

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Commercial Appeal No. 4 of 2023

Rungta Projects Ltd., a Company incorporated under Companies Act, 1956 having registered office at 301, Mangalam Building, 24 Hemanta Basu Sarani, P.O.- G.P.O, P.S.- Hare Street, District- Kolkata-700001, West Bengal, and its office at Vikas Bhawan, Bariatu Road, Bariatu, P.S.- Lalpur, P.O.- Ranchi University, District – Ranchi, 834008, through its duly authorized representative Sri Kamal Kishore Prasad, aged about 60 years, son of Sri Lala Hari Kishore Prasad, Vikas Bhawan, Bariatu Road, Bariatu, P.S.- Lalpur, P.O.- Ranchi University, District – Ranchi- 834008.

..... Appellant

(Claimant in arbitration and
Petitioner in the Commercial Court)

Versus

Central Coalfields Limited, Darbhanga House, P.O.- Ranchi, P.S.- Kotwali, District – Ranchi, through its Chairman-cum-Managing Director, having address as Darbhanga House, PO- Ranch, PS- Kotwali, District – Ranchi.

..... Respondent

(Respondent in arbitration and
Opposite Party in the Commercial
Court)

CORAM: HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Appellant: Mr. Pandey Neeraj Rai, Advocate
Mr. Arpit Khandelwal, Advocate
Mr. Rohit Ranjan Sinha, Advocate
For the Respondent: Mr. Anoop Kumar Mehta, Advocate
Mr. Amit Kumar Sinha, Advocate

Reserved on: 18.03.2025

Pronounced on: 08/04/2025

Per M.S. Ramachandra Rao, C.J.

1. This Commercial Appeal has been preferred against the judgment dt. 29.09.2020 passed in Original Suit No.50 of 2018 filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dt. 30.08.2014 of the learned Arbitrator.
2. The case was initially filed under Section 34 of the Arbitration and Conciliation Act, 1996 before the Court of the Civil Judge (Sr. Division) Cum Subordinate Judge, Hazaribagh, as Misc. Case No.30 of 2014 and it

was then transferred to the Commercial Court at Dhanbad through an Order No.80 of 2018 dt. 26.03.2018 passed by the Principal District Judge, Hazaribagh.

Background facts

3. The respondent had floated an NIT dt. 02.08.1996 with respect to work of transportation of coal and washery products from various projects/mines/units of Kuju and Hazaribagh Area of the respondent for two years.
4. The contract was awarded to the appellant and agreements were executed and later Work Orders were also issued.
5. The contract expired on 31.10.1999, after which, the respondent issued a fresh tender on 10.09.1999 for a fresh period of two years.
6. The date of opening of the fresh tender was 14.10.1999. In the tender issued on 10.09.1999, the grant was purportedly made to a bidder M/s. Essem Transporter & Contractors Pvt. Ltd. on a lower rate than that applicable or payable under the previous tender dt. 02.08.1996.
7. The appellant did not participate in the said tender.
8. A Letter of Intent had been issued in favour of M/s. Essem Transporter & Contractors Pvt. Ltd. on 28.04.2000. But it alleged that it was compelled to execute work under the NIT dt. 10.09.1999 by imposing penal and coercive consequences and approached this Court through a writ petition C.W.J.C. No. 1344 of 2000 and succeeded in L.P.A. No. 167 of 2002 on 08.07.2002.
9. This Court held that that the respondent cannot force the said party to execute the contract and so the award of work to the said party was struck

down. Thus due to above litigation, the finalization of the new tender dt.10.9.1999 did not take place.

10. In order to meet the exigencies, the respondent decided to make an ad-hoc arrangement by extending the contract granted to the appellant previously, though it had expired on 31.10.1999.

11. The respondent requested the appellant to continue the transportation of coal beyond the period of contract through a letter dt. 30.10.1999 stating that since the period of the appellant's contract was up to 31.10.1999, it is extended from 01.11.1999 on condition that that the rate applicable would be either current rate (i.e. existing contract rate) and/or lowest acceptable rate of new tender, *whichever is lower*.

12. The appellant executed the work till 28.04.2000 and from that date, another tenderer did the work.

13. The appellant also filed a writ petition being W.P. (C) No. 5862 of 2002 making certain claims against the respondents, but later, withdrew the same and invoked the arbitration clause through a notice dt. 17.03.2008 to the respondent requesting for action to be taken under Clause 95 of the GTC for settlement of the claim.

14. When no action was taken, the appellant filed Arbitration Application No.29 of 2008 and initially, Director Technical (Operation of Mines) was appointed as an Arbitrator on 01.10.2010.

Stand of the appellant before the Arbitrator

15. The appellant contended that in view of the extinction of the second tender dt. 10.09.1999 before it could ever take a final shape, "*Lowest acceptable tender rate of new tender whichever is lower*" in the condition mentioned in the letter dt. 30.10.1999 became redundant, and that the tender

issued on 10.09.1999 met a natural death by afflux of time and became void *ab initio*.

16. The appellant contended that the modality of payment as adopted by the respondent had been to make ad-hoc payment of only 80% and to retain 20% payable in terms of the earlier contract on the pretext that on making final settlement on finalization of the new tender, the 20% would be paid. The respondent had also deducted security deposit during the extended period of contract which had been retained on the ground of distance measurement dispute and excess quantity executed.

17. The appellant claimed that the respondent had withheld Rs.1,23,83,300.33 illegally. It also demanded to release balance 20% of the amount and security deposit with interest through various letters and reminders, but the payment was not made.

Stand of the respondent before the Arbitrator

18. The respondent contended the claim of the appellant was barred by limitation since it related to the period 01.11.1999 to April 2000 and the notice invoking arbitration was given on 17.03.2008.

19. The respondent contended that the appellant had not participated in the subsequent tender dt. 10.09.1999, but still its previous contract has been extended till 30.4.2000 on a rate which would either be the current rent or lowest acceptable tender rate of the new tender, whichever is lower, and the appellant had even given letters including letters dt. 10.12.1999 and 16.05.2000.

20. It was also contended that the appellant had submitted its final bill *on the basis of lower rate* between the existing rate of its previous contract and the new rates of the subsequent tender dt. 10.09.1999 *and having agreed to*

the lowest rate, it cannot claim for the payment at a higher rate. The appellant was allowed to continue under Clause 38(b) of the GTC which stated that the period of quantity if so required by the Company may be extended further at mutually settled rate.

21. It was also contended that a letter was given by the appellant that the rate would be either contract rate and/or lowest accepted rate of new tender, whichever is lower, and the appellant had accepted to work on the said terms till April 2004 and submitted their final bill on the basis of the lower rate of the previous tender and the subsequent tender dt. 10.09.1999.

Award of the Arbitrator

22. The Arbitrator framed following four issues:-

- (i) Whether the claim of claimant is barred by principle of waiver, estoppels and acquiescence?
- (ii) Whether the claim of claimant is barred by limitation?
- (iii) Whether the claimant is entitled to get the rate of transportation as per NIT No. 1904 dated 02.06.1996 for the period 01.11.1999 to 28.04.2000?
- (iv) Whether the claimant is entitled to any other relief?

23. After considering the pleadings and the material evidences adduced by the parties, the Arbitrator pronounced an award on 30th August 2014 holding that the appellant was entitled to payment of final bill dt. 12.08.2004 only and it cannot claim the rate of payment as per the rate under the previous tender dt. 02.08.1996, as it had accepted the lower acceptable rate of the said tender and the subsequent tender dt. 10.09.1999.

24. The Arbitrator ordered the respondent to pay the amount of final bill of Rs.1,73,142.94 within three months from the date of award to the appellant. It further directed that if it was not paid, the appellant would be

entitled for interest @ 6% on the awarded amount from the date of award; and if the amount is still not paid within three months, the respondent would have to pay interest @ 9% on the awarded amount till realization.

Section 34 application filed by the appellant after passing of Award

25. Challenging the same, the application under Section 34 of the Arbitration and Conciliation Act, 1996 was filed by the appellant.

26. Before the Commercial Court, several contentions were raised by the appellant and were contested by the respondent.

The judgment of the Commercial Court

27. The Commercial Court noted that the dispute between the parties was as to which of the two rates should be actually paid to the appellant.

28. It then also noted that in the tender issued on 10.09.1999, the grant was made to the bidder on a *lower rate* than that applicable or payable under the previous tender dt. 02.08.1996.

29. The Commercial Court noted that the appellant had contended that it should be paid the rate which it was getting under the first contract dt. 02.08.1996, even though it is higher, because there exists no second or lower rate in the eye of law, while the respondent contended that the appellant should get the said lower rate arrived at in the tender of 10.09.1999.

30. The Commercial Court considered whether the award was falling within the scope of interference with an arbitral award in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act.

31. The Commercial Court was of the opinion that the Arbitrator did not at all discuss the case of M/s. Essem Transporter & Contractors Pvt. Ltd., to which Letter of Intent had been issued by the respondent on 28.04.2000, which had challenged the same in a writ petition being C.W.J.C. No. 1344 of

2000(R) and L.P.A. No. 167 of 2002 and had succeeded in the LPA vide order dt. 08.07.2002.

32. It also noted that a letter dt. 04.12.2009 had been given by the Power of Attorney Holder of the respondent that they were ready to receive payment as per the bill prepared by the Management of the respondent and requested the respondent to release the payment and security money and, therefore, the appellant had waived their right to claim a higher amount.

33. The Commercial Court held that the Arbitrator had not discussed the effect of the tender dt. 10.09.1999 after 13.01.2000.

34. It also held that the appellant had contended that as soon as they came to know about the letter dt. 04.12.2009, they had objected and informed the respondent that they were not ready to receive the final bill of 2004; that as per the record, the appellant had challenged the letter dt. 04.12.2009 given by the Power of Attorney Holder on 15.09.2012 and had protested about its genuineness as well as the authority of its Power of Attorney Holder; that it had revoked the Power of Attorney on 22.03.2013 and had informed the Arbitrator through an affidavit.

35. The Commercial Court noted that the claim of the appellant was that they had retracted from the letter dt. 04.12.2009 and it was a case of *retraction of waiver* and so the respondent could not act upon the said letter and the respondent should pay only at the lower rate.

36. The Commercial Court then held that the Arbitrator had not discussed the evidence on record and the settled law relating to principles of retraction of waiver.

37. It also held that the appellant had a power to disown and resile from the letter dt. 04.12.2009 given by their Power of Attorney Holder at a later

stage on 21.01.2015 after the pronouncement of the Award and that, they had received the payment under protest.

38. However, notwithstanding the said findings, the Commercial Court refused to interfere with the award passed by the Arbitrator on the ground that while deciding an application under Section 34, evidence on record should not be taken into account even if the Arbitrator had given finding otherwise. It also observed that it cannot act as a court of appeal and correct the errors of fact.

Argument on behalf of the appellant in this appeal

39. Challenging the same, this appeal is filed.

40. Counsel for the appellant contended that the Commercial Court had erred in not interfering with the award of the Arbitrator passed on 30th August 2014 in spite of having observed itself that the learned Arbitrator had not considered certain aspects including the aspect of *retraction of waiver*.

41. Counsel for the appellant relied on Para 1027 of Halsbury's Laws of England which dealt with the principles of waiver. In the said passage it is observed that, "*Nevertheless, where the concession lacks the support of consideration or a deed, it may still have an effect as a waiver by estoppel or forbearance of the obligations under the contract, provided that the waiver is unequivocal and has been acted upon.*"

42. Reliance is also made to the judgment of the Court of Appeal in **W.J. Alan & Co Ltd v. EL Nasr Export and Import Co.**¹ to contend that a waiver can be retracted and in the instant case there was such a retraction.

43. The counsel for the appellant fairly admitted that there is no judgment of the Indian Court accepting the principles of *retraction of waiver* and that,

¹ [1972] 2 All ER 127

only the above judgment of the Court of Appeal and the passage in the Halsbury's Laws of England, which is being relied upon, supports the plea.

44. When the concept of retraction of waiver is not part of Indian Law (as no precedent or authority is cited by appellant to show that it is part of Indian law), the Commercial Court could not have held in paragraph 11 of its judgment that there is a *settled law* relating to retraction of waiver.

45. Moreover, on 04.12.2009, admittedly, during the pendency of proceedings before the Arbitrator, a letter had been given by the Power of Attorney Holder of the appellant stating that they were ready to receive the payment as per the bill prepared by the respondent and requested the respondent to release the payment and security money. Thus, the appellant had accepted to take the lower rate under the tender dt. 10.09.1999 and is therefore estopped from claiming the higher rate of the previous contract dt. 02.08.1996.

46. Admittedly, the appellant had revoked the Power of Attorney of the Power of Attorney Holder only on 22.03.2013 and had informed the Arbitrator about the same through an affidavit, but since the letter dt. 04.12.2009 had been issued by the Power of Attorney Holder before its revocation and its genuineness was questioned only for the first time on 15.09.2012, and later it was revoked on 22.03.2013, the said letter would bind the appellant. It has to be taken that the appellant had waived its claim for a higher rate than in view of the letter dt. 04.12.2009 issued by its Power of Attorney Holder.

Findings and Conclusion of this Court

47. We do not accept that there is a principle of retraction of the said waiver merely because the appellant later on 15.9.2012 took a different stand

and disowned the letter dt. 04.12.2009 and to this extent the finding of the Commercial Court is set aside.

48. But we uphold the judgment of the Commercial Court in so far as it had refused to interfere with the award, and its judgment to that extent does not warrant any interference.

49. Accordingly, the appeal fails and is dismissed. No costs.

(M.S. Ramachandra Rao, C.J.)

(Deepak Roshan, J.)

N.F.R.

Manoj/-