
(1999) 05 OHC CK 0011

In the Orissa High Court

Case No : Original Jurisdiction Case No. 4631 of 1999

Orient Paper Mills and Another

APPELLANT

Vs

Civil Judge (Senior Division) and Another

RESPONDENT

Date of Decision : 14-05-1999

Acts Referred:

Evidence Act, 1872 — Section 118

Citation : (2000) 89 CLT 135 : (1999) 2 OLR 99

Hon'ble Judges : R.K. Patra, J; Pradipta Ray, J

Bench : Division Bench

Advocate : K.K. Jena and A.K. Biswal, for the Appellant; S.P. Mishra, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—This is an application under Articles 226 and 227 of the Constitution of India praying for a direction to the learned Civil Judge (Senior Division), Bhubaneswar to dispose of the petitioners' application dated 17.1.1998 to summon B.N.Mishra, the then Chairman of Arbitration Tribunal, Orissa, for being examined in Misc. Case No. 99 of 1997 (arising out of O.S.No. 74 of 1997). The petitioners have also made an alternative prayer that this Court may consider the aforesaid prayer on merit.

2. Petitioner No. 1 - Orient Paper Mills filed O.S.No. 321 of 1998-1 u/s 20 of the Arbitration Act, 1940 (hereinafter referred to as "the Act") in the Court of Subordinate Judge, Bhubaneswar (now designated as Civil Judge (Senior Division) praying to direct the State of Orissa (opp. party No. 2) to file the original agreement and to refer the dispute between the parties to the Arbitration Tribunal for adjudication. The learned Subordinate Judge by the judgment and order dated 9.8.1990 decreed the suit and directed the State to file the original agreement. After the agreement was filed, the learned Subordinate Judge by order dated 23.11.1991 referred the dispute for adjudication to the Arbitration Tribunal, Orissa, Bhubaneswar. The Arbitration Tribunal by majority passed a nil

award on 29.11.1996. Petitioner No. 1 being aggrieved by the award filed an application on 1.3.1997 u/s 30 read with Section 33 of the Act (vide Misc. Case No. 99 of 1997) before the learned Civil Judge (Senior Division) to set aside the award and remit the matter to the Arbitration Tribunal for fresh disposal on merit. On 17.1.1998 petitioner No. 1 filed an application before learned Civil Judge to issue summons to the Chairman, Arbitration Tribunal, Orissa, for being examined in the case. State of Orissa filed its objection to the aforesaid application on 31.1.1998. The matter was being adjourned by the learned Civil Judge from time to time and ultimately on 6.2.1998 he adjourned the hearing of the said application to 7.8.1999.

3. Shri Jena submitted that the learned Civil Judge has been adjourning the case freely without taking up the application to summon the Chairman as a witness and a long adjournment from 6.2.1999 to 7.8.1999 was unjustified causing grave prejudice to the party. The learned counsel contended that in the application filed on behalf of petitioner No. 1 a clear case had been made out to summon the Chairman of the Arbitration Tribunal to be examined in the case and this Court may consider the said prayer without requiring the learned Civil Judge to decide the matter.

In view of the aforesaid submission, we have heard Shri Jena on the merits of petitioner No. 1's application to summon the Chairman of the Arbitration Tribunal to be examined as a witness. In support of the application, Shri Jena heavily relied upon the judgment of this Court in *State of Orissa v. D.C. Routray* AIR 1983 SC 163.

4. Can an arbitrator be called as a witness to give evidence in respect of the arbitration proceedings ?

Russell on Arbitration (18th Edition) stated as follows :

"Arbitrator as witness.

An arbitrator may be called as a witness to give evidence respecting proceedings in arbitration. There does not seem to be any privilege attaching him in his judicial character, whether he is a legal or lay arbitrator, entitling him to refuse his testimony; but where, in an action on an award, the defendant called the arbitrator to prove the ground on which he made his award, in order to show that he had exceeded the limits of the submission, Mansfield C.J. told the witness that he need not be examined unless he chose. The arbitrator in consequence declined to be examined. On a motion for a new trial no objection was made to this decision."

Quintin Me Garel Hegg in the Law of Arbitration (1936 Edition) wrote as follows :

"D. THE ARBITRATOR AS A WITNESS

Parties to an arbitrator may require the evidence of an arbitrator in one of two ways. Either they may require the evidence of the arbitrator in proceedings to set

aside, enforce, or remit the award, or revoke the submission, or they may require his oral evidence in an action upon the award.

It might be conceived that parties other than parties to the submission might require the evidence of an arbitrator as to what took place in arbitration proceedings. There does not appear to be any authority upon this point, but it is conceived that no professional privilege exists, even though the arbitrator be a barrister, and that therefore he would be bound to answer such questions as might be put to him, should the Court so direct.

On the other hand, the questions which an arbitrator may be asked when called by a party to the reference, were very fully discussed in *Bucclough (Duke) v. Metropolitan Board of Works* 1871 5 LR 418 (and See also L.R.5 Ex. 221; see also *Fraser v. Fraserville City* (1917) A.C. 187; *O' Rourke v. Railway Commissioners* (1890) 15 A.C. 371).

In that case defendants to an action on the award desired to prove that the arbitrator had exceeded his jurisdiction and tendered the arbitrator as evidence.

The following points emerge :

(1) The arbitrator is a competent witness (per CHELMSFORD, C, at p. 457).

(2) The Arbitrator may be asked whether in his estimate of the compensation he took into consideration matters not included in the reference and therefore not within his jurisdiction (ibid).

(3) The arbitrator may be asked the course which the argument before him had taken, what claims were made, and what claims were admitted, so as to put the Court in possession of the history of the litigation up to the time of making of the award (per LORD CAIRNS, at p. 462).

(4) The arbitrator may not be asked questions to explain, to aid or to contradict what is to be found on the face of the award. The award is a written instrument and must speak for itself.

(5) It follows that the arbitrator may not be asked questions about the grounds on which he decided a question within his jurisdiction, and, therefore, where one of the questions was a question of the quantum of damage, he may not be asked what items of damage were included in it (per CLEASBY, B., at pp. 433, 434, adopted by Lord CAIRNS, supra)."

5. In the case of *D.C.Rout* (supra) Justice R.C.Patnaik (as he then was) after considering several decisions including that of the House of Lords held as follows :

"The law that can be culled from the above authorities may be stated thus : An arbitrator is a competent witness and his evidence is admissible to show over what subject-matter he was exercising jurisdiction, into which he was inquiring. He can be examined as to the course of the proceeding before him - what claims were made, what claims were admitted, to investigate if he took into

consideration any matter not included in the reference and, therefore, not within the limits of his jurisdiction, and also where a charge of dishonesty or partiality is made. He cannot be examined as to the elements which entered into his consideration in determining the quantum of compensation or as to the exercise by him of any discretionary power to award compensation or for the purpose of showing what he intended to be included. The power is to be exercised cautiously and sparingly and not in routine manner."

6. On careful perusal of the judgment of this Court in the case of D.C.Routray (supra) we find that it was a case in which the State made a prayer before the trial Judge to examine the arbitrator as a witness. The arbitrator in that case passed a specific and categorical order assuring the parties that he would give reasons in support of the awards. The arbitrator's order dated 8.7.1980 was as follows :

"Both parties present. Perused the written argument of G.P. and" heard the submission of the advocate for the claimant on the petition filed by the G.P., dated 21.6.1980. My answer will be given at the time of giving the award....."

He gave the awards (one for lump sum of Rs. 19,87,646.00 and the other for lump sum of Rs. 20,11,625.00) without recording any reason in support of them. Since the awards rendered by the arbitrator were contrary to and inconsistent with his own order dated 8.7.1980, it was, therefore, necessary to know from him as to the reasons which impelled him in passing a non-speaking award. It was the main ground taken on behalf of the State in its application for summoning the arbitrator as a witness. In that context it was held by this Court that the trial Court erroneously rejected the State's application for summoning the arbitrator for examination as a witness.

7. The decision of D.C.Routray (supra) relied on by Shri Jena cannot be pressed into service in the present case which will be presently seen.

May it be stated that an arbitrator may be called as a witness to give evidence in respect of proceedings in arbitration on certain grounds. On mere asking by a party to summon an arbitrator, the Court, however, will not freely accede to it. Court's discretion in this regard is a judicial one and not an arbitrary exercise of discretion. It cannot casually and as a matter of course call an arbitrator as a witness. The prayer of a party to summon the arbitrator as witness if smacks of mala fide is liable to be rejected.

8. Let us now examine if the application filed on behalf of petitioner No. 1 to summon the erstwhile Chairman, Arbitration Tribunal as a witness has any merit. The grounds taken in support of the application are as follows :

(i) The award was "procured" behind the back of the petitioner No. 1 by relying on certain materials "procured" behind its back and there is every reason to believe that those materials were supplied by the officer of the State after the argument was closed.

(ii) The Arbitration Tribunal relied on documents like the Wealth of India, Raw Materials Vol. III, Silvi Culture of India Trees by P.S.Troup Vol. III, Botany of Bihar and Orissa by H.H.Hainas, Part IV which were not available before it nor were they referred or filed by any of the parties to the dispute.

(iii) Indian Forests Bamboo Special-I, Vol. 114 No. 9 was not filed or cited by any of the parties but was referred to in the award.

(iv) Revised working plan for the reserved and demarcated protected forests of Angul Forest Division from 1990-91 to 1999-2000 was relied upon by the Arbitration Tribunal behind the back of petitioner No. 1. Moreover, the dispute was in respect of Ghumsur North Forest Division and reference to working plan of Angul Forest Division was irrelevant.

9. In the objection filed by the State (Annexure-6) the allegation that officers of the State supplied the materials after the argument was closed has been denied. Similarly, the allegation that documents were filed after hearing was closed has been refuted. It was asserted that the records of the Arbitration Tribunal would speak that the award was passed on the basis of materials available.

10. The award rendered by the Arbitration Tribunal is a speaking one. The reasons in rejecting the claim of petitioner No. 1 have been indicated therein. The grievance of petitioner No. 1 that documents referred to in the award were not cited or placed before it by any party can be examined on perusal of the records of the Arbitration proceedings. Whether any evidence or document was taken into account by the Arbitration Tribunal without notice to petitioner No. 1 or behind its back is a question which can be resolved by looking into the records. If any document or material was considered behind the back of petitioner No. 1 and was utilised against it, it may constitute a valid ground for setting aside the award itself on the ground of infraction of the principles of natural justice. Similarly, if any irrelevant document or evidence was referred to in the award, the Court while considering the objection to the award can examine the same.

11. For the reasons aforesaid, the prayer of petitioner No. 1 to summon the then Chairman of the Arbitration Tribunal to be examined as a witness has no legal basis and is otherwise misconceived. Consequently the application dated 17.1.1998 pending before the learned Civil Judge stands rejected.

12. Registry is directed to send a copy of this judgment to the learned Civil Judge (Senior Division), Bhubaneswar for passing consequential order on the said application on the date fixed for hearing. Before parting with the case, we may observe that the learned Civil Judge should not have posted the case by giving a long adjournment of seven months from 6.2.1999 to 7.8.1999. He will do well to take up the main case for hearing and dispose of the same as expeditiously as possible preferably by the end of October, 1999.

The writ application is dismissed. There would be no order as to costs.

Pradipta Ray, J.

13. I agree.