

(1979) 05 OHC CK 0014

In the Orissa High Court

Case No : Civil Revision No. 489 of 1978

Consolidated Construction Company

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-05-1979

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 12(2), 20(4), 4

Citation : (1979) 48 CLT 138

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : G. Rath, R.K. Rath, N.C. Panigrahi and G.S. Sarangi, for the Appellant; D.P. Mohapatra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. Acharya, J.—The Petitioner has filed this revision against the order dated 8-8-1978 passed by the Subordinate Judge, Bhubaneswar in Misc. Case No. 387 of 1977 (A). That Misc. Case arose out of a petition filed under Sections 5 and 12(2) of the Arbitration Act (hereinafter referred to as the "Act") for revocation of the authority of the arbitrator appointed in the case and to appoint another arbitrator in his place.

2. Mr. Rath, the learned Counsel for the Petitioner, contended that in accordance with Clause (23) of the F-2 agreement between the parties it was only the Chief Engineer, Roads & Buildings, Orissa who was to appoint the arbitrator in that case, but as the Additional Chief Engineer, and not the Chief Engineer, appointed the arbitrator, the latter had no authority or jurisdiction to proceed with the arbitrator of the dispute between the parties.

Admittedly, the Chief Engineer, Roads & Buildings, Orissa, was to appoint the arbitrator in accordance with Clause (23) of the F-2 agreement between the parties, but the arbitrator in this case was appointed by the Additional Chief Engineer of the department. Mr. Mohapatra, the learned Additional Government

Advocate, could not produce anything to show that at the relevant time the Additional Chief Engineer, who appointed the arbitrator, was acting as the Chief Engineer of the department or was in overall charge of the said department.

A copy of the letter from the Secretary to the Government of Orissa, Works Department, dated the 10th May, 1977 to the Chief Engineer, Roads & Buildings, Orissa and a copy of the letter from the Under Secretary to Government of July, 1961 were shown to me at the hearing of this revision petition by the learned Additional Government Advocate. These letters do not solve the problem. The first letter is of 10th May, 1977, it had no retrospective effect, and so it did not apply to the appointment of the arbitrator made on the 9th May, 1977. The other letter of July, 1961 only shows that the Additional Chief Engineers were discharging certain functions of the Chief Engineers as Heads of Department and so he was declared as such under the relevant rules. There is nothing in the said letters to show that on the 9th May, 1977, when the arbitrator was appointed, the Additional Chief Engineer, Roads & Buildings, was acting or had the authority to act for all intents and purposes the Chief Engineer of that department or that he had at least authority to appoint arbitrators in such case's. The second letter rather shows that the Additional Chief Engineer did not have all the powers of the Chief Engineer.

The agreement is the foundation of the arbitration, and if the appointment of the arbitrator is not done in strict accordance, with the arbitration agreement, the arbitrator would suffer from want of jurisdiction; his appointment cannot be sustained and consequently the arbitration proceeding before him or the award given by him would be a nullity.

The above view gets support from the decisions reported in *Khardah Company Ltd. v. Raymond & Company (India) Private Ltd.* AIR 1962 S.C. 1810, *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, , *The Union of India (UOI) Vs. Shri Om Prakash*, and *Sunil Mukherjee Vs. Union of India (UOI)*, .

Section 4 of the Act provides that the parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder, for the time being, of any office or appointment. That being so, if by the arbitration agreement a particular person was designated in the agreement to appoint an arbitrator, no person other than that person can appoint the arbitrator.

3. Mr. Mohapatra, the learned Additional Government Advocate, urged that the Petitioner never challenged the appointment of the arbitrator on the above ground, nor did it urge such appointment in the Court below. So it is estopped from challenging the jurisdiction of the arbitrator at this stage.

The question raised by Mr. Rath, the learned Counsel for the Petitioner, is a question of lack of jurisdiction of the arbitrator to do the job on the admitted fact that the Additional Chief Engineer, and not the Chief Engineer, who was designated in the agreement to appoint the arbitrator, made that appointment.

Therefore, in the facts of this case, the question raised is a pure question of law based on admitted facts not requiring any investigation into fact for the purpose of deciding that question. That being so, Mr. Rath cannot be estopped from raising this question at this stage.

4. Mr. Mohapatra next urged that as the Petitioner submitted to the jurisdiction of the arbitrator by filing its written statement of claims before him and also took part in the proceedings before him, it would be permitted to challenge the jurisdiction of the arbitrator at this stage on the ground that the appointment was not made by the competent authority.

There is no force in this contention also, If there is an initial and inherent want of jurisdiction on the part of the arbitrator to proceed with the matter, that cannot be cured by acquiescence because it is well settled that consent cannot confer jurisdiction. As the appointment of the arbitrator by the Additional Chief Engineer was not in accordance with Clause (23) of the F-2 agreement, that appointment was illegal and without jurisdiction, and as there was initial want of jurisdiction for the arbitrator so appointed to act in the arbitration proceeding, his acts and functions as the arbitrator were without jurisdiction. Merely because the parties or one of them did not expressly challenge his jurisdiction in the course of the proceeding such a proceeding would not, in law, be valid and cannot be sustained, because it is well settled that consent cannot confer jurisdiction and want of jurisdiction cannot be cured by acquiescence. In paragraph 21 of the decision reported in *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, .

Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.

Similar view has been expressed by their Lordships in the cases reported in *Khurdah Company Ltd. v. Raymon & Company (India) Private Ltd.* AIR 1962 S.C. 1810 and *The Union of India (UOI) Vs. Shri Om Prakash*, . The decision reported in *Raghunath Mahanty and Others Vs. State of Orissa and Others*, , cited by Mr. Mohapatra does not apply to this case as the arbitrator in that case was appointed by the Supreme Court under the provisions of Section 20(4) of the Arbitration Act. The decision reported in *State of Orissa v. Bhagabat Prasad Bal* 1972 (1) C.W.R. 951, is not in all fours with this case. Moreover, that decision will not hold good in view of the other Supreme Court decisions in the field mentioned above. The decision reported in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, , is distinguishable on facts, and the point in question did not arise for determination in that case. Moreover, the third ground mentioned in paragraph 13 of that decision, i.e. disqualification of arbitrator, which is accepted to be a good ground for the revocation of the arbitrator's authority, would apply

to this case; and as the arbitrator was not appointed in accordance with the agreement between the parties, the Petitioner can ask for the revocation of his authority on the ground of his disqualification.

The observation of the Supreme Court in paragraph 7 of its decision reported in *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, that by acquiescence the Board was precluded from challenging the jurisdiction of the umpire should be read in the context of the finding in paragraph 5 that the umpire had not lost his jurisdiction to pass the award merely because he wanted, an order from the Court by way of abundant caution authorising him to enter upon the reference. As the above quoted observation was made in the context of entirely different facts and circumstances, that will not apply to a case like this where the arbitrator completely lacked jurisdiction to proceed with the arbitration for reasons stated above.

The observation in paragraph 12 of the single Judge decision of this Court reported in *Union of India (UOI) Vs. Ch. Radhanath Nanda and Another*, cannot be accepted as good law in view of the above Supreme Court dictum on this question.

Mr. Mohapatra could not cite any decision which could be accepted as good law on this point especially in view of the above-mentioned Supreme Court decisions mentioned above. The above contention of Mr. Mohapatra cannot therefore be accepted.

5. Mr. Rath, the learned Counsel for the Petitioner, has further urged that the arbitrator has not acted in fairness and has exhibited bias in favour of the opposite party by granting adjournments to them on several occasions and accepting the counter statement from them on a date not fixed for that purpose and all this at the back of the Petitioner. It is further urged that the arbitrator grossly disregarded the elementary principles of natural justice in conducting the proceeding before him. In this connection it is urged that the arbitrator, opposite party No. 3 in this case, was appointed on 9-5-1977. He called upon the parties to file their statements of claims and counter statements by 6-6-1977. On 28-5-1977 the Petitioner filed its statement of claims. Thereafter the arbitrator called upon the opposite party to file his counter statements by 25-6-1977. On 9-6-1977 the arbitrator, on the application of the opposite party No. 2, granted time till 15-7-1977 to file the counter statement in the case, and he did not hold any sitting on 25-6-1977 which was the date fixed for filing the counter statement by the opposite parties. Again on 12-7-1977, i.e. before 15-7-1977, opposite party No. 2 prayed for time till 31-7-1977 and the arbitrator, without hearing the Petitioner and at the back of the Petitioner, allowed the said prayer of opposite party No. 2. Once again on 30-7-1977 the Executive Engineer prayed for extension of time till 31-8-1977. To the knowledge of the Petitioner no order on that petition was passed by the arbitrator, but the, without holding any sitting on 31-7-1977, the date fixed for taking up the case, accepted the counter statement from the opposite party on 28-9-1977, i.e. a date not fixed for the

purpose. As the arbitrator was granting adjournment to the opposite party in the aforesaid manner behind the back of the Petitioner, the Petitioner by a petition dated 15.8-1977 protested against such action of the arbitrator. The above facts indicate that adjournments on several occasions were granted to the opposite party at the back of the Petitioner and without giving an opportunity to the Petitioner to have its say in the matter. Such an attitude on the part of an arbitrator in favour of one party is not only against the elementary principles of natural justice but also tends to give rise to apprehension of bias in favour of the Government, giving rise to suspicion in the mind of the Petitioner that the arbitrator was favourably disposed towards the Government, more so as the arbitrator was an officer of the Government. Such conduct, attitude and action of the arbitrator in favour of the Government could also reasonably give rise to suspicion that the arbitrator might not act impartially in deciding the dispute between the parties. It is not for the party to prove actual bias arising out of the act and conduct of the arbitrator, but the possibility of bias is sufficient to remove the arbitrator. In the decision of this Court reported in *State of Orissa and Another Vs. Modern Construction Co.,* . It has been observed:

It is not for the Court when moved for the removal of an arbitrator on grounds of bias to find out whether there has been actual bias already expressed in some overt act of the arbitrator. The possibility of bias must be taken as sufficient.

The proceedings before the arbitrator are quasi-judicial proceedings. So the same should be conducted as far as possible in the manner judicial proceedings are conducted in the Courts of law. Moreover, the arbitrator by his act and conduct must show that all his actions are fair and above board. He should be able to inspire confidence in both parties that he shall decide the matter fairly, impartially and without any leanings, sense of obligation or fear for any of the parties.

Considering all the facts and circumstances stated above, one feels inclined to hold that the arbitrator misconducted himself by acting in the manner aforesaid, and that his actions and conduct could have created in the mind of the Petitioner reasonable apprehension and suspicion of partiality and bias in favour of the opposite parties.

6. It was next urged by Mr. Rath, the learned Counsel for the Petitioner, that the arbitrator was liable to be removed and his authority revoked as he did not act with reasonable despatch and neglected to complete the proceeding within a reasonable time.

Paragraph 3 of the first schedule to the Arbitration Act provides that the arbitrator shall make his award within four months after entering on the reference or after being called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. That postulates that the arbitrator should act with reasonable diligence and despatch and complete his job with expedition. In Federal Republic of Germany

Vs. S. Dey and Associates and Another, it has been held:

A During the pendency of an arbitration the Court may, on application of any party remove an arbitrator or umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award u/s 11. The Court can also remove an arbitrator or umpire who misconducts himself of the proceedings under the same section. u/s 12 of the act, the Court can not only remove the arbitrator or the umpire but appoint anybody to act as an arbitrator in place of the person removed.

Their Lordships of the Nagpur High Court, following the decisions reported in *Coley v. Da Costa* 17 Cal. 200 and *Bhogilal Purushottam v. Chimanlal Amritlal* 52 Bom. 116, have held in the decision reported in AIR 1940 386 (Nagpur) , as follows:

Unreasonable delay on the part of the arbitrator amounts to legal misconduct.

and that "even a delay of one year in arbitration proceedings, if not properly accounted for vitiates the award."

In the Calcutta case the delay was not more than a year. Even then it was held that it was such a delay as entitled any of the parties to the arbitration" to revoke the reference and withdraw the proceedings from the arbitrator.

In *Keshavsingh Dwarkadas Vs. Indian Engineering Co.*, , it has been held that if the arbitrators fail to make the award within the time fixed. It can, as a matter of plain language, be said the they have neglected to do what they had undertaken, namely to make the award within the time fixed.

One of the most important consideration which weigh with a party to resort or accede to arbitration is to avoid the law's delay, and if the arbitrator delays the matter unreasonably and without sufficient justification any of the parties to arbitration would be justified in revoking the reference.

In this case, the arbitrator was appointed on 9-5-1977. The Petitioner filed its statement of claim before the arbitrator on 28-5-1977. Since that time, as stated above, the arbitrator, behind the back of the Petitioner and without giving it any opportunity to have its say in this matter, went on granting time to the opposite parties to file their counter statements till 31-7-1977. At no stage the arbitrator took any peremptory step compelling the opposite parties to file their counter statements within a reasonable time. After 31-7-1977 he kept the matter open and accepted the counter statement of the opposite party on 28-9-1977. So the arbitrator allowed things to drift for more than 4 months after his appointment. Though this question of delay was taken up in the Court below and has also been taken up in this Court, the arbitrator, who was and is a party in both the Courts, has not chosen to explain the delay. So, apart from arbitrary grant of time to one party behind the back of the other a case of unexplained delay is made out on the face of the record.

7. On the above considerations, the authority granted to the arbitrator (Sri B.B. Panda) is liable to be and is hereby revoked, and he is discharged from his appointment. None of the parties to the agreement has either expressly or by implication resiled from the agreement to refer the dispute in question to arbitration. The claim preferred is of a heavy amount and, therefore, an experienced man of position, who can properly deal with the matter, should be appointed as arbitrator in this case. In course of the hearing of this case I wanted to know from both the parties if they had any objection to the appointment of retired Justice Shri Abhimanyu Misra as the arbitrator in this case. None of the parties expressed any objection against him, though Mr. Mohapatra, the learned Counsel for the opposite parties, as usual, desired that the matter should again go back to the Chief Engineer who could appoint another arbitrator as per the arbitration clause in the agreement. To avoid further delay and to allay all apprehensions in the mind of the Petitioner. I deem it just and proper to directly appoint an arbitrator of integrity, personality and judicial experience so that there would be or could be no scope for any objection on that score by any of the parties. Taking into consideration all aspects of this case, I hereby appoint retired Justice Shri Abhimanyu Misra as the arbitrator in this case. I expect that Justice Shri Misra will accept this appointment and shall proceed to deal with the matter in accordance with law.

8. For reasons stated above, the appointment of Sri B.B. Panda as arbitrator in this case is hereby revoked, and in his place retired Justice Shri Abhimanyu Misra is appointed as the arbitrator to deliver his award in respect of the dispute in question within as short a time as possible.

9. The Civil Revision accordingly is allowed. Each party will bear his own costs of this revision.

The L.C.R. be sent back immediately.