18.8.1990 and those objections have been shut out from the consideration on the ground that the same have been filed beyond the period of limitation prescribed under the relevant provisions of the Limitation Act. On the totality of the circumstances, we are satisfied that there was a sufficient cause for delay in making the application and the time should be extended till 18.8.1990 when the application was made. We condone the delay in filing such objections upto that date. B
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There is a clear lapse on the part of the Advocate appearing in the case in neither making a proper application for enlargement of time in the civil court nor pursuing this aspect of the matter in the High Court. In this Court too even, at the time of arguments, no application was forthcoming. However, to meet the ends of justice, we have adopted this course, but this indulgence shown by this Court cannot be taken advantage of by the appellant without paying appropriate costs to the respondent which we quantify to be a sum of Rs. 40,000 which shall be paid before the new arbitrator commences the arbitration proceedings. This cost shall not be the costs in the cause and are payable by way of penalty. F
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So far as the main matter is concerned, there is no difference between the award passed in Title [Arbitration] Suit No.37/86 and the proceedings in Title [Arbitration] Suit No. 40/86 and the same also deserves to be set aside H

A for the very reasons stated earlier and shall be governed by the same terms as to remittal of the award for fresh consideration by a new arbitrator.

B As suggested by the learned counsel on both sides, we name Shri Justice Uday Sinha, former Judge, High Court of Patna, as the new arbitrator who is at liberty to fix his terms as he deems fit and proper to adjudicate the matter in dispute. The new arbitrator shall consider the pleadings and evidence on record already placed by the parties and shall not permit either of the party to raise further or fresh pleas or evidence. It would be appropriate for the arbitrator to make an award within a period of four months from the date of the receipt of this judgment and submit the same to this Court after publishing the same to the parties.

C The Registry of this Court is directed to transmit a copy of this judgment to Shri Justice Uday Sinha, former Judge, High Court of Patna, 308, Patliputra Colony, Patna-13 forthwith. The parties are directed to appear before Shri Justice Uday Sinha for further directions, as may be deemed fit by him, within one week from the date of this judgment.

D In the result, the appeals are disposed of accordingly. In the circumstances of this case, the appellant is directed to pay a sum of Rs. 40,000 [Rupees forty thousand only] to the respondent as costs.

E VM Appeals disposed of.