IN THE HIGH COURT OF JHARKHAND AT RANCHI
Arbitration Appeal No. 16 of 2011

1. Bihar State Mineral Development Corporation Limited (B.S.M.D.C.) now Jharkhand State Mineral Development Corporation Limited (J.S.M.D.C.) having its office at Khanij Nigam Bhawan, PO Hinoo, PS Doranda, Distt. Ranchi.
2. Managing Director, Jharkhand State Mineral Development Corporation Limited (J.S.M.D.C.) having its office at Khanij Nigam Bhawan, PO Hinoo, PS Doranda, Distt. Ranchi.

.... **Appellants**

Versus

M/s Encon Builders (I) Pvt. Ltd. West Morabadi Maidan, PO Ranchi University, PS Bariatu, Distt. Ranchi

… …. **Respondent**

CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Appellants : Mr. Sachin Kumar, Advocate,
M/s Niti, Advocate
For the Respondent : M/s Ajit Kumar, Sr. Advocate
Rohit Roy & Vibhor Mayank, Advocates

CAV ON 03.03.2025 **PRONOUNCED ON 28 .03.2025**

Heard, learned counsel for the parties.

1. This appeal is under Section 37 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to Act, 1996) against the dismissal of the objection/application filed under Section 34 of the Act, 1996, whereby and whereunder the arbitral award dated 12.03.2010 made in favour of the respondent has been affirmed.

2. The appellant entered into an agreement with the Respondent-Company on 17.03.1992 for hiring of heavy earth moving machines to be deployed for removal of soil (soft and hard) sandstone, shale, conglomerate, coal and stacking it up to a distance to 1 km.

3. The period for execution of work contract was from **17.03.1992 to 01.08.1994** at an average output of 10,000 MT of coal to be removed and stacked per month. B.S.M.D.C. reserved the right to increase or decrease the output at its discretion, according to its needs and circumstances. If the shortfall in production was due to the fault of the

agency, the Corporation reserved right to terminate the agreement without giving any notice and also to forfeit the earnest and security amount.

4. The dispute arose as the work could not be executed by the Respondent-Company as per the agreement, as there was a shortfall in production of 1,06,747 metric ton of coal and consequently the agreement was terminated.

5. Respondent M/s Encon Builders filed a money suit No.92/95 for a decree of Rs 87,71,018/- against its claim in pursuant to the agreement. The Corporation made a counter-claim for a sum of Rs.1,83,33,797.25/- alleging that there was shortfall in the achievement of target of coal production.

6. In view of the consent of the parties the money suit was withdrawn and Arbitrator was appointed by the Court under Section 8 of the Arbitration and Conciliation Act. As per the arbitration agreement between the parties.

7. Learned Arbitrator awarded total amount of Rs. 44,51,932.21/- under the following heads: -

   (a) Rs. 20,697,60/- for loss due to idling of man and machineries.
   (b) Rs. 17,27,936/- for loss of profit.
   (c) Rs. 6,59,237.21/- for refund of security deposit and
   (d) Rs. 2,000,00/- as cost for arbitration.
   (e) Interest @ of 18% per annum w.e.f. 01.09.1994.

8. Learned Court below in Miscellaneous Case No. 24 of 2010 affirmed the award mainly considering the nature of adjudication under Section 34 of the 1996 Act and the limited scope of interference in arbitral Award.

ARGUMENT FOR APPELLANT

9. Instant appeal is preferred on the ground that the breach of contract was on the part of the respondent and the award under the head of idling of man and machineries was beyond the terms of agreement under Clause

18. Further, when the work itself was not executed by the respondent, there was no scope for allowing profit. When the respondent agency was responsible for breach of contract, it could not claim damages under Section 73 of the Contract Act,1872.

10. As per the case of the Respondent- agency, the requisite amount of explosives were not furnished which resulted in delay for non-execution of work as per agreement.

11. Contra plea of the Appellant-Company is that: -

(a) Clause 18 of the agreement prohibited any idling charges and the agreement too is a composite one.

(b) The claimants-M/S Encon Builders failed to achieve minimum target for production of coal at an average rate of 10,000 MT per month.

(c) The M/S Encon Builders did not deploy sufficient HEMM, and deployed only old equipments in poor condition which were inadequate for achieving target.

(d) The explosives were supplied by the Corporation as per requirement of the claimant/respondent and the work was never stopped due to non-available of the Explosives.

(e) The claim for loss of profit and interest is not supported by contractual provisions and that the forest authorities never asked M/S Encon Builders to stop the work at the site.

12. The main point urged on behalf of the appellants is that learned Arbitrator has recorded a finding that non-execution of the work on the part of the agency was on account of non-supply of explosives without any evidence to that effect. As a matter of fact, Clause 29 of the agreement required the agency to comply with a system of documentation, but the agency could not produce the copies of the demand slip(s) making demand of the explosives.

13. There is no discussion of any evidence on the basis of which, the learned Arbitrator held that only 36% of the explosives needed for the work were provided by the corporation, which resulted in shortfall of

production by 63472 MT. Learned Arbitrator has not referred to even a single correspondence by the agency regarding shortfall of any demand of explosives. Assessment of loss has been made without any details regarding idling charges showing on which dates and for how many hours and what number of machines or men remained idle.

14. This ground was taken before the learned Arbitrator as well as before the learned Court below, but the same was not considered. Further, there is an error of record in the award at page no. 19, wherein it has been stated that the clause 18 of the agreement acknowledges that agency will be entitled for idling charges for man, plant and machineries.

15. Lastly, it is argued that learned Arbitrator has noted in page 21 of the award, in his own handwriting the following lines have been added: -

> "(in written submission Annexure-A nine pages attached to it) the agency gave calculations relating to idling. None of these calculations have been challenged by the Corporation".

It is contended that that argument was concluded on **21.09.2008** and the parties were allowed to file their notes of argument and Respondent-Agency filed the notes of written argument on **19.01.2009** after conclusion of the arguments. Hence, there was no opportunity for corporation to challenge written submissions/arguments.

16. With regard to loss of profit, no specific reason or evidence has been stated. It has only been stated that agency was legally entitled to such loss of profit, if it had been allowed to complete the work. Thereafter, fixing 15% of the amount of non-executed work as loss of profit, Rs. 17,27,936/- was awarded under this Act. Such loss of profit was not admissible under Section 73 of the Contract Act, 1872. Reliance is placed on

a. (2019) 5 SCC 131 para 74 page 199,
b. High Court of Madras Arbitration O.P. (Com. Div) No. 112 of 2021,
c. (2024) 2 SCC 375,

d. (2023) SCC OnLine SC 1366,

e. Commercial Appeal No. 10/2020, wherein the order was challenged without success in SLP No. 8905/2024.

17. The counter claim preferred by the Corporation for a sum of Rs.1,83,33,797.25/- was turned down only by accepting argument on behalf of the Appellant(s)-Agency that it was a product of afterthought. It is argued that the award is bad in view of the fact that there is no finding on the counter claim.

ARGUMENT FOR RESPONDENT

18. It is argued by the learned counsel on behalf of the respondent that admittedly there was a shortfall in production 1,06,747 MT, but this was due to the corporation's failure to supply adequate explosives, electricity and timely payments. Only 21,475 Kg of explosives were supplied out of required 1,65,140 Kg, causing the production shortfall of 63, 472 MT.

19. The issue of short supply of explosives was raised before the arbitrator and the arbitrator came to such finding upon the oral evidence of the Mine Manager, who had stated in his cross-examination that the project report is the deciding factor for coming to a conclusion as to the requirement of explosives.

20. M/s Encon Builders claimed loss of profit due to unexecuted work. The arbitrator fixed 15% of the unexecuted work value as loss of profit, amounting to Rs.17,27,936. Since there was no fault on the part of the Agency, respondent was also entitled to a refund of the security deposit.

21. With regard to counter claim, it is argued that corporation had failed to issue notices under relevant contract clauses regarding non-performance during contract period. The Arbitrator found that production short falls were due to the corporation's own failures, including non-supply of explosives and delayed payments and consequently, counter claim was rejected and no amount was awarded to the corporation.

22. The main contention urged on behalf of the respondent is that the

jurisdiction of appellate Court under Section 37 of the Act is extremely limited. It is exercisable only to find out if the Court exercising power under Section 34 of the Act, has acted within its limits or has exceeded or failed to exercise the power so conferred. Re-appraisal of evidence is beyond the jurisdiction of the appellate Court and the appellate Court should be extremely cautious and slow to disturb the concurrent findings. It has been held by the Apex Court in Somdatt Builders-MCC-NEC-NEC(JV) Vs. National Highway Authority of India, 2025 SCC OnLine SC 170, the High Court was not at all justified in setting aside the arbitral award exercising extremely limited justification under Section 37 of the 1996 Act by merely using expression like "oppose to the public policy of India" "Patent illegality" and "Shocking the conscience of the Court.

23. Corporation's failure to supply adequate explosives led to work delay. There was no evidence to support the case of the Corporation that inadequate machineries were deployed. Arbitrator came to a finding that explosives were insufficient. The finding of fact recorded by Arbitrator is not liable to be interfered with in appeal.

ANALYSIS

24. So far scope of interference with the arbitral award at the stage of appeal is concerned, there cannot be two views on the proposition of law urged on behalf of the Respondent that it is a limited one, and the appellate court cannot enter into reappreciation of evidence. Nature and scope of judicial scrutiny at different stages of adjudicatory process varies, but at no stage it is an empty formality. If arbitral adjudication is perverse or without any evidence, it cannot be permitted to be perpetuated on the premise that appellate court has no power to interfere. It is for this reason that it has been held in ***Sharma & Associates Contract (P) Ltd. v. Progressive Constructions Ltd.*, (2017) 5 SCC 743** that an arbitrator is a creature of contract between the parties and if he ignores the specific term of the contract, it would be a question of jurisdictional error which can be corrected by the court. A deliberate departure or conscious

disregard of the contract not only manifests the disregard of his authority or misconduct on his part, but it may tantamount to legal mala fide as well. It is further settled in law that the arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable. This is so held in *Food Corporation of India* v. *Chandu Construction & Anr. [*(2007) 4 SCC 697].

***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.*, (2024) 2 SCC 375 :**

> **32.** Post award interference and the extent of the second look by the courts under Section 34 of the A&C Act has been a subject-matter of perennial parley. The foundation of arbitration is party autonomy. Parties have the freedom to enter into an agreement to settle their disputes/claims by an Arbitral Tribunal, whose decision is binding on the parties. [See *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549, which examines arbitrability and non-arbitrability of subject-matters and claims, which aspect will not be examined in this case.] It is argued that the purpose of arbitration is fast and quick one-stop adjudication as an alternative to court adjudication, and therefore, post award interference by the courts is un-warranted, and an anathema that undermines the fundamental edifice of arbitration, which is consensual and voluntary departure from the right of a party to have its claim or dispute adjudicated by the judiciary. The process is informal, and need not be legalistic [The expression "judicially", does not equate arbitration with formal/court proceedings, and would include a just and fair decision.]. *Per contra*, it is argued that party autonomy should not be treated as an absolute defence, as a party despite agreeing to refer the disputes/claims to a private tribunal consensually, does not barter away the constitutional and basic human right to have a fair and just resolution of the disputes. The court must exercise its powers when the award is unfair, arbitrary, perverse, or otherwise infirm in law. While arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a "judicially" sound and objective

outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award should invite intervention by the court.

39. The expression "public policy" under Section 34 of the A&C Act is capable of both wide and narrow interpretation. Taking a broader interpretation, this Court in ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] (for short Saw Pipes), held that the legislative intent was not to uphold an award if it is in contravention of provisions of an enactment, since it would be contrary to the basic concept of justice. The concept of "public policy" connotes a matter which concerns public good and public interest. An award which is patently in violation of statutory provisions cannot be held to be in public interest. Thus, expanding on the scope and expanse of the jurisdiction of the court under Section 34 of the A&C Act, it was held that an award can be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

(emphasis supplied)

***SAIL v. J.C. Budharaja, Govt. and Mining Contractor*, (1999) 8 SCC 122:**

16. Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. In *Continental Construction Co. Ltd.* v. *State of M.P.* [(1988) 3 SCC 82] this Court considered the clauses of the contract which stipulated that the contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed the contractor's claim. That was set aside by the Court and the appeal filed against that was dismissed by this Court by holding that it was not open to the contractor to claim extra costs towards rise in

prices of material and labour and that the arbitrator misconducted himself in not deciding the specific objection regarding the legality of the extra claim. In that case, the Court referred to the various decisions and succinctly observed: (SCC p. 88, para 5)

"If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award." (emphasis supplied)

***Associate Builders v. DDA*, (2015) 3 SCC 49 (**followed in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 para 41)

31. *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)*

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In ***Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429]*** *, it was held : (SCC p. 14, para 10)*

> *"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.*"
>
> (emphasis supplied)

25. In the present case it is not in dispute that respondent company failed to meet the production target as per the terms of agreement, causing the production shortfall of 63, 470 MT.

26. Respondent attributes the shortfall to three factors, short supply of electricity, delayed payment and short supply of explosives. So far, the first two grounds are concerned there is no material in support of it and have not been seriously pressed.

27. The main contention of the respondent is that appellant company committed breach of agreement, by not furnishing the requisite quantity of explosives to carry out the work as per the terms of agreement.

28. It is an admitted position that total 21,475 Kgs of explosives were supplied. As per M/s Encon Builders the requirement of total explosives for the whole work was 1,65,140 Kgs

29. The period for execution of work contract was from 17.03.1992 to 01.08.1994, and if at all the appellant company failed to supply the explosives as per requirement, it was expected that Agency must have raised this issue at any level and not have quietly sat over it. There is not a chit of paper to remotely suggest that the respondent ever made any correspondence in this regard with the appellant company. It is not that there had been no correspondences between the appellant and respondent. After the contract was terminated, request for extension of time was made, which was rejected by the appellant corporation on 22.07.1994. There is no oral or documentary evidence to show that there had been short supply of explosives. Explosives are not like any

common building materials, but has to be dispatched on specific requisition, and everything needs documentation. In para-11 and 12 of the Examination-in-chief of the appellant witness Shivdip Singh (Mines Manager) the explosives were to be supplied as per requirement.

30. Learned Arbitrator appears to have attributed the breach of agreement to the appellate corporation, without any evidence, solely on the basis of project report which assessed the total requirement of explosive for the work to be 1,65,140 kg, where the supply was much than as stated in the report. Project reports are general assessment, and explosives could not have been supplied in one go as per the project report, and logically could be supplied only as per the progress of work and requisition made. It is perverse to contend that entire explosives should have been supplied, at the inception of work without any requisition.

31. As discussed above in the absence of any oral or documentary evidence of appellant corporation having failed to supply the explosives on any requisition, the finding that breach of contract was on account of non-supply of explosive is perverse to the core.

32. Further, the manner in which damages under the heading of idling charges has been awarded, without any attributable fault on the part of the appellant corporation, smacks of bias on the part of the learned Arbitrator. The said assessment of loss was beyond the express term of agreement which reads as under.

Clause-18 of the agreement reads as under:

> "Agency will not be entitled for any idling charges for men, plant and machineries, etc. for the periods and reasons beyond the control of corporation and also for reasons for which Agency is responsible."

33. Further, the assessment of loss to the tune of Rs 20,69,760/- on account of idling of manpower and machine, is bereft of any supporting evidence, except for the statement made in the claim petition. It was incumbent on the part of the respondent to have maintained documentation with regard to deployment of men and machines at the work site, as per Clause-29 of the agreement. But no such record was

maintained, and quite surprisingly the arbitrator observed that it was for the appellant corporation to ask the respondent to maintain the same. Terms of agreement are intended to be followed and not be reminded for its observance. To cap it all, learned Arbitrator at page 21 of the award at first para added in his hand writing that calculations of idling charges were made on the basis of written notes of argument. It has been rightly contended on behalf of the appellant corporation, that making assessment in this manner at this stage, deprived it the opportunity to rebut calculations put forward by the respondent.

34. Without going further, for the reasons discussed above this Court is of the view that breach of contract was on the part of the respondent and, therefore, the impugned Arbitral Award and Judgment passed by the learned Arbitrator and the Court below is not sustainable and is, accordingly, set aside.

Arbitration Appeal is accordingly allowed.

Pending I.A, if any, stands disposed of.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi
Dated 28th March, 2025
AFR/ Pawan/AKT