

(2003) 01 OHC CK 0042

In the Orissa High Court

Case No : M.J.C. No"s. 249, 250, 251, 252, 253, 254 and 255 of 2000

Birat Chandra Dagara

APPELLANT

Vs

Steel Authority of India Limited

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Arbitration Act, 1940 — Section 17, 8

Arbitration and Conciliation Act, 1996 — Section 10, 11

Citation : (2003) 2 ARBLR 276 : (2003) 95 CLT 396

Hon'ble Judges : P.K. Balasubramanyan, C.J

Bench : Single Bench

Advocate : R.N. Mishra and S.K. Das, for the Appellant; Jagannath Das and Sujata Das, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, C.J.—The question arising for consideration in all these applications made under Sections 10 and 11 of the Arbitration and Conciliation Act, 1996 being the same, they are being disposed of together. The parties are also the same and the nature of the contracts between the parties is also the same.

2. The petitioner had entered into an agreement for supply of iron ore to the Steel Authority of India. The iron ore was to be supplied by railway wagons. The value of the goods, of iron ore, had to be paid for, on the basis of the quantum of weight of the iron ore supplied. The contract provided that the weight taken in the destination stations would be the basis for determination of the value of the goods consigned under the relative railway receipts. The contract also provided that in case the wagons were not weighed by the railways and the actual weights were not indicated under the railway receipts, the wagons when received at Durgapur Steel Exchange Yard, would be weighed and the weight taken at the Durgapur Steel Exchange Yard will be the basis for payment. For the iron ore supplied, the petitioner claimed its value. According to the Steel Authority of

India, the value was paid in terms of the contract. The petitioner claimed that the entire quantity had not been paid for. This position was not accepted by the Steel Authority of India. According to the petitioner, this gave rise the dispute between himself and the Steel Authority of India in relation to the contract. There was an arbitration clause in the agreement providing that any dispute arising under the agreement should be endeavoured to be resolved by the parties by mutual discussion and in case the dispute could not be resolved, the same should be referred to arbitration in accordance with the Arbitration Act, 1940 and the rules made thereunder. Complaining that he had invoked the arbitration clause in the agreement and the Steel Authority of India had not acceded to his request for arbitration, the petitioner approached the Civil Judge (Senior Division), Rairangpur in respect of the various Supplies, with suits u/s 20 of the Arbitration Act, 1940 praying for production of the agreement and for appointment of an arbitrator. The Steel Authority of India resisted the applications raising various contentions including the questioning of the jurisdiction of the court. Ultimately, by separate orders dated 16.1.1997, the Civil Judge (Senior Division), Rairangpur decreed the suits filed by the petitioners. The identical orders passed in the suits read thus :

"The plaintiff and the defendant are directed to sit across the table for mutual discussion and bi-lateral amicable discussion to settle over the dispute within three months of this order failing which within next three months, they are to decide to whom the matter is to be referred to for arbitration amongst themselves and they are to refer the matter to the arbitrator. In case of failure on both counts due to non-cooperation by defendant, the plaintiff is given opportunity to apply to this court or any other competent court for appointment of arbitrator and refer the matter to arbitration."

3. It is the case of the petitioner that the dispute was neither settled by mutual discussion nor did the defendant-Steel Authority of India appoint an arbitrator in terms of the order of the court. Though the order provided that he should move the court for appointment of an arbitrator in case the parties could not agree on an arbitrator after three months of the order, he could not do so since he suffered from illness from 16.7.1997 to 5.5.2000, from 6.5.2000 to 30.7.2000 and from 1.3.2000 to 13.9.2000. It was therefore not possible to take steps. I may indicate that he came forward with these applications u/s 11 of the Arbitration and Conciliation Act only on 15.9.2000.

4. According to the petitioner, since no arbitrator had been appointed by the Steel Authority of India, the respondent, in view of the existence of arbitration clause in the agreement, he was entitled to move the Chief Justice u/s 11(6) of the Arbitration and Conciliation Act, 1996 and he was entitled to have an arbitrator appointed. The further claim is that in view of the fact that the Arbitration Act of 1940 had been repealed and the new enactment has come into force with effect from 22.8.1996, all pending cases come under the purview of new Act enabling the petitioner to move the Chief Justice.

5. The applications are resisted by the Steel Authority of India by pointing out that disputes had arisen under the Arbitration Act, 1940 and the arbitration proceeding had commenced while the Arbitration Act, 1940 was in force and in view of Section 85 of the Arbitration and Conciliation Act, 1996, the proceeding had to be continued under the Arbitration Act, 1940 and the new Act had no application. It is also contended that on the terms of the agreement, there is no arbitrable dispute and there was no occasion for appointment of an arbitrator. It is thus prayed that the applications may be dismissed.

6. The first question to be considered is whether these applications u/s 11(6) of the Arbitration and Conciliation Act, 1996 are maintainable. There cannot be any dispute that the contract was worked when the Arbitration Act, 1940 was in force and the dispute arose while that Act was in force. But that by itself cannot lead to the position that the new Act cannot be invoked. But if the arbitral proceeding had commenced before the coming into force of the Arbitration and Conciliation Act, 1996, notwithstanding the repeal of the Arbitration Act, 1940, the Arbitration Act, 1940 continued to apply in relation to that proceeding. This is clear from Section 85(2)(a) of the Arbitration and Conciliation Act, 1996.

7. The Supreme Court has held that the provisions of Arbitration Act, 1940 will apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act. The phrase "in relation to arbitral proceedings" in Clause (a) of Subsection (2) of Section 85 of the new Act cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the Act of 1940 for the award becoming a decree u/s 17 of the Act of 1940 and also appeal arising thereunder. The new Act would be applicable only in relation to arbitral proceedings which commenced on or after the new Act came into force. *Thyssen Stahlunion GmbH v. Steel Authority of India Ltd.* AIR 1999 SCW 4016).

8. The question here is, whether the arbitral proceeding had commenced before the coming into force of the new Act, on 22.8.1996. As we have noticed, the contract was worked when the Arbitration Act, 1940 was in force. The dispute also arose when the Act of 1940 was in force. The petitioner demanded an arbitration when that Act was in force. Thereafter, the petitioner invoked Section 20 of the Act of 1940 for the appointment of an Arbitrator by approaching the concerned Civil Court in the year 1992 before the coming into force of the new Act. The Court gave him an order under the 1940 Act. Even though the Court disposed of the proceeding only on 16.1.1997, after the coming into force of the Act of 1996, the petitioner did not contend before that Court that that Court had lost its jurisdiction to proceed with the matter and the matter had to be dealt with under the 1996 Act. In view of Section 85(2)(a) of the new Act and the decision of the Supreme Court referred to above, the Civil Judge, (Senior Division), Rairangpur was correct in proceeding to pass an order in terms of

Section 20 of the Arbitration Act, 1940, notwithstanding its repeal by the time he disposed of the proceeding which was pending before him on the date the Act of 1996 came into force. Obviously, when a party moves the Court u/s 20 or Section 8 of Arbitration Act, 1940 for appointment of an Arbitrator, it has to be held that the arbitral proceeding had commenced at least by that motion made under Arbitration Act, 1940. I am therefore inclined to hold that the present application made by the petitioner u/s 11(6) of the Arbitration and Conciliation Act, 1996 is not maintainable. The remedy of the petitioner lies in pursuing his claim under the Arbitration Act, 1940 based on the order of Court made on the motion u/s 20 of the Arbitration Act of 1940.

9. There is also another aspect. The petitioner's cause of action for arbitration, in terms of the arbitration clause under the contract between the parties, had merged in the orders passed by the Civil Judge (Senior Division), Rairangpur in the various suits filed by him u/s 20 of the Arbitration Act, 1940. The remedy open to the petitioner is only to work out that order or decree (it is not strictly a decree since an application u/s 20 of the Act has been recognised to be not a suit, *stricto sensu*) by an appropriate proceeding in that behalf. It is not open to him to file yet another application for the same relief. In that view also, I find that the present applications are not maintainable.

10. Thus, I hold that the present applications are not maintainable. Hence, I dismiss the applications. I make no order as to costs.