

(1971) 10 OHC CK 0008
In the Orissa High Court
Case No : Civil Revision No. 217 of 1970

Kalinga Otto (P) Ltd.

APPELLANT

Vs

Charanjit Kochhar

RESPONDENT

Date of Decision : 07-10-1971

Acts Referred:

Arbitration Act, 1940 — Section 5
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1972 Ori 172

Hon'ble Judges : A. Misra, J

Bench : Single Bench

Advocate : S. Mohanty and K.N. Sinha, for the Appellant; A.K. Mitra, P. Roy, A.C. Bhashra and R. Jhunjunwala, for the Respondent

Final Decision : Allowed

Judgement

A. Misra, J.—The facts giving rise to this revision application, in brief, are as follows:

The petitioner who entered into a contract with the Hindusthan Steel Ltd., Rourkela, for making certain constructions in connection with the extension of the latter's coke-oven plant engaged the opp. party as a sub-contractor to carry out certain works concerning the contract. In or about April, 1966, the work was completed and the parties agreed by correspondence to refer their disputes to two arbitrators, one to be nominated by each. Accordingly, Shri B. Das and Shri A.K. Sen were nominated as arbitrators by the petitioner and opposite party respectively. The two arbitrators by their letter dated 15-12-67 informed the parties that they had appointed Shri N. C. Deb as umpire and entered on the reference. At the first meeting of the arbitrators held on 23-2-68, it was decided that issues involved in the reference would be disposed of by them without participation of the umpire and the points on which they failed to agree would be referred to the umpire. On 25-11-68, an application was filed before the learned Subordinate Judge, Sundergarh for extension of time to make the award who by

his order dated 7-1-69 extended the time till 6-3-69. On 1-2-69, Shri B. Das, arbitrator nominated by the petitioner wrote to the umpire requesting him to make an award as they, the arbitrators had failed to agree. He sent copies of this letter by way of information to the parties as well as the joint arbitrator Shri A.K. Sen. On the basis of this letter, the umpire purported to assume jurisdiction and proceeded with the arbitration proceeding. The umpire by his letter dated 20-3-69 addressed to the parties requested them to obtain extension of four month's time from the Court and informed them that only on receipt of such extension order action would be initiated by him. On 27-3-69, however, he gave notice to the parties fixing 11-4-69 at 3.00 p. m. for hearing of the proceeding. The opposite party wrote a letter on 3-4-69 to the umpire asking for an adjournment of the date of sitting pending receipt of opinion from his solicitors, but this was rejected by his letter dated 4-4-69. The representative and solicitor of the opposite party attended the sitting on 11-4-69 under protest. The umpire did not record their protest at the commencement of the minutes of the proceedings of that day and also arbitrarily purported to enhance his fee per sitting from Rs. 300/- to Rupees 1,500/- in spite of objection by the representative of the opposite party, while the petitioner's representative agreed to the same. The solicitors of the opposite party wrote a letter on 12-4-69 to the umpire questioning his right to assume jurisdiction and complaining about the manner in which the date for the sitting was fixed, the meeting was conducted and the minutes recorded. The umpire sent a reply to this letter on 26-4-69 wherein he denied the allegations and stated that the reply was without prejudice to further action which he might decide to take in view of the scurrilous mis-statements, grave distortion of facts and highly defamatory allegations made. On these allegations, an application was filed by the opposite party u/s 5 of the Arbitration Act for grant of leave to revoke the authority of the umpire. The revocation was sought on the ground that the umpire had inherent lack of jurisdiction to enter on the reference and that he misconducted himself and the proceedings in a manner which has created reasonable apprehension in the mind of the opposite party that the umpire will be biased.

2. The learned Subordinate Judge allowed the application and granted leave as prayed for on the following findings: (1) The umpire had inherent lack of jurisdiction to enter on the reference as both the arbitrators had not referred the dispute to him; (2) the umpire assumed authority to enter on the reference before the arbitrators had allowed the statutory period to expire without making an award; (3) the umpire misconducted himself by refusing to grant an adjournment of the date of sitting (4) by attending the proceedings on 11-4-69, the opposite party was not estopped or precluded from questioning the jurisdiction of the umpire and (5) there are reasonable grounds for apprehension in the mind of the opposite party that the umpire will be biased in view of his conduct exhibited in fixing the date of sitting, refusing an adjournment, conduct of the meeting and the reply sent by him on 26-4-69. It is this order which is under challenge in the present revision.

3. Learned Counsel for petitioner assails the impugned order on the following grounds: (1) The Court below was wrong in holding that there was inherent lack of jurisdiction in the umpire to enter on the reference; (2) the reference by Shri B. Das, one of the arbitrators to the umpire with a copy of the letter to the co-arbitrator is sufficient compliance with the requirements of law in conferring jurisdiction on the umpire; (3) even if there was any irregularity in the umpire's assuming jurisdiction, the opposite party by his participation in the proceedings held on 11-4-69 will be deemed to have submitted himself to such jurisdiction and estopped from questioning it subsequently; (4) refusal to grant an adjournment applied for by the opposite party and enhancement of the sitting fee are matters entirely within the competence of the umpire and cannot amount to misconduct or as evidence of bias and (5) denial by the umpire in his reply dated 26-4-69 of the truth of the allegations made against him cannot be considered as affording reasonable grounds for apprehension of bias on his part.

4. Points Nos. 1 to 3:-- It is not disputed that the provisions set out in the First Schedule of the Arbitration Act are applicable to the arbitration proceedings in question by virtue of Section 3 of the Act. Rule 4 of the First Schedule provides that the umpire shall enter on the reference in lieu of the arbitrators on the occurring of any of the two following contingencies; (1) if the arbitrators have allowed their time to expire without making an award and (2) if the arbitrators have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree. Rule 3 of the First Schedule prescribes that the arbitrators are to make their award within one or other of the three alternative periods mentioned therein. Rule 5 prescribes the alternative periods within which the umpire is to make his award.

5. One of the points for consideration is whether any of the two contingencies mentioned in Rule 4 had occurred to enable the umpire to assume jurisdiction to enter on the reference. Learned counsel for petitioner does not dispute that the Court below had granted an extension of time to the arbitrators to make an award till 6-3-69, and therefore, before that date, the umpire could not have assumed jurisdiction under the first clause mentioned above. One of his contentions is that where one of the arbitrators makes a reference to the umpire with intimation to the co-arbitrator, it will be sufficient compliance with the requirements of the second clause. The second clause requires delivery of the notice in writing by the arbitrators stating that they cannot agree. The letter dated 1-2-69 at Annexure A/1 was addressed to the umpire by Shri B. Das, one of the arbitrators and this cannot amount to delivery of notice in writing by the arbitrators. Delivery of the notice by the arbitrators necessarily means joint action on their part and not unilateral action by one of the arbitrators with intimation to the other. The subsequent correspondence at Annexures A/2 and A/3 also makes the position clear that the letter at Annexure A/1 was not joint action of the arbitrators, but was only unilateral action by one of them. In the letter at Annexure A/2, Sri A.K. Sen took exception to his co-arbitrator having referred the matter to the umpire. Annexure A/3, the reply by Shri B. Das, to

Shri Sen also indicates that the reference made by the letter at Annexure A/1 was unilateral action and not joint action of the arbitrators. In this letter, it is stated:

"As a last resort and to do justice to my appointment as Arbitrator I have referred the issue to the Umpire. In view of the above, I trust that you will agree to my steps already taken in the matter."

Therefore, the Court below was right in holding that this unilateral action of Shri B. Das is not in accordance with the requirements of the second clause to entitle the umpire to enter on the reference.

6. The next contention of learned Counsel for the petitioner is that under the first clause of Rule 4 the umpire was competent to assume jurisdiction where the arbitrators allowed the time to expire without making an award. In this case, the time, extended by the Court below to make the award, expired on 6-3-69. It is true that the letter by Shri B. Das to the umpire was addressed on 1-2-69 and some preliminary correspondence might have taken place; but the umpire must be deemed to have entered on the reference only on 11-4-69, the date of the first sitting, and by then, the time allowed to the arbitrators had already expired. For opposite party, on the other hand, it is argued that though the first sitting was fixed by the umpire on 11-4-69, he had already entered on the reference long before that date at a point of time before expiry of the period extended by the court. Therefore, the assumption of jurisdiction by the umpire cannot be valid. For the purpose of appreciating the respective contentions, it is necessary to consider what the expression "entering on the reference" means. Relying on the decisions reported in AIR 1950 Lah 174 and Ramsahai Sheduram Vs. Harishchandra Dullchandji and Another, , it is contended that an arbitrator or umpire enters on the reference only on the date on which he does the first appropriate judicial act in connection with the controversy referred to him by way of examining witnesses, hearing arguments and the like. In the present case, therefore, the umpire will be deemed to have entered on the reference only on 11-4-69 when in the presence of the parties for the first time he applied his judicial mind to the matters referred. On the other hand, it is argued by learned Counsel for opposite party that "entering on the reference" takes place as soon as the arbitrators or umpire accept their appointments and communicate with each other, and in any case, they will be deemed to have entered on the reference when they do something in furtherance and execution of the work of arbitration. In support of this contention, reliance is placed on the decisions reported in Hari Shankar Lal Vs. Shambhunath Prasad and Others, .

7. The facts of the case reported in AIR 1950 Lah 174, (Abdul Majid v. Bahawal Baksh), disclose that on a certain date the arbitrator decided that no further notice need be sent to one of the parties and on a subsequent date, the ex parte order was passed. Relying on the decision reported in Sardar Mal, Hardat Rai Vs. Sheo Bakhsh Rai, Sri Narain, , it was held that "entering upon the reference" means not when the arbitrator accepts the office or takes upon himself the duty,

but when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order he is compelled to conclude the hearing ex parte. The Allahabad case which was followed had been decided relying on the decision *Baker v. Stephens* (1867) 2 QB 523, where it was held that an arbitrator enters on the reference when he enters into the matter of reference either with both parties before him or under a peremptory appointment enabling him to proceed ex parte. Learned Counsel for opposite party, however, referred to a later decision reported in 1941 1 KB 396, (*Iossifoglu v. Coumantaros*) in which it was held that arbitrators enter upon a reference as soon as they have accepted their appointments and have communicated with each other about the reference. This latter decision does not appear to have been brought to the notice of the Court, while deciding the case reported in AIR 1950 Lah 174. Following this latter decision of the English Court., a Division Bench of Calcutta High Court in the decision reported in *Bajranglal Laduram Vs. Ganesh Commercial Co. Ltd*, held that the arbitrators must be held to have entered upon the reference when they take upon themselves the office of the arbitrators and exercise some function as arbitrators. In that case, it was held that the arbitrators entered upon the reference when they accepted their appointment and instructed the Registrar to call for statements from the parties. In the decision reported in *Babubhai Vanmalidas Mehta Vs. Prabhod Pranshankar Joshi*, , it was held:

"It may be going a bit too far to hold that the moment the arbitrator accepts an appointment he enters upon a reference. He must do some act which is referable to his position as an arbitrator and to nothing else before it can be said that he entered upon the reference."

A Division Bench of the Patna High Court in the decision reported in *Soneylal Thakur Vs. Lachhminarain Thakur and Another*, , after a consideration of the various authorities on the point, held:

"On a careful consideration of the authorities discussed above, I have no hesitation in arriving at a conclusion that an arbitrator does not enter upon a reference the moment he accepts to work as an arbitrator, nor can it be said that he enters upon a reference only when he actually hears the reference. In my opinion, as already observed, an arbitrator enters upon a reference when, after having accepted the reference, he applies his mind and does something in furtherance and execution of the work of arbitration. The exact date as to when an arbitrator enters on a reference in a particular case, however, will have to be determined on the facts and circum-stances of that case."

The following observations in the decision reported in *Hari Shankar Lal Vs. Shambhunath Prasad and Others*, , clearly negative the view expressed in AIR 1950 Lah 174:

"I also do not consider it necessary to decide in this case as to when arbitrators can be said to enter on the reference or what is meant by "their being called

upon to act" by notice under Rule 3 of the First Schedule. I simply note that I agree with the view expressed in 19411 KB 396, that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference. This is a stage earlier than their starting the proceedings in the presence of the parties or under some peremptory order compelling them to conclude the hearing ex parte."

The above being the position of law as to the date when the umpire can be said to have entered on the reference or assumed jurisdiction, it follows that Mr. Mahanti's contention that he assumed jurisdiction only on 11-4-69 when he held the first sitting cannot be sustained. It is, therefore, to be seen when he can be said to have entered on the reference.

8. From the correspondence, it appears that on 1-2-69 Shri B. Das referred the dispute to the umpire. Annexure B dated 20-3-69 shows that on 12-3-69 the umpire had already received certain documents and papers relating to the proceeding from Shri B. Das. Annexure D is a letter addressed by the umpire to both the arbitrators wherein he referred to the letter and Annexure A/1 and asked for forwarding to him certain documents and papers and intimated that his sitting fee would be Rs. 300/- per day. The date of issue of this letter by the umpire to the arbitrators is not noted therein. This letter must have preceded 12-3-69, because on the later date, documents and papers were forwarded to him by one of the arbitrators. This letter (Annexure D) undoubtedly was written in between the date of receipt of the letter dated 1-2-69 and 12-3-69. In this letter, firstly the umpire states that the reference was made to him by the letter at Annexure A/1, This shows that he assumed jurisdiction on the basis of the reference and not on account of the failure of the arbitrators to make an award within the statutory period. Secondly, he has intimated that he assumed jurisdiction from the date the letter of reference was sent to him. Thus, this letter establishes two things; that the umpire purported to enter on the reference before 6-3-69 and that he assumed jurisdiction on the basis of the reference and not on failure of the arbitrators to make an award. Such assumption of jurisdiction was therefore illegal.

9. Next it is argued by Mr. Mohanti that even if there was any irregularity or illegality at the inception in the umpire assuming jurisdiction, opposite party having submitted to his jurisdiction on 11-4-69 is estopped from questioning it subsequently. In support of this contention, he placed reliance on a decision of the Punjab High Court reported in AIR 1955 P&H 240, (Prince & Co. v. G. G. in Council). The facts of that case are entirely different. That was a case where Government as a party to the reference were fully aware of the circumstances in which the umpire had been appointed, took part in the proceedings before him without any objection as to any defect in his appointment at the first opportunity and allowed the award to be made without any protest taking a chance of a favourable decision. In those circumstances, it was held that Government acquiesced in the appointment and waived their objection. In the present case,

such considerations do not arise. Immediately on receipt of a copy of the letter at Annexure A/1, Mr. Sen by his letter at Annexure A/2 questioned the validity of the reference and even in the first proceedings held on 11-4-69, the representative of opposite party attended under protest about the competency of the umpire to proceed With the reference. Thus, considered from any point of view, there was lack of jurisdiction in the umpire to enter on the reference and proceed with the matter.

10. Points Nos. 4 and 5:-- Section 5 of the Arbitration Act does not enumerate or indicate the grounds or circumstances on which the Court will grant leave for revoking the authority of an arbitrator or umpire. It is well-settled that the Court may grant leave if it is satisfied that there is reasonable ground for apprehension in the mind of the applicant that the arbitrator or umpire will be biased. In the decision reported in AIR 1966 SC 3036, *Amarchand Lalitkumar v. Ambica Jute Mills Ltd.*), while dealing with the difference between an application under Sec. 5 of the Arbitration Act and one u/s 34, it was observed:

"It is true that on an application u/s 5 it is not necessary to show that the arbitrator is in fact biased and it is enough to show that there is a reasonable ground for apprehension that the arbitrator will be biased. But the reasonable ground must be established to the satisfaction of the Court to which an application for leave to revoke the authority of an appointed arbitrator is made."

This being the principle to be borne in mind while considering an application u/s 5, it is to be seen whether in the circumstances established in this case there are grounds for reasonable apprehension in the mind of the applicant that the umpire will be biased, and whether this Court has jurisdiction u/s 115, C. P. C. to interfere with the conclusion of the Court below. According to Mr. Mahanti, the finding of the Court below that there are reasonable grounds for apprehension is erroneous. In short, the grounds for apprehension of bias put forth by the opposite party in his application u/s 5 are: (1) Assumption of jurisdiction by the umpire contrary to law; (2) though in the letter at Annexure B dated 20-3-69 the umpire informed the parties that action would be initiated by him only after receipt of order of extension by the Court, by his subsequent letter at Annexure C/I dated 27-3-69 he fixed the date of sitting as 11-4-69 without any reference to his previous letter; (3) rejection of the prayer for an adjournment of the date of sitting, though opposite party prayed for an adjournment on the ground that he was awaiting his solicitor's opinion about the , competency of the umpire to proceed; (4) the arbitrary enhancement of the daily sitting fee by the umpire from Rs. 300/- to Rs. 1,500/- which was agreed to by the present petitioner and not accepted by the opposite party; (5) the manner of recording his protest in the minutes while participating at the sitting held on 11-4-69 and (6) tone of the letter of the umpire dated 26-4-69. The Court below was satisfied by some of these circumstances as affording grounds for reasonable apprehension in the mind of the opposite party that the umpire will be biased. What is contended by Mr. Mohanti is that the Court below came to a wrong conclusion, and therefore,

passed the impugned order. The point is whether such an order is open to interference in revision on the ground that the conclusion is erroneous. It is not disputed that the Court below, had jurisdiction to deal with the application and arrive at its finding on an appreciation of the materials before it. The legal position is well settled that the High Court in exercise of its revisional powers u/s 115, C. P. C cannot correct errors of fact, however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute. In this case, it is not and cannot be contended that the court below exercised a jurisdiction not vested in it or failed to exercise a jurisdiction so vested. So also, it is not open to petitioner to contend that in arriving at the finding, the court below acted in exercise of its jurisdiction illegally or with material irregularity. Therefore, the impugned order is not open to interference in revision on the ground that the finding of the court below is erroneous. Thus, I find no merit in the contentions advanced on behalf of the petitioner.

11. In the result, the revision fails and is accordingly dismissed with costs.