

(1998) 04 OHC CK 0011
In the Orissa High Court
Case No : O.J.C. No. 1608 of 1995

Nanda Kishore Ray

APPELLANT

Vs

Secretary Areikana S.C.S. Ltd. and Others

RESPONDENT

Date of Decision : 02-04-1998

Acts Referred:

Citation : AIR 1999 Ori 46

Hon'ble Judges : S. Chatterji, J; R.K. Dash, J

Bench : Division Bench

Advocate : K.C. Lenka, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.K. DASH, J.—In this writ petition filed under Articles 226 and 227 of the Constitution of India the petitioner, erstwhile President of Areikana Service Co-operative Society Limited (for short, "Society") has prayed for quashing the impugned order of the Member, Co-operative Tribunal, passed in C.T. Review (T) No. 2 of 1993, Annexure-2 wherein his prayer for review of the order passed in Revision No. 5 of 1985 has been rejected.

2. The brief facts of the case giving rise to the present writ petition are that the petitioner was the President of the Society from 16-3-1966 to 27-4-1978. During his incumbency he alleged to have committed misappropriation of funds of the Society to the tune of Rs. 52,961.63 paise which could be ascertained during audit. For recovery of the said amount the Society initiated Dispute Case No. 254 of 1980 before the Assistant Registrar of Co-operative Societies, Jaipur Circle, who having admitted the case sent it to J.N. Das, Arbitrator-cum-C.E.O., Dharmasala Block for arbitration. On 18-4-1981 the petitioner entered appearance and filed his written statement. Thereupon, it is alleged that the arbitrator only on perusal of the books of account of the Society and the audit report, passed the award on 18-4-1981. Aggrieved by the said award the petitioner preferred appeal before the Deputy Registrar in Appeal Case No. 26 of

1981. It was contended before the Appellate Authority that the petitioner had not been afforded opportunity to lead evidence refuting the claim of the Society. This contention was negated and the impugned award was affirmed. The petitioner then moved the revisional authority, namely, Registrar Co-operative Societies, Orissa, challenging the order of the Deputy Registrar passed in the aforesaid appeal. A contention was raised on behalf of the petitioner that it was obligatory of the arbitrator to briefly record memorandum of evidence and that having not been done, the award passed by the arbitrator solely based on the audit report was unsustainable. This submission did not find favour with the revisional authority since according to it, there being no evidence led by the Society, there was no occasion for the arbitrator to record memorandum of evidence. Consequently the Registrar declined to interfere with the orders of both Arbitrator and the Appellate Authority and dismissed the revision. Thereupon the petitioner preferred the Second Revision to the State Government which did not yield any positive result in his favour. He then filed a review petition before the said second revisional authority and while the petition was pending adjudication, Orissa Co-operative Societies Act (for short, "the Act") came to be amended and the power of revision which was originally with the State Government vested with the Cooperative Tribunal. Consequently the review petition was transferred to the Tribunal. The very same contention was raised on behalf of the petitioner that the arbitrator having not recorded a brief memorandum of evidence of the parties which is mandatory in nature, the award passed by him was unsustainable. Repelling such contention learned Tribunal held that the phrase "shall record a brief memorandum of the evidence of the parties" appearing in Rule 78 of the Orissa Co-operative Societies Rules, 1965 (for short, "the Rules") necessarily postulates that the oral evidence shall be recorded when it is tendered. So, when both parties did not prefer to adduce any oral evidence the Arbitrator was perfectly justified in passing the award solely based on the documentary evidence, that is, audit report relied upon by the Society. Having so held, the Tribunal dismissed the review petition and it is against that order of dismissal, the present writ petition is filed praying to quash the same and to remand the case for fresh trial.

3. The Secretary of the Society, opposite party No. 1 despite service of notice has not entered appearance. Opposite parties 2 to 5 are the officials of the Co-operative Societies, Orissa, opposite party No: 6 is the Addl. Secretary to Govt. in Co-operation Department and opposite party No. 7 is the Member, Co-operative Tribunal against whose order the present writ petition is filed. We have heard Sri K. C. Lenka learned counsel for the petitioner and learned Addl. Government Advocate and perused the writ petition in great detail. Sri Lenka in his lengthy argument has contended with vehemence that without there being proper enquiry as envisaged in the Act and Rules framed thereunder, the award passed against the petitioner is bad in law. Elucidating the argument, Sri Lenka has urged that the Act which is a self-contained statute provides the nature of dispute to be raised and the person or persons competent to decide such dispute

and the procedure for determining the questions involved in the dispute. Referring to Section 68, he submitted that it starts with non obstante clause that notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or the business of a Society shall be referred to the Registrar for decision. The next relevant provision, is Section 70 which provides that the Registrar is the competent person who on reference of a dispute u/s 68 may decide the dispute himself or transfer it for disposal to any other person invested with the power by the State Govt. to decide or transfer the same to arbitrator so appointed for the purpose. Conceding that the dispute in the present case falls within the ambit of Section 68, he argued that the procedure prescribed in Rule 78 of the Rules for deciding a dispute was not followed by the Arbitrator, inasmuch as without recording the brief memorandum of evidence of the parties and the witnesses, the Arbitrator only basing the audit report held that the petitioner had defalcated certain sum while being President of the Society and consequently passed the award. Thus, determination of the dispute in contravention of the aforesaid Rules which is mandatory in nature has made the award vulnerable. Counsel further urged that though similar contention was raised before the learned Tribunal, but it rejected the same on flimsy ground and therefore, the impugned order passed under Annexure-2 should be quashed and the matter should be remitted to the Arbitrator for taking up the hearing afresh.

4. In view of the above submissions, the sole question for consideration in the present writ application is whether, there has been non-observance of the procedure prescribed under Rule 78 of the Rules by the Arbitrator while determining the dispute and passing of the award, and if so, whether the award suffers from any infirmity and illegality.

Rule 78 of the Rules, relevant for the purpose, reads as under;

"The Registrar, the Arbitrator or any other person deciding the dispute shall record a brief memorandum of the evidence of the parties and witnesses and upon the evidence so recorded and after consideration of any documentary evidence produced by the parties a decision or award, as the case may be, shall be given in accordance with justice, equity and good conscience by such Registrar, arbitrator or other person, x x "

The aforesaid Rule prescribing the procedure for hearing of a dispute is almost *pari materia* with the procedure for trial of a suit under Small Cause Courts Act. During hearing of such suits, the Court only records brief memorandum or substance of the evidence adduced by the parties. Question arises if a party does not intend to adduce any oral evidence and in support of his case he only relies upon the documents, then could it be said that the Court hearing such suit should compel the party to adduce oral evidence? In our opinion, it cannot. The word "evidence" defined in Section 3 of the Evidence Act needs and includes both oral and documentary evidence. According to Taylor "evidence" means all the legal means exclusive of mere argument which tend to prove or disprove any

fact the truth of which is submitted to judicial investigation. Phipon says "evidence" means the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute. In view of the aforesaid meaning of word "evidence" a party to a proceeding has option either to lead oral or documentary evidence or both. Instead of adducing oral evidence, he can produce documents and bring the same on record and ask the Court to give verdict on it. In that case the Court cannot say Unit since he has not fed any oral evidence either by examining himself or any witness, he is not entitled to the relief asked for even if he has established his case by proof of documentary evidence. This is the basic fundamental which a Court or any other authority normally follows while trying a suit or proceeding of quasi-civil in nature. So, the expression "shall record a brief memorandum of the evidence of the parties" occurring in Rule 78 means that it is obligatory of the authority to record brief memorandum of oral evidence, if the same is tendered, The word "shall" docs not mean that the authority shall compel the party to adduce oral evidence. Such an interpretation as argued by Sri Lenka is fallacious and contrary to strong common sense. In the present case, it is not disputed that audit report on the basis of which the dispute was raised was brought in evidence without there being any objection by the petitioner. So, when its admissibility, was not questioned there was no legal bar or impediment on the part of the Arbitrator to accept the same as evidence and to pass award on the basis thereof particularly when no evidence was led by the petitioner to disprove the same. This view of ours gains support from a decision of this Court in Sailendra Kishore Patnaik Vs. Harekrushna Satpathy and Others, where it was observed (at page 126) :

" xx xx xx xx When documents are marked as exhibits without objection of a particular party, that party cannot raise the objection that the said document has not been admitted in evidence, but that party can impeach that document and the contents thereof in all other possible manner.

xx xx xx xx

Similar view was also taken by the apex Court in P.C. Purushothama Reddiar Vs. S. Perumal, .

5. Regard being had to the facts narrated in the writ petition and the submissions of the learned counsel for the petitioner, we are of the view that the Arbitrator cannot be faulted with for passing the award solely on the basis of audit report which was brought in evidence without there being any objection by the petitioner. Therefore, the said award as well as the orders of the appellate and revisional authority and the impugned order of the learned Tribunal under Annexure-2 do not suffer from illegality or infirmity requiring interference of this Court in exercise of writ jurisdiction. In the result, the writ petition fails and the same is dismissed. No costs.

S. Chatterji, J.

6. I agree.