
(1976) 08 OHC CK 0012
In the Orissa High Court
Case No : Second Appeal No. 9 of 1973

Nityananda Sahu

APPELLANT

Vs

Postmaster General and Others

RESPONDENT

Date of Decision : 23-08-1976

Acts Referred:

Arbitration Act, 1940 — Section 46
Civil Procedure Code, 1908 (CPC) — Section 9
Telegraph Act, 1885 — Section 7B, 7B(1)

Citation : AIR 1977 Ori 48 : (1976) 42 CLT 1049

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : B.H. Mohanty, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Plaintiff has carried this second appeal against the confirming judgment and decree of the learned Additional District Judge of Cuttack in a suit for recovery of Rs. 5,000/- by way of damages.

2. Plaintiff claims that he is a renowned businessman of Cuttack and was subscriber of a telephone bearing No. CK 431 which had also an extension being CK 431-A. He had been regularly clearing the bills issued by the Department against these telephone connections. On 8-9-1965, the telephones were disconnected on the plea of non-payment of telephone bills. When the plaintiff enquired, he was served with a demand note for a sum of about Rs. 1,400/-. Plaintiff disputed the correctness of the demand and ultimately a corrected demand note for a sum of Rs. 795.80 paise was given to him. This amount plaintiff paid on 31-5-1966 under receipt No. 9887 and asked for restoration of the connections. The Postmaster General (defendant No. 1) directed restoration of connection, but in spite of his order actual reconnection was not effected until the suit was filed on 20th of February, 1968. During the pendency of the suit, the telephone connection was restored. Though at the time of filing of the suit

plaintiff had asked for a mandatory injunction for restoration of the connection, the claim for that relief has since been dropped in view of the pendente lite restoration of service. Plaintiff claimed that he had sustained loss of business as also loss of prestige on account of unlawful disconnection of the telephone and illegal withholding of re-connection in spite of his paying the arrear dues as demanded.

3. Defendants 1 and 3 filed a joint written statement and pleaded that the suit was not maintainable in view of the provisions contained in Section 7B of the Indian Telegraph Act of 1885. They further pleaded that restoration was directed on two conditions, namely that the reconnection fee was to be paid by the plaintiff and that the rental for the period the telephone remained disconnected on account of non-payment of rent would also be paid by the subscriber. The defendants pointed out that the plaintiff never gave the undertaking as required under the departmental rules and restoration of connection was not possible as a spare cable was not available in the area where the telephone connection had to be restored. Several other factual averments were also made.

4. The learned Additional Subordinate Judge who tried the suit came to hold that the plaintiff had failed to tender the declaration required by order of defendant No. 1 dated 2-7-1966 and, therefore, he was not entitled to restoration of connection. He further found that the plaintiff had failed to establish his claim for damages. The suit was dismissed.

5. In appeal, two grounds were mainly raised: (i) there was no provision for calling for a declaration as directed by defendant No. 1 and (ii) there was evidence in support of the claim for damages and on the basis of such evidence, plaintiff's suit should have been decreed. The learned Additional District Judge negatived the first contention by holding that the departmental rule required a declaration as demanded and the plaintiff failed to furnish the same. He also found that the pleading for damages and, the evidence in support of the plea fell far short of the legal requirement to establish a claim for, special damage as prayed for and, therefore, plaintiff was not entitled to the reliefs as claimed. This affirming decree of the learned Additional District Judge is now assailed in second appeal.

6. Mr. Mohanty for the appellant no more contends that plaintiff's claim for special damage is maintainable. According to him, however, on the materials placed on the record, a decree for general damage should have been granted on the footing that the disconnection was unauthorised and restoration of the connection had been withheld without justification even if the plaintiff had paid the dues and satisfied the conditions indicated in the order of defendant No. 1. Counsel for respondents challenges the maintainability of the suit on the basis of the provisions contained in Section (sic)B of the Indian Telegraph Act of 1885 (hereafter referred to as the "Act"). This in fact was one of the pleas raised in the written statement and issue No. 3 had been raised in the trial Court on this score. The issue seems not to have been disposed of at all by the trial Court. In

the lower appellate Court this question does not appear to have been canvassed as the judgment does not deal with it. As jurisdiction of the Civil Court to maintain the action is raised, in second appeal the question can also be examined. I propose to deal with the respondents' objection regarding maintainability of the suit first and in case I reach a conclusion that the suit lay, the merit of the matter has to be examined.

7. Statutory arbitration was introduced into the Telegraph Act by Central Act 47 of 1957. Section 7B of the Act reads thus:--

"Arbitration of disputes. -- (1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.

(2) The award of the arbitrator appointed under Sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any court."

There is no need to examine whether Section 7B of the Act applies to the facts of the case as parties agree that the dispute in question would come within the ambit of Section 7-B(1) quoted above. Mr. Mohanty for the appellant, however, claims that the Arbitration Act of 1940 would apply to the arbitration contemplated u/s 7B of the Act and the defendants having submitted to the jurisdiction of the Civil Court and having not taken steps as required u/s 34 of the Arbitration Act to stay the suit are precluded from disputing jurisdiction of the court to entertain the suit. Respondents' counsel maintains that the Arbitration Act of 1940 does not apply to arbitration contemplated u/s 7B of the Act and, therefore, there is no force in Mr. Mohanty's contention.

Section 46 of the Arbitration Act provides:--

"The provisions of this Act, except Sub-section (1) of Section 6 and Sections 7 12 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

According to Mr. Mohanty for the appellant in view of the clear provision in Section 46, the Arbitration Act of 1940 applies to statutory arbitration u/s 7B of the Act and, therefore, unless an application u/s 34 of the Arbitration Act was made in good time and the suit was stayed, the defendants are precluded from raising want of jurisdiction of the court at this stage. In support of his contention,

Mr. Mohanty has relied on a number of authorities. In the case of Harnam Singh Rulia Vs. Man Singh and Others, , applicability of the Arbitration Act, 1940, to arbitration under the Central Co-operative Societies Act of 1912 was being considered. On the strength of Section 46 of the Arbitration Act, the provisions of that Act were held applicable to the dispute in question. It was clearly indicated that there was no express bar to a suit in the statute or the rules made thereunder. In the case of Dr. Brij Mohan Sharma Vs. The Chancellor, Lucknow University, Lucknow, , the applicability of the Arbitration Act to the provision for arbitration under the Lucknow University Act was examined. Section 44 of the University Act provided that every dispute which was referred to, the Tribunal constituted under the Act for decision shall be deemed to be a submission to Arbitration within the meaning of the Arbitration Act of 1940. It further provided that the provisions of the Arbitration Act with the exception of Section 2 would apply to such proceedings. The Court, therefore, found that there was nothing in Section 44 of the Locknow University Act which might set to militate against the provisions of the Arbitration Act. Accordingly the provisions of the Arbitration Act were found applicable.

In the case of Rajdhari Devi Vs. Deputy Registrar, Co-operative Societies, U.P., Gorakhpur and Others, , an application for certiorari had been filed against an award. While examining the maintainability of the application, the Court proceeded to observe that provisions of the Arbitration Act including Section 46 were applicable to arbitrations under the U.P. Co-operative Societies Rules. In view of the deeming clause in Section 46 of the Arbitration Act, arbitrations under the U.P. Co-operative Societies Rules framed under the corresponding Act have been put on the same level as arbitrations based on agreements. Consequently, arbitrators under the Cooperative Societies Rules were not amenable to the writ jurisdiction and a- writ cannot be issued to quash an award made in an arbitration under those Rules. The ratio, therefore, has no application to the facts of this case.

In the case of Nawabzada S.M. Ali Dabir and Another Vs. Nawabzada S.M. Ali Kabir Khan and Others, , applicability of the Arbitration Act to an arbitration under the U.P. Court of Wards Act was being considered. Section 58 (2) of the U.P. Act provided that a reference to arbitration made in accordance with Sub-section (1) shall take effect in the same manner and have the same consequences as a reference made by persons who are not wards of Court. In view of this provision, the Court rightly extended the application of the Arbitration Act. This, therefore, does not support Mr. Mohanty's contention.

These authorities, in my view, are not, of any avail for the contention of Mr. Mohanty for "the appellant. As already noticed, Sub-section (2) of Section 7B of the Act makes the award of the Arbitrator conclusive between the parties to the dispute and mantes it immune from challenge in any court. This provision rules out the application of the Arbitration Act Section 46 of the Arbitration Act clearly indicates that the Arbitration Act shall apply provided it is not inconsistent with

the scheme of the statute providing statutory arbitration. Under the Arbitration Act, the court has power to modify an award, to remit an award or to make the award a rule of the court. It has also power to set aside an award. In view of the clear terms of Section 7B of the Act, the general scheme of the Arbitration Act is not applicable to statutory arbitration under the Act,

A Division Bench of the Patna High Court in the case of Union of India (UOI) Vs. Ramdas Oil Mills, examined at length the applicability of the Arbitration Act to an arbitration proceeding u/s 19 of the Defence of India Act and came to hold that the provisions of the Arbitration Act would not apply since the provisions in the Defence of India Act were inconsistent with the Arbitration Act. The reasoning given by the learned Judges was that while the Arbitration Act did not contemplate an appeal against the award of an arbitrator and the award of the Arbitrator had to be filed in or submitted to the court to be made a rule of the court, against the award under the Defence of India Act, an appeal lay. The Court, therefore, concluded that it was clear from the reading of the provisions of Section 19 of the Defence of India Act that it was a self-contained enactment and on a comparison of the provisions of this Act with those of the Arbitration Act, it was manifest that the former provisions were absolutely inconsistent with those of the latter and, therefore, they could not be administered simultaneously. This exactly is the position here. As I have already indicated, the scheme under the Arbitration Act does not fit in with the provisions of Section 7B of the Telegraph Act. Accordingly the Arbitration Act would have no application. Mr. Mohanty, therefore, is not entitled to contend that the defendants are estopped from challenging the maintainability of the suit having participated in the proceeding before the court.

The mandate given by the Act is clear. It ousts the jurisdiction of the Civil Court and creates an alternate forum for determination of the disputes of the stated nature. As it is conceded before me that the dispute in question is covered by Section 7-B(1) of the Act, no suit in the Civil Court was maintainable and the matter could only be referred to arbitration. From this conclusion, it would follow that the plaintiffs suit was misconceived and the only remedy open to him was arbitration. It is open to the plaintiff to ask for an appropriate relief under the Act if it is still maintainable.

8. It is unfortunate that having raised the point in the written statement regarding want of jurisdiction, the defendants did not appropriately press for the determination of the question in the trial court nor did they pointedly canvass this aspect in the lower appellate court. Though I have not discussed in my judgment about the conduct of the defendants, I have no doubt that better service was expected from a public utility service like the Posts and Telegraphs Department and the plaintiff appeared to have a genuine grievance to ventilate. In these circumstances, it is appropriate to direct parties to bear their own costs throughout and not to follow the usual rule of costs abiding the result.

The second appeal fails and is dismissed.