
(2019) 05 OHC CK 0007

In the Orissa High Court

Case No : Writ Petition (Civil) No.11992 Of 2018

M/s.National Aluminium Company Ltd

APPELLANT

Vs

Indo Power Projects Ltd

RESPONDENT

Date of Decision : 01-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Arbitration and Conciliation Act, 1996 — Section 11, 27

Citation : (2019) 05 OHC CK 0007

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : Bigyan Kumar Sharma, Sanket Palei, Himanshu Sekhar Mishra

Final Decision : Allowed

Judgement

Dr. A.K. Rath, J

1. This petition challenges the order dated 3.7.2018 passed by learned Arbitrator in Arbitration Proceeding No.05 of 2017, whereby and whereunder

the application filed by the petitioner-respondent under Sec.27 of the Arbitration and Conciliation Act, 1996 (the Act) to accord approval to the

respondent to apply to the court for assistance in taking evidence of Sri S.C. Panigrahi, retired Manager (material), Nalco has been rejected.

2. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Suffice it to say that the petitioner has

issued notice inviting tender for electrical works for Phase-II expansion project at Alumina Refinery at Damanjodi. The bid of opposite party was

accepted. An agreement was entered into between the parties on 10.10.2007. Since the dispute arose between the parties, the opposite party filed an

application under Sec.11 of the Act before this Court for appointment of an

Arbitrator. This Court appointed Justice A.K. Parichha (retired), as sole Arbitrator to adjudicate the dispute between the parties. The proceeding was registered as Arbitration Proceeding No.5 of 2017. The claimant-opposite party filed its statement of claim. The petitioner filed counter to the same. The evidence from the side of the claimant was closed. On 9.5.2018, the evidence of the petitioner was commenced. The petitioner filed list of five witnesses on the said date. Two witnesses had been examined by the petitioner. While the matter stood thus, the petitioner filed an application under Sec.27 of the Act to accord approval of the Tribunal to apply to the court for assistance in taking evidence of Sri S.C. Panigrahi, the then Manager (material), Nalco, who had lodged the claim before the Insurance Company for loss of property by theft. It is stated that Mr. Panigrahi has retired from service. He has been engaged in another public sector undertaking. He has expressed his inability to examine in the proceeding, unless he receives notice from the Tribunal. In view of the same, the petitioner could not file the affidavit evidence of 3rd witness. The opposite party filed objection to the same. The Tribunal rejected the petition holding inter alia that earlier occasion, the examination and non-availability of Mr. S.C. Panigrahi was not indicated. Despite opportunity, the affidavit evidence was not filed. The plea of the counter claim no.4 was not disputed by the claimant in the rejoinder can be decided only at the final stage and not at this stage. The respondent has liberty to examine the witnesses named in the witness list and prove documents. At this stage, the Tribunal cannot be asked to assist/procure a new witness for the respondent.

3. Heard Mr. Bigyan Kumar Sharma along with Mr. Sanket Palei, learned Advocates for the petitioner and Mr. Himanshu Sekhar Mishra, learned Advocate for the opposite party.

4. Mr. Sharma, learned Advocate for the petitioner submitted that the petitioner-respondent has examined two witnesses. The claimant has disputed the insurance claim in respect of theft of property and disowned the liability on the ground that they are not party to the insurance claim. In view of the same, it is imperative to bring on record the claim lodged before the Insurance Company. The concerned officer, who lodged the insurance claim, has retired from the Company. He has been engaged in another public sector undertaking. He has expressed his inability to examine unless he receives

notice from the Tribunal. In view of the same, the petitioner has filed an application under Sec.27 of the Act for seeking assistance of the court in

taking evidence of Mr. S.C. Panigrahi. No prejudice shall be caused to the claimant, if the petition is allowed.

5. Per contra, Mr. Mishra, learned Advocate for the opposite party submitted that learned Tribunal observed that the petition is premature. The

petitioner has furnished the list of five witnesses. The other witnesses have not been examined. The petitioner has not assigned any reason as to how

the examination of Mr. Panigrahi is essential for adjudication of the case.

6. Sec.27 of the Act, which is hub of the issue, is quoted hereunder.

â??27. Court assistance in taking evidence.â?"(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

(2) The application shall specifyâ?

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular.â?

(i) the name and address of any person to be head as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced to be inspected.

(3) The Court, may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the

arbitral tribunal.

(4) The Court may, while making an order under sub-section

(3) , issue the same processes to witnesses as it may issue in this suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral

tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation

of the arbitral tribunal as they would incur for the like offences in suits tried

before the Court.

(6) In this section the express "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

7. The language of the Section is clear and unambiguous. Sub-Sec.(1) empowers the Arbitral Tribunal or a party to lis before the Arbitral Tribunal to

apply to the court for assistance in taking evidence with the approval of the Tribunal. Under sub-sec.(2), the application must specify the details

enumerated in clauses (a) to (c) including subparas (i) and (ii) of clause (c). Sub-sec.(3) provides that the court may within its competence and

according to its rules on taking evidence execute the request by ordering that the evidence be provided directly to the Arbitral Tribunal. Sub-sec.(4)

empowers the court to issue the same processes to the witnesses as it would issue in a suit being tried before it. Sub-sec.(5) provides consequence of

non-appearance. Sub-sec.(6) clarifies the expression of processes.

8. In the application under Sec.27 of the Act, the petitioner has clearly mentioned the reasons for according approval of the Tribunal to apply to the

court for assistance in taking evidence of Mr. Panigrahi. The Tribunal observed that at this stage, it cannot be asked to assist/procure a new witness

for the respondent. Merely because, the petitioner has filed the list of witnesses, the same does not preclude the Arbitral Tribunal to accord approval

for taking evidence under Sec.27 of the Act, if the party assigned sufficient reasons.

9. In view of the forgoing discussions, the order dated 3.7.2018 passed by learned Arbitrator in Arbitration Proceeding No.05 of 2017 is quashed. The

petition is allowed. Learned Arbitrator shall accord approval to the petitioner enabling him to apply to the court for taking assistance in taking evidence

of Mr. S.C. Panigrahi. Since both the parties agree that the period shall be extended, the Tribunal is requested to conclude the proceeding by end of

December, 2019.

â?|â?|â?|â?|â?|â?|â?|â?|â?|â?|â?|â?|.