

(1982) 09 OHC CK 0012
In the Orissa High Court
Case No : Civil Revision No. 514 of 1982

Sri Gokul Chandra Kanungo	Vs	APPELLANT
State of Orissa and Another		RESPONDENT

Date of Decision : 09-09-1982

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4), 8

Citation : (1982) 54 CLT 463

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : R.K. Rath and B.K. Nayak, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—This is a revision against an order of the Subordinate Judge, Bhubaneswar, directing the arbitrator, to decide specifically two issues, namely, (a) maintainability of the claims and (b) question of limitation; and to give a reasoned award.

2. The Petitioner has contended that the learned Subordinate Judge had no jurisdiction to give directions to the arbitrator to decide any issue specifically or to give a reasoned award. It has further been contended that the learned Subordinate Judge was wrong in stating that the parties agreed to the aforesaid course.

3. The, tender submitted by the Petitioner for the construction of: "High" level bridge over Rushikulya on N.H. No. 5 near Ganjam was accepted by the opposite parties under agreement No. 38 F-2 of 1970-71. Some disputes arose in course of the execution and adjudication was done by arbitration and awards were passed. On 12-1-1974, the contract was rescinded by the opposite parties. The final bill for the work done by the Petitioner however, was not prepared and the amount due to the Petitioner was not paid. So, he issued a notice on 27-11-1981

demanding payment claiming interest at the rate of 19 1/2 per cent per annum and for damages. By letter dated 19-12-1981, the claim of the Petitioner was refuted by opposite party No. 2. So, the Petitioner invoking the arbitration clause in the agreement, filed an application u/s 20 of the Arbitration Act for filing of the agreement and reference of disputes for adjudication by arbitration. The Petitioner annexed the details of his claims as per Annexure-1 to the application. The opposite parties filed objection stating that the Petitioner was not entitled to make any further claim in view of awards already passed in his favour in arbitration proceedings arising out of the contract. They alleged that the cause of action arose on 12-1-1974 when the contract was rescinded. So, the claims were barred by limitation. They further contended that certain of the items of claim were not arbitrable because inter alia those were the subject matter of the earlier arbitration proceedings. It was further pleaded that the reference of the disputes, if any, could be made only to the arbitrator already appointed as per the provisions of the agreement; but not to a retired Judge as suggested by the Petitioner. The opposite parties annexed to their written statement a letter dated 7-1-1982 from the Chief Engineer, National Highway and Projects, Orissa, addressed to Sri Subash Chandra Sahu, Superintending Engineer, Southern Circle (R & B), Berhampur, intimating him that disputes having arisen between the Petitioner and the opposite parties as per the arbitration clause in the agreement, he was to nominate the arbitrator and in exercise of the said powers, he nominated Sri S.C. Sahu, as arbitrator. A copy of the said letter was sent to the Petitioner and to the Executive Engineer, opposite party No. 2. The opposite parties pleaded that appointment of an arbitrator having already been made for adjudication of the disputes between the parties there was no scope overtaking recourse to Section 20.

4. In a proceeding u/s 20 of the Arbitration Act, where the court is satisfied that there is an arbitration agreement between the parties and differences contemplated in the agreement have arisen, it shall order the agreement to be filed and thereupon "shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court."

5. Sub-section (4) of Section 20 reads as follows:

(4). Where no sufficient cause is shown the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator appointed by the Court.

6. An analysis of this provision would indicate that the stage for appointment is reached after the order for filing of the agreement is made and the agreement is filed pursuant thereto. The stage is not reached before the agreement is filed. The reason is obvious. The court has to consider the provisions contained in the agreement to ascertain the intention of the parties regarding the mode of appointment of arbitrator: appointment of arbitrator by the machinery provided

in the agreement or to a named arbitrator or otherwise.

7. Appointment of an arbitrator, contrary to the terms of the arbitration agreement, is not permissible. "Section 20 contemplates any of the parties to an arbitration agreement, coming before the court for filing that agreement and for setting up a machinery for arbitration in pursuance of the agreement": See *Ama Corporation Vs. Food Corporation of India*, .

In *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, , the Supreme Court observed that if the parties had appointed the arbitrator or had provided machinery for selection of arbitrator the court's act is a ministerial one of sending the agreement to him to be dealt with by him and if the parties do not agree, it may be required to make a decision as to who should be appointed as arbitrator. The court further observed that parties by their agreement having placed the power of selecting an arbitrator or arbitrators in the hands of the Chairman of the Board of Directors of the East India Cotton Association Limited, the court could perform the ministerial act of sending the agreement to him to be dealt with by him.

Where the arbitration agreement sets out adequate and exhaustive machinery for the appointment of an arbitrator to decide the disputes between the parties such course ought to be adopted unless that is not feasible and reasonable: See *Ama Corporation Vs. Food Corporation of India*, .

No doubt in *Union of India v. Prafulla Kumar Sanyal* AIR 1979 S.C. 1457, Kailasam. J. speaking for the Court observed:

...Taking into account the wording of the Sub-section the court shall make an order of reference to the arbitrator appointed by the parties, we do not feel that the Sub-section required the court to appoint an arbitrator who had not actually been appointed, but for whose appointment adequate provisions have been made.

A little later, his Lordship, however, said:

...it is desirable that the court should consider the feasibility of appointing an arbitrator according to the terms of the contract....

The latter observation spells out the first mode contained in Sub-section (4) of Section 20.

8. The arbitration clause in the agreement embodies the intention of the parties and has to be given effect to unless it is shown that there is some legal impediment. Convincing grounds acceptable in law shall have to be shown for relieving either of the parties from the course of action they intended to pursue in the event of the happening, namely, disputes arising. Unless Sub-section (4) of Section 20 is interpreted in the manner as laid down by their Lordships, as extracted above, either of the parties may make the provision embodying the machinery or mode for appointment of arbitrator nugatory, by a pre-emptive

action u/s 20.

9. To sum up: After the agreement is filed, if a mode or machinery is provided for the appointment of arbitrator, the court has to give effect to the intention of the parties and explore the feasibility of appointment of an arbitrator in accordance with such intention. Where it is not feasible or reasonable to appoint an arbitrator in terms of the agreement, and where the parties cannot agree upon an arbitrator, the court gets jurisdiction to appoint an arbitrator of its choice. But not until then. The jurisdiction to appoint an arbitrator of its own choice comes last in the scheme. Where the parties come-forward with suggestions agreeing upon an arbitrator, the same should be given effect to. By agreeing upon an arbitrator, the parties modify and substitute the provision relating to manner of appointment of arbitrator contained in the agreement. So, in my opinion, the occasion for exercise of jurisdiction by the court to appoint an arbitrator of its choice does not arise until the first two modes are exhausted. In this case, the parties have agreed to the appointment of Sri R.K. Das, a retired Judge of this Court as arbitrator. It was within their competence to do so thereby modifying the mode provided in the agreement for appointment of arbitrator.

10. In a proceeding u/s 8, disputes and differences are presented before the arbitrator; whereas in a proceeding u/s 20, the disputes are referred to the arbitrator by the court.

Sub-section (4) of Section 20 requires that after the appointment of an arbitrator, the court shall make an order of reference, i.e., reference of disputes which are arbitrable and not disputes which are not arbitrable. The intention is not that reference should be made as a matter of course or as a routine matter. At the stage of reference, therefore, the court has to determine judiciously which of the disputes raised by the parties should be referred and which not.

11. It is elementary that the arbitrator has authority to adjudicate by arbitration such disputes which are arbitrable. Disputes, which are not arbitrable are not within his authority to adjudicate.

It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been, fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction - See Russell on Arbitration, 19th Edn. 99.

As an arbitrator (and subsequently any umpire) obtains his jurisdiction solely from the agreement for his appointment, it is never open to him to reject any part of the agreement or to disregard any limitations placed on his authority, as for example a limitation on his right to appoint an umpire. Nor can he confer jurisdiction upon himself by deciding in his own favour some preliminary point upon which his jurisdiction depends. Nevertheless he is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worthwhile to proceed, and an award which expressly or impliedly refers to such a finding is not thereby invalidated - See Halsbury's Laws of England, 4th

Edn. Volume-2, paras 577 and 610 note-3.

In *May v. Mills* (1913) 3 T.L.R. 286, Coleridge, J. observed:

...It had always been held that no Court of limited jurisdiction could give itself jurisdiction by a wrong decision, collateral to the merits of the case as to facts upon which the limit to its jurisdiction depended....

Lord Devlin in *Christopher Brown Ltd. v. Oesterreichischer Waldbesitzer Holswirtschaftsbertriebe Registrierte Genossenschaft Mit Beschränkter Haftung* (1953) 2 All E.R. 1039. observed:

The arbitrators cannot determine their own jurisdiction. The question which has arisen is: What is the position if the dispute embraced not merely, the question whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine. I think that the answer to that question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the Jurisdiction of the arbitrator. It is not the law that arbitrators if their jurisdiction is challenged or questioned are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some Court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not. If it became abundantly clear to them that they had no jurisdiction as for example, it would be if the submission which was produced was not signed, or not properly executed, or something of the sort then they might well decide not to proceed with the hearing. They are entitled, in short to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever on the rights of the parties. That is plain, I think, from the burden that is put on a Plaintiff who is suing on an award. He is obliged to prove not only the making of the award but that the arbitrators had jurisdiction to make the award. The principle *omnia praesumuntur* does not apply to proceedings of arbitration tribunals or, indeed to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made that, therefore, it is a valid award. It has to be proved by the party who sues on it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

In *May v. Mills* (1913) 3 T.L.R. 286 (supra), the submission was in respect of dispute arising during the tenancy and the arbitrator found as a fact that the dispute did arise during the tenancy. It was held that this was not a fact which had been submitted to him, and that he could not acquire jurisdiction by finding this preliminary fact in favour of the Plaintiff, so as to bind the Defendant, and the award was set aside. Redman's Laws of Arbitrations and Awards, 5th Edn. page 130, says:

An arbitrator cannot give himself jurisdiction by a wrong decision, collateral to the merits of the case, as to facts upon which the limit of his jurisdiction depends.

In *Jagan Nath Phool Chand v. Union of India* AIR 1982 Del 93. Division Bench of the Delhi High Court observed:

...It is trite that the arbitrator derives his power from the reference which furnishes the source and prescribes the limit of his authority. He cannot enlarge the scope of the reference by construing the agreement in a particular manner....

I am in respectful agreement with the aforesaid observation.

If the parties intended as per the agreement that certain matters are "excepted matters" and/or are not arbitrable, the arbitrator cannot cloth himself with jurisdiction by erroneously interpreting the agreement. A question arises whether, when such are the disputes and objection is raised that some or all the disputes are not arbitrable, it is open to the arbitrator not to answer the said questions and avoid or evade the same?

In any adjudication just and fair play is the first principle and observance of the said principle sustains the faith and confidence of the parties in the adjudication and in the concept. In an arbitration where the questions are simple and jurisdiction is not questioned in regard to some or all items, the consideration and approach may be different; but where the question has been raised and jurisdiction challenged, failure to decide the questions specifically is subversive of the principle of just and fair play. The principle pervades the proceeding from the stage of reference till the passing of the award.

The parties in this case have agreed that the arbitrator should specifically decide the question on maintainability of the claims and if the claims are barred by limitation.

12. It is the settled law that the decision of an arbitrator on a question of fact or of law right or wrong, is binding on the parties because parties have chosen their arbitrator to be a judge of the disputes between them. In my opinion, this rule which has general application does not hold good where the decision is perverse. Does the rule hold good when the decision is arbitrary? The principle being that perversity or arbitrariness vitiates any decision, are the courts impotent to go behind the award where there is no material to support the decision? When there is no material on which the decision can be founded, is not the decision perverse?

13. Take a hypothetical case. A contractor enters into an agreement to construct a well for rupees ten thousand. He commits breach before completion. The contract is rescinded by the other side. But the contractor is paid for the quantity of work executed. Years later, he raises a dispute claiming a sum of rupees fifty lakhs under various heads. The claims are made on the grounds that the site was ear-marked late; bricks and cement were not supplied in time; approach road was not forthwith provided; the one provided later on was a circuitous one; on account of delay in supply of materials, the contractor had to pay his idle employees; loss of profit which could have been earned otherwise by him by engagement in other work; loss of reputation; hardship and compensation and interest. No evidence or acceptable evidence in support of the claim is produced. No evidence acknowledging the liability to extend the period of limitation is also laid. Despite the objections raised by the other side, an award for rupees fifty lakhs is passed in favour of the contractor. Does the law still enjoin, in such situation, that the court should act as a helpless looker-on?

Is not the question of limitation a question of jurisdiction and like other jurisdictional questions, is it open to the arbitrator to prevent consideration of the question of jurisdiction by the court by a lump-sum award or no-reason award? Is it open to him to devise or follow a procedure because he is administering contractual justice, which infringes the principle of just and fair play?

Is the law an ass or...?

14. In this case, the parties have agreed that the arbitrator shall give reasons for his award. So, the intention of the parties is that there shall be just and fair play throughout the proceeding and in the passing of the award too. An objection has been raised by the Petitioner that though he did not agree that the arbitrator should give a reasoned award, the learned Subordinate Judge erroneously so directed. In support of the stand, the Petitioner has relied upon a memorandum filed by his counsel before the learned Subordinate Judge stating that the Petitioner "does not agree that the arbitrator should give a reasoned award".

At the hearing, the learned Counsel for the opposite parties asserted that the parties had agreed during the hearing before the learned Subordinate Judge that the arbitrator should give reasons for the award. No review was sought before the court below. Having regard to the order passed by the learned Subordinate Judge reflecting what happened 10 the proceeding before him. I hold that the parties in fact agreed as recorded 10 the order.

15. In the result, the revision fails and is dismissed. In the circumstances, there would be no order as to costs.