

(1985) 12 OHC CK 0014
In the Orissa High Court
Case No : Civil Revision No. 815 of 1982

Ganesh Prasad Nayak

APPELLANT

Vs

Orissa State Co-operative Marketing Federation Ltd. and
Others

RESPONDENT

Date of Decision : 20-12-1985

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : (1986) 1 OLR 333

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : K.N. Jena, for the Appellant; K.C. Mohanty and S.S. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—This application u/s 115 and Section 151 of the CPC is directed against the order dated 22. 7.1982 of the Subordinate Judge, Bhubaneswar, rejecting the petitioner's application for revocation of the authority of the arbitrator, opposite party No. 4.

The petitioner was entrusted to execute the work" Construction of balance ancillary works of Rice Mill at Udala (Khunta)" in the district of Mayurbhanj. An agreement, No. 35-F2, was entered between the petitioner and the Secretary, Orissa State Co-operative Marketing Federation Ltd.-opposite party No 2, acting on behalf of the society-opposite party No. 1. As dispute arose between the parties in course of execution of the aforesaid work, a letter was issued on 19.4.1976 intimating the petitioner that his contract was rescinded and requesting him to attend personally or send an agent to be present at the time of final measurement of the work. Thereafter, according to the petitioner, all his attempts to get his dues having failed he issued a notice u/s 8 of the Arbitration Act calling Upon the Managing Director Orissa State Co-operative Marketing Federation Ltd. to appoint an arbitrator in accordance with clause in the

agreement. The opposite party No 4 was appointed as arbitrator in pursuance of clause in the agreement. The petitioner seeks revocation of the authority of the opposite party No. 4 mainly on the ground that his appointment is not in accordance with arbitration clause in the agreement. According to the petitioner while the arbitration clause contemplates appointment of an Executive Engineer under the State Co-operative Marketing Federation, opposite party No. 4, Refrigeration Engineer has been appointed as arbitrator.

2. The application was objected to by the opposite parties inter alia on the ground that it was barred by limitation. It was also contended by the opposite parties that the claims if any were also time barred and hence were not realisable. According to the opposite parties the contract with the petitioner having been rescinded by letter No. 54-16 dated 19. 4. 1976 the right of the petitioner to apply for appointment of an arbitrator accrued on that date and since the petitioner failed to take appropriate steps for appointment of arbitrator within three years there after and filed the application before the Court only on 19. 5 1981, after lapse of about five years, the application was barred by limitation under Article 137 of the Limitation Act, 1963. It was the further case of the opposite parties that the appointment of opposite party No. 4 as arbitrator was a voluntary act on the part of opposite party Nos. 1 and 2. The petitioner had no right to maintain the application for revocation of authority of the appointed arbitrator.

3. The learned Subordinate Judge, on consideration of the matter accepted the contention of the opposite parties that the petition for revocation of the authority of the arbitrator, opposite party No. 4, and for appointment of another arbitrator in his place was barred by limitation under the provisions of Article 137 of the limitation Act. The Court farther held that since the petitioner challenged the appointment of opposite party No. 4 as arbitrator on the ground that he was not competent for such appointment, the said appointment could not provide him with a cause of action to file the application in question. On these findings he rejected the application filed by the petitioner. Hence this revision petition.

4. Sri K. N. Jena, the learned counsel for the petitioner, has contended that the learned Subordinate Judge clearly erred in holding that the application under Sections 5: 8: 11 and 12 of the Arbitration Act filed by the petitioner was barred by limitation under Article 137 of the Limitation Act; 1963. He also questioned the finding of the Court below that a cause of action for filing the said application arose on 19. 4. 1976 when the opposite party Nos. 1 and 2 rescinded the contract with the petitioner. Mr. Jena reiterated the objection raised by the opposite party Nos. 1 and 2 in their counter filed the Court below that the appointment of opposite party No. 4 as arbitrator was not In accordance with arbitration agreement.

Sri K. C. Mohanty the learned counsel for the opposite party Nos. 1 and 2 on the other hand, supported the order under challenge. He further submitted that even if it was held that the decision of the learned Court below on the question of

limitation was erroneous, that by itself would not bring success to the petitioner on his application. He has to further establish that opposite party No. 4 was not competent to be appointed as arbitrator under the arbitration clause.

5. After giving my anxious consideration to the rival contentions raised by the learned counsel for the parties I am of the view that the learned Subordinate Judge fell into an error in holding that the application filed by the petitioner to revoke the authority of the appointed arbitrator, opposite party No. 4, was barred by limitation. The position is not in controversy that the petitioner does not challenge the action of the opposite party Nos. 1 and 2 in rescinding the contract with him. The dispute raised by him relates to payment of outstanding dues for the work done by him before the contract was rescinded. A bare perusal of letter No. 5416 dated 19. 4. 1976 from opposite party No. 2 to the petitioner shows that while rescinding the contract the latter was requested to come to the work site of Khunta Rice Mill to attend the final measurement of the work done on 26. 4. 1976 or to send his authorised representative for the purpose. In the said letter the petitioner was also required to attend the office for hearing on 30. 4. 1976 before the President about his claim petition. From the aforementioned statements in the letter, it is clear that no final decision was conveyed there under about the payment for the work executed by the petitioner before rescission of the contract. Therefore it cannot be said that the petitioner's cause of action to apply for appointment of an arbitrator arose on 19. 4. 1976 and not on any date thereafter. From the materials on record, it further appears that though protracted correspondence was carried on between the parties after rescission of the contract, as material is available to show that a final decision was conveyed by the opposite party Nos. 1 & 2 to the petitioner regarding the claim for the work executed by him. In these circumstances, the learned Subordinate Judge erred in taking 19. 4. 1976 as the starting point for limitation and on such erroneous basis in coming to the conclusion that the application was barred by time under provisions of Article 137 of the Limitation Act.

6. But the aforesaid finding is not the end of the difficulties on the part of the petitioner. For the application of the petitioner to succeed it has to be established that Sri L. N. Das, opposite party No. 4, was not competent to be appointed as arbitrator under the terms of the agreement. As noticed earlier, the contention of the petitioner in this regard is that while under the arbitration clause an Executive Engineer working in the organisation was to be appointed as arbitrator, Sri L. N. Das was a Refrigeration Engineer at the time of his appointment as arbitrator. In my view the contention is not sound. Refrigeration Engineering is the field of specialisation of Sri L. N. Das. He has been described as such in the appointment order. But that does not mean that he was not holding the post of Executive Engineer by the date of his appointment as arbitrator. Executive Engineer is the post or designation to which a Refrigeration Engineer may also be appointed in the same way as an Electrical Engineer, a Mechanical Engineer, a Civil Engineer or Chemical Engineer can be appointed as an Executive Engineer. No material has been brought to my notice to show that the post held by Sri L.

N. Das on the date of appointment as arbitrator was not that of an Executive Engineer. In the absence of any such material the contention raised on behalf of the petitioner that Sri Das was not competent to be appointed as arbitrator under the agreement cannot be accepted.

On the aforesaid discussions while holding the finding of the learned Subordinate Judge that the application filed by the petitioner under Sections 5: 8: 11 and 12 Arbitration Act was barred by limitation under Article 137 of the Limitation Act, was erroneous, it has to be held that the petitioner has failed to make out a case for revocation of the authority of the appointed arbitrator, opposite party No, 4, on the ground that he was not competent to be so appointed in accordance with the terms of the arbitration clause. Accordingly, the revision petition fails and the same is dismissed, but in the circumstances of the case without any order for cost of this proceeding.