

(1986) 02 OHC CK 0015

In the Orissa High Court

Case No : Misc. Appeal No. 176 of 1980

Mahabir Prasad Agarwalla (dead) after him Shanti Devi and Others APPELLANT

Vs

State of Orissa RESPONDENT

Date of Decision : 19-02-1986

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : (1986) 1 OLR 361

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

Bench : Single Bench

Advocate : P.K. Patnaik, A.K. Mohanty, S.K. Das, K.N. Panigrahi and H.H. Kar, for the Appellant; Indrajit Ray, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal u/s 39 of the Arbitration Act, 1940 (hereinafter referred to as the "Act").

2. Appellant is a works contractor. He entered into agreement with the respondent for execution of some works, details of which are not necessary, relating to Express Way. A written agreement was entered into which was No. 45-F2 of 1968-69.

3. After the payment of the final bill, the appellant raised some disputes relating to the work executed by him, As per the clause in the written agreement, the Chief Engineer appointed Sri N.C. Pani, Superintending Engineer to be the Arbitrator. Claims on the statement and counter-statement were filed by the parties before Sri Pani After fixing the hearing and adjourning the same for some dates, Sri Pani expressed his unwillingness to continue as the Arbitrator. Accordingly, the Chief Engineer appointed Sri N. N. Panda to be the Arbitrator. Sri Panda entered into reference by calling upon the appellant to file his statement of claim on 26.6.1976. Sri Panda also called for the papers with Sri Pani from

him. On 25.8.1976, Sri Pani sent all the papers to Sri Panda including the claim statement and counter-claim. On 17.9.1976, the appellant filed his rejoinder. Thereafter, the hearing dates were fixed. The last date of hearing was on 5.8.1978. That day, an application was filed by the appellant before Sri Panda that he had no jurisdiction to be the Arbitrator and the matter should be referred to the Court to answer about the jurisdiction. However, Sri Panda in his order dated 5.8.1978, held that both the parties having agreed to the adjudication of the disputes by him and having submitted to his jurisdiction, the proceeding was valid. He considered the claims and held that he cannot take any action as the disputes were not raised during the execution of the contract and claims were not put forth earlier to the full and final payment of the final bill. As such, according to Sri Panda, the nature of claim items so referred is not covered within the ambit of Clause 23 of the agreement. This decision was reduced to the form of an award on 10.11.1978. It was written on stamp paper on 15.3.1979 and was received in Court on 22.3.1979. On receipt of notice from the Court, objection was raised to the validity of the award under Sections 30 and 33 of the Arbitration Act by the appellant.

4. The objections of the claimants inter alia are :

(i) Sri Panda had no jurisdiction to be the Arbitrator.

(ii) The award having been given more than four months after entering into reference is without jurisdiction.

(iii) On the face of the award, an error of law is apparent inasmuch as that Sri Panda, the Arbitrator refused to entertain the claims of the appellant on account of receipt of payment of final bill.

The respondent contested all the grounds raised in the objection to the award. After consideration of the objections and hearing the parties, the trial Court rejected the objection in the impugned order.

5. Mr. S.K. Das, the learned counsel for the appellant reiterated all the grounds of objection to the award for setting aside the same. Mr. Indrajit Ray, the learned Additional Government Advocate, on the other side, submitted that the grounds taken are not available to be raised, in view of the conduct of the appellant and the limited jurisdiction of the Court to challenge the award.

6. Mr. Das submitted that the Chief Engineer had no jurisdiction to appoint another Arbitrator after refusal of Sri N.C. Pani to proceed further after entering into reference. It is the Court alone which can appoint an Arbitrator if moved u/s 8 of the Act. The contention of Mr. Das finds full support from the observation of the Supreme Court in *Keshavsinh Dwarkadas Kapadia, etc. Vs. Indian Engineering Company*, to the following effect:

"If the appointed person after acceptance of office refused to act or will not act the parties have to take recourse to the Court."

In the present case, Sri N.C. Pani was appointed as Arbitrator. He accepted the office and after fixing the case for hearing, refused to act. After the Chief Engineer appointed Sri Pani who entered into reference, there was no scope for him to appoint another Arbitrator. When the Chief Engineer has no jurisdiction to appoint another Arbitrator, consent of parties cannot confer jurisdiction on the Chief Engineer. Thus, taking part in the proceeding before Sri N. N. Panda, would not be a bar for the appellant to raise the question of lack of jurisdiction. If the Chief Engineer would have jurisdiction to appoint another Arbitrator, the matter would have been completely different and the conduct of the appellant would have disentitled him from raising the question since sitting on the fence he took a chance for success and on failure, wanted to raise the question. However, the Chief Engineer having no jurisdiction to appoint Sri N.N. Panda, as the Arbitrator, the conduct of the appellant would not give Sri Panda jurisdiction to be the Arbitrator. The award given by Sri Panda is thus, invalid in law.

7. The next contention of Mr. Das that the award having been given much after four months, as stipulated in Clause (3) of Schedule-I of the Act, is invalid even assuming that Sri Panda was validly appointed since he became functus officio after expiry of the period and the Court had not extended the time at any time to give an award. In support of is contention Mr. Das relied upon the decision reported in State of Punjab Vs. Hardyal, . The Supreme Court directly overruled the decision of this Court reported in I. L. R. 1964 Cut. 685 (Ganesh Chandra Misra v. Artatrana Misra and Ors.). It has been held that the limitation of time fixed under Clause (3) of Schedule-I is a statutory provision and the conduct of parties cannot operate as estoppel against the statute. The contention of Mr. Das, therefore, is fully supported by the decision of the Supreme Court and the award would be invalid having been made by a person who had become functus officio.

8. Mr. Indrajit Ray, the learned Additional Government Advocate, submitted that the Court can also extend the time frost facto. The Supreme Court while observing that there is no estoppel against statute extended the time in that case. Therefore, he submitted that in view of the appellant by taking part in the proceeding till the last date, the time should be extended in this appeal. In case, the delay would have been for some months only and Sri Panda would have been vigilant. I would have considered the question to extend the time. The purpose of arbitration is speedy determination of the dispute by the Arbitrator without being bound by the technicalities of the procedure or even of the provisions in the Evidence Act. The Act, therefore, fixed the time limit where parties themselves did not fix the time in the agreement. As I find from the order-sheet maintained by Sri Panda, he was dealing with the matter casually. Even while filing the award, he did not explain to the Court the circumstances under which there was delay beyond the statutory limitation. He had freely granted adjournments even on the mere asking for the same. The Arbitrator concluded the proceeding on 5-8-1978 and clearly expressed his views in the order that he would not entertain the claim of the appellant. Even then he did not make the award till

10.11.1978. The stamp paper was purchased by the Arbitrator on 9-3-1979 as is disclosed from the endorsement of the stamp vendor on the stamp paper. Even after purchase of the stamp paper, Sri Panda took six days to type it out on 15-3-1979 on the stamp paper. Thus, the casual manner in which the Arbitrator has dealt with the matter does not justify the extension of time. Thus, the award having been passed by Sri Panda after he became functus officio when I am not inclined to extend the time the award is also invalid on that ground.

9. In view of the two grounds of legal invalidity of the award, I need not enter into the question of misconduct raised by Mr. Das which would be academic.

10. In the result, the appeal is allowed and the award is set aside. After the records are received back, the trial Court shall send the dispute to the Arbitration Tribunal constituted by the State Government for giving the award, in view of the provision u/s 41A of the Act as inserted by the State Legislature. Parties shall bear their own costs throughout.