

(1986) 09 OHC CK 0005

In the Orissa High Court

Case No : Civil Revision No. 799 of 1983

B.K. Parida and Brothers

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 29-09-1986

Acts Referred:

Arbitration Act, 1940 — Section 11, 30

Citation : (1986) 2 OLR 663

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : J. Das, Y. Das, T. Hafiz and M.S. Haque, for the Appellant; M.R. Mohanty, A.S.C. (for O.P. Nos. 1 and 2), R.K. Patra and B.K. Nayak, (for O.P. No. 3), for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—Claimant is the petitioner in this civil revision. It has sunk some tube-wells. Its claim in that report to opp. party Nos. 1 to 3 not being settled, an application u/s 20 of the Arbitration Act, 1940 (in short "the Act") was filed by the claimant in which the trial Court decided to appoint an arbitrator to make a reference of the disputes and appointed Shri G. S. Patnaik, Chairman, Arbitration Tribunal to be the Arbitrator. Against the said order, opp. party Nos. 1 and 2 and opp. party No. 3 challenged the order in two separate appeals. This Court confirmed the order [see State of Orissa and Another, etc. Vs. B.K. Parida and Bros. and Another, in M A. No. 249 of 1981 and (Lift Irrigation Corporation Ltd. v. M/s. B. K. Parida and Brothers and others). When the SLP was being heard in the Supreme Court, the ,, claimant and the opposite parties gave their consent that instead of Mr. G.S. Patnaik, the reference would be made to Mr. V. Gopalswamy Chairman of the Arbitration Tribunal constituted by Government of Orissa failing him to Mr. A N Nanda, Member of the Arbitration Tribunal. Supreme Court directed that the Arbitrator should dispose of the reference as expeditiously as possible preferably within four months. After the decision In the

Special leave petition, the matter was referred to Mr. V. Gopalswamy, who entered into reference. Apprehending that the claimant would not get justice in the hand of the Arbitrator, and on the ground that the Arbitrator failed to use reasonable despatch in entering on and proceeding with the reference, It filed an application for his removal in the year 1983. While the application registered as Misc. Case No. 120 of 1983 was pending, State Legislature amended the Act in Orissa Act 3 of 1983 by adding Section 41A. In view of the language of Section 41-A(7), the proceeding stood transferred to the Arbitration Tribunal constituted by the State Government consisting of three members. As the proceeding stood transferred, the trial Court dismissed the misc. case as infructuous.

2. Getting notice from the Arbitration Tribunal to appear on 12-5-1983 the petitioner entered appearance and filed an application alleging that the Tribunal has no jurisdiction to proceed with the reference. Rejecting the said petition, the Tribunal posted the matter to 13-7-1983 for hearing. On 27-7-1983, the claimant filed the present petition under consideration for removal of the Arbitrator, i.e., the Arbitration Tribunal on the ground that its Chairman is biased against the petitioner, Along with the petition, an application for stay of further proceeding before the Arbitration Tribunal was filed. Trial Court directed issue of notice in both the petitions fixing 12-8-1983 for appearance and objection, Between 12-8-1983 and 14-9-1983, the petition for stay was not moved by the petitioner and the Arbitration Tribunal gave the award. On 14-9-1983 the claimant filed an application that the application for removal should be tagged to O. S. No. 171 of 1983 which was registered on the award being filed by the Tribunal to make it a rule of the Court and to hear both the matters jointly. The trial Court posted the matter to 20-9-1983 for consideration. On 20-9-1983, the matter was heard at length and the impugned order was passed.

3. The grievance of the petitioner as submitted by Mr. Jasobanta Das, the learned counsel for the petitioner, is that the trial Court could not have disposed of the application for removal of the Arbitrator in the impugned order while fixing the matter for consideration of the question relating to tagging of the application with O. S. No. 171 of 1983 to be heard jointly. Mr. Das is correct in his submission. While posting one matter for consideration, trial Court would not be Justified in disposing of another matter unless parties agree to it since the same would be in violation of the principle of natural justice. If the parties agreed to the same, the order-sheet should have indicated the fact clearly. Accordingly, there is no doubt that the trial Court exercised its jurisdiction with material irregularity.

4. The two decisions relied upon by Mr. Das which were also relied upon in the trial Court reported in Murari Lal Vs. Gopal Chand and Others, and in AIR 1981 Raj, 67 (Devi Narain and Anr. v. Harish Chandra) support the contention of Mr. Das to the effect that on the making of an award by the Arbitrator the application for removal of Arbitrator or appointment of a new Arbitrator does not become infructuous. The Rajasthan High Court has held that the application for removal

of Arbitrator cannot be thrown out on the ground that the misconduct of the Arbitrator alleged in the application can be raised in the objection to the award u/s 30 of the Act. If the trial Court would have kept the application pending for consideration with O. S. No. 171 of 1983 as prayed for by the petitioner, the question would have been different. The application has, however, been dismissed.

5. All orders passed with material irregularity, in exercise of jurisdiction are not to be interfered with, in revision. This Court is to examine the prejudice of the petitioner for invoking the power of revision since such power is not to be exercised on academic interest. Where no prejudice would be caused to the petitioner, the discretionary powers of revision is not to be exercised to set aside the impugned order merely on the finding of exercise of jurisdiction with material irregularity. Therefore, I called upon Mr. Das to satisfy me how the petitioner is prejudiced by the order. Mr Das submitted that in case the application would have been heard along with O. S. No. 171 of 1983, the petitioner would have led evidence to prove that the allegation in the petition for removal of the Arbitrator is justified on account of his bias and the misconduct. This plea of bias and misconduct of the Chairman of the Arbitration Tribunal is not lost by dismissal of the application. It can be raised u/s 30 of the Act while objecting to the award. Therefore, the plea being available to be raised by the petitioner, no prejudice is caused to him even though the trial Court ought not to have disposed of the application for removal of the Arbitrator on merit in the impugned order.

6. Mr. R. K. Patra, the learned counsel for the opposite party No. 3. submitted that in case the Arbitrator is removed there is no scope for appointment of any other Arbitrator in view of the statutory provision in Section 41-A that the dispute is to be referred to the Arbitration Tribunal. Expression of any view at this stage, while refusing to interfere with the order as the objection of the claimant is otherwise available to be raised u/s 30 of the Act, would prejudice both the parties. Hence, I leave the matter open to be decided by the trial Court while deciding the objection of the petitioner, if any, to the award u/s 30 of the Arbitration Act.

7. In the result, the civil revision is dismissed. There shall, however, be no order for costs.