

(1972) 08 PAT CK 0003
In the Patna High Court
Case No : Civil Revision No. 88 of 1971

Hindustan Steel Works Construction Ltd.	APPELLANT
Vs	
Chotanagpur Mining Corporation	RESPONDENT

Date of Decision : 24-08-1972

Acts Referred:

Arbitration Act, 1940 — Section 8(2)

Citation : AIR 1973 Patna 416

Hon'ble Judges : G.N. Prasad, J

Bench : Single Bench

Advocate : Ranen Roy and J.K. Sinha, for the Appellant; Prem Shankar Dayal, Baleshwar Pd. Gupta and Ravinandan Sahay, for the Respondent

Final Decision : Allowed

Judgement

G.N. Prasad, J.—This application arises out of a proceeding u/s 8 of the Arbitration Act, 1940, for appointment of an umpire as per an arbitration clause contained in Agreement No. CE/ 22/67-68 entered into by the parties on the 20th December, 1967. The proceeding which was registered as Title Arbitration No. 65 of 1970 in the Court of the First Subordinate Judge at Dhanbad, was commenced by the opposite party (referred to as the plaintiff), which is a partnership firm of contractors registered under the Partnership Act with its head office in Ranchi. The petitioner is a limited company incorporated under the Indian Companies Act as a Government Company with its registered office in Calcutta.

2. The agreement of the 20th December, 1967 into which the parties had entered was for supply and spreading of hard stone ballast inside the plant area of Bokaro Steel City in the district of Dhanbad. Certain disputes arising out of the said agreement having arisen, the same were referred in accordance with Sub-clause (2) of Clause 108 of the said agreement to the joint arbitration of (1) Sri S. K. Poddar, Advocate, Ranchi. and (2) Shri P. N. Sen. Bar-at-Law, Calcutta and the said arbitrators entered upon the reference on the 25th August, 1968. By the

consent of the parties, all the proceedings in arbitration were held at Calcutta. The said arbitrators, however, could not come to an agreement so as to be in a position to make a common award, whereupon the matter was referred to one Sri S. N. Singh. who was appointed as an Umpire on the 4th November. 1969. Sri S. N. Singh entered upon the reference on the 5th December. 1965, but subsequently on the 22nd April, 1970. he expressed his inability to act as an Umpire in the said arbitration proceeding. The opposite party (plaintiff) thereupon gave a registered notice to the said arbitrators, with a copy to the petitioner, calling upon them to fill up the vacancy thus created in the office of the Umpire within fifteen days of the date of the notice. But one of the arbitrators. Sri S. K. Poddar, intimated to the plaintiff by his letter dated the 1st May, 1970 that the arbitrators did not have any jurisdiction to appoint any Umpire in the case. Accordingly, on the 2nd May, 1970, the plaintiff opposite party commenced the proceeding in the Court of the First Subordinate Judge at Dhanbad out of which the present revision application has arisen. The prayer of the plaintiff was that "your honour may be graciously pleased to appoint Umpire in terms of Section 8 of the Arbitration Act and be further pleased to issue directions to the said Umpire to give his award within a time to be fixed by this Hon"ble Court and/or to pass such further order or orders as your honour may deem fit and proper in the circumstances of the case".

3. In pursuance of the notice Issued by the learned Subordinate Judge, the petitioner appeared and filed its show cause on the 23rd July. 1970. Therein the petitioner challenged the jurisdiction of the Dhanbad Court to entertain the petition u/s 8 of the Arbitration Act but at the same time it proposed that Sri B. K. Guha an Ex-Judge of the Calcutta High Court, who is also on the panel of Umpires approved by the Central Government for appointment as Umpire, should be appointed Umpire in the present case. A rejoinder to the show cause of the petitioner was filed by the opposite party and the matter was ultimately posted for hearing on the 15th December 1970. On that date, the plaintiff opposite party filed a petition wherein it suggested the names of three persons for the appointment of any one of them as Umpire in the present case, namely,

(a) Shri G. Jagannath Murty. Advocate. C/o Shri D. Sreeram Murty, East Katras Colliery. Katrasgarh (Dhanbad)

(b) Shri S. P. Agarwal. A. C. A., Chartered Accountant, P. O. Jharia (Dhanbad).
And

Shri B. K. Chatterjee. Consulting Engineer, Dhanbad.

learned Subordinate Judge heard the lawyer of the plaintiff and directed the matter to be put up on the 22nd December, 1970 in presence of both sides. On the 22nd December, 1970. the parties filed Hazri and the matter was put up in presence of lawyers of both sides, whereupon the learned Subordinate Judge fixed the 2nd January, 1971 "for further order in presence of lawyer." On the 2nd January, 1971. the plaintiff filed Hazri. but the defendant (the present petitioner)

filed a petition for time on the ground that the lawyer of the defendant had already informed his client regarding the appointment of the Umpire but so far no information had been received by him from his client. The petition for time was rejected by the learned Subordinate Judge on the ground that "the defendant has applied for time on several occasions in the past also". Thereupon the plaintiff filed a petition praying that the name of one more gentleman may also be included in the list of persons for consideration for appointment as an Umpire, namely. Shri Kameshwar Pra-sad a renowned Advocate of Ranchi, having wide experience in civil laws and well known for his integrity. It was further stated in the said petition that the place for carrying out the contract work was situated at Ranchi and as such it would be convenient if a local person was appointed as an Umpire. Upon this petition, the learned Subordinate Judge passed the impugned order, which is in the following terms :

day is the last date for appointment of an Umpire. The defendant has not objected to this name. I see no reason to reject the name of Shri Kameshwar Prasad. Advocate. Ranchi as an Umpire for this suit."

Hence let Sri Kameshwar Prasad, Advocate. Beni Roy Lane. Tharpakhna, Ranchi be appointed as an Umpire to give his award within two months from today i.e. by 3-2-1971.

4. The present revision application was filed on the 29th January. 1971 and it was admitted on the 30th January. 1971. on which date the operation of the impugned order was stayed until the disposal of the present application.

5. Mr. Ranen Roy appearing in support of this application did not dispute the jurisdiction of the Dhanbad Court to entertain the petition u/s 8 of the Arbitration Act. Learned counsel has. however, assailed the impugned order principally on the ground "that the appointment of Shri Kameshwar Prasad as the Umpire was made in hot haste without affording a reasonable opportunity to the petitioner of having its say in the matter. Learned counsel relied upon Sub-section (2) of Section 8 of the Arbitration Act. which is in the following terms :

"If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or Umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

6. To appreciate the force of the contention of Mr. Roy. it is necessary to refer to the provisions of Sub-section (1) of Section 8, a perusal of which leaves no room for doubt that in the ordinary course every arbitrator or umpire has to be appointed with the consent of all the parties to the dispute. It is only when an arbitrator or an umpire is not appointed by agreement amongst the parties that the Court has to step in. in the circumstances mentioned in Sub-section (2) and to appoint an arbitrator or umpire, as the case may be who will be deemed to

have been appointed by the consent of all parties. It is manifest, therefore, that the requirement of the law about "giving the other parties an opportunity of being heard" before proceeding to make an appointment has great significance, and not a mere formality, because it operates as a substitute for the consent of the other parties for the appointment of an arbitrator or umpire. Such consent is necessary not merely to the question as to whether the appointment of an arbitrator or an umpire, ought to be made or not. The wide term in which Sub-section (2) of Section 8 is couched shows that the concerned parties are entitled to a reasonable opportunity of being heard even with regard to the person or persons who are proposed to be appointed by the Court as arbitrator or umpire. Therefore, there can be no doubt that the defendant, namely the present petitioner, was entitled to have its say in the matter of the appointment of Shri Karneshwar Prasad as the umpire. The record shows that a reasonable opportunity of being heard in the matter was not afforded to the petitioner before the Court decided to appoint Shri Kameshwar Prasad as the umpire. From the summary of the proceedings which I have already given, it is abundantly clear that the name of Shri Kameshwar Prasad for appointment as an umpire was proposed for the first time on the 2nd January, 1971 itself. Prior to that stage the lawyer of the defendant had no opportunity to contact his client in connection with the choice of Shri Kameshwar Prasad for appointment as an umpire. It was pointed out by Mr. Roy that it was also given out by the plaintiff for the first time on the 2nd January, 1971 that the place for carrying out the contract was situated at Ranchi so that it would be convenient to appoint a local person as an umpire. Mr. Roy drew my attention to the petition of the plaintiff filed on the 15th December, 1970. wherein it was stated that the arbitration proceedings ought to be conducted in Dhanbad. The impugned order shows that the learned Subordinate Judge took two factors into consideration; (i) that the 2nd January, 1971 was the last date for appointment of an umpire, and (ii) that the defendant had not objected to the appointment of Shri Kameshwar Prasad as an umpire. I have not understood as to how the 2nd January, 1971 was the last date for the appointment of an umpire. No provision of law has been brought to my notice which might show that an appointment u/s 8 must be made within a prescribed period. It seems to me that a hurried order was passed by the learned Subordinate Judge under an erroneous impression that the 2nd January, 1971 was the last date for appointment of an umpire. The second factor which weighed with the learned Subordinate Judge was also unrealistic. The Court having already rejected the petitioner's prayer for time on the ground that it has applied for time on several occasions in the past also, it was idle to expect that the petitioner would come forward with a second petition for time on the same date. The learned Subordinate Judge ought to have realised that the earlier petitions for time filed by the defendant were in connection with the selection of one of the three names proposed in the plaintiff's petition dated the 15th December, 1970. A fourth name having come in the picture, the earlier petitions for time filed by the petitioner could not be related to the selection of this fourth name. It should also have been realised that the lawyer of the defendant had not

raised any objection to the appointment of Shri Kameshwar Prasad as an umpire on the ground that he had neither contacted his client in this connection nor was any opportunity afforded to him for this purpose. I am, therefore, of the opinion that the appointment of Shri Kameshwar Prasad as an umpire was made without giving a real opportunity to the petitioner to be heard in the matter as enjoined by Sub-section (2) of Section 8. In other words, the rule of natural justice was violated, so that there was a material irregularity in the exercise of the Court's jurisdiction calling for interference of this Court in revision.

7. For the aforesaid reasons. I set aside the impugned order and send the case back with a direction that the appointment of the umpire should be made after affording reasonable opportunity to both the parties of being heard with regard to the choice of the personnel to be so appointed. The application is, accordingly, allowed; but in the circumstances, there will be no order as to costs.