

(1989) 02 OHC CK 0016
In the Orissa High Court
Case No : Civil Revision No. 7 of 1985

Srustidhar Mohanty

APPELLANT

Vs

The Steel Authority of India Ltd. and Others

RESPONDENT

Date of Decision : 21-02-1989

Acts Referred:

Arbitration Act, 1940 — Section 11, 28(2), 30, 41

Citation : AIR 1989 Ori 251 : (1989) 1 OLR 402

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : P. Kar, for the Appellant; R. Mohanty and Misra-2, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Patnaik, J.—The order of the Subordinate Judge dt. 29-9-84 rejecting the petitioner's prayer to remove the arbitrator is being challenged in this revision. The petitioner entered into an agreement with opposite party for running a canteen. Disputes having arisen between the parties, invoking the arbitration clause in the agreement, opposite party 2 was appointed as an arbitrator. The petitioner apprehended that he would not get fair dealing from the arbitrator and accordingly he filed an application for removal of the arbitrator u/s 11 of the Arbitration Act. But that application was rejected by the Subordinate Judge against which the petitioner filed a revision in this Court which was numbered as C.A. No. 466/81. The Civil Revision was dismissed by this Court by order dt. 28-7-83 on the ground that though misconduct was alleged against the arbitrator but the arbitrator had not been made a party. The petitioner thereafter filed a fresh application for removal of the arbitrator, inter alia, on the ground that the arbitrator did not act with reasonable despatch and having entered into the reference in 1980 has not been able to pass an award. It was also urged that the arbitrator unilaterally extended time after expiry of four months of the date of entering into the reference which is without jurisdiction. Misconduct on the part of the arbitrator was also alleged in the arbitration proceeding itself. Objections

were filed on behalf of the opposite parties.

2. On consideration of the materials on record, the learned Subordinate Judge rejected the petitioner's prayer for removal of the arbitrator. Hence the petitioner has approached this Court.

3. Mr. Kar appearing for the petitioner raised the following contentions : --

(i) Under First Schedule, Clause 3 of the Arbitration Act, an arbitrator is required to submit his award within four months from the date of entering into the reference and the same not having been done, the further continuance of the arbitration proceeding is illegal and without jurisdiction;

(ii) In view of Section 22 of the Arbitration Act, the arbitrator has no jurisdiction to extend time unless there is consent of both parties. The petitioner not having consented to the unilateral extension is without jurisdiction;

(iii) Non-maintenance of an order sheet of the proceeding itself amounts to misconduct and, therefore, the arbitrator is liable to be removed on that score;

(iv) The arbitrator being an officer of opposite party 1, the petitioner entertains a reasonable apprehension in his mind that he would not get justice in the hands of the arbitrator and such reasonable apprehension in the mind of the petitioner is sufficient for removal of the Arbitrator.

4. Mr. Mohanty, the learned counsel for the opposite parties, on the other hand, contends that though the arbitrator is required to pass an award within four months from the date of entering upon the reference, yet the arbitrator does not become functus officio as soon as the time for making an award is over. The learned counsel further contends that the reason for delay, as would appear from the order sheet itself is the request by the petitioner to adjourn the proceedings on several occasions and, therefore, the petitioner having obtained time cannot challenge the arbitration proceeding. It is further urged that the power to enlarge time vests with the Court and in fact the Subordinate Judge having extended time by order dt. 30-11-84, there is no illegality in the arbitration proceeding. So far as non-maintenance of order sheet is concerned, the learned counsel for the opposite parties contends that though the arbitrator has not maintained a regular order sheet like a court of law, but on each date of hearing independent orders have been passed and copies thereof have been communicated to the parties keeping one copy in the file and that would be sufficient for coming to a conclusion that the arbitrator has not acted illegally or unfairly. So far as appointment of opposite party No. 2 being an employee of opposite party 1 is concerned, Mr. Mohanty contends that the said appointment has been made in accordance with the Arbitration clause of the agreement and an apprehension in the minds of the petitioner merely on the ground that the arbitrator happens to be an employee of opposite party 1, cannot be said to be a reasonable apprehension in the mind of a reasonable man so as to be sufficient for removal of the arbitrator. The rival submissions require careful examination.

5. So far as the first submission of Mr. Kar is concerned, no doubt Schedule 1 of Clause 3 prescribes that the arbitrator must make the award within four months from the date of entering upon the reference. But the said provision unequivocally indicates that the arbitrator is entitled to make his award within Such extended time as the court may allow. It is an implied term in the arbitration agreement that the award shall be made within four months but the said term is subject to extension with consent of parties like any other terms of contract. Section 28(2) of the Arbitration Act gives the said indication. If, therefore, the parties subject themselves to the jurisdiction of the arbitrator after the expiry of four months and take part in the proceedings enabling the arbitrator to make an award then the arbitration proceeding cannot be said to be null and void. An arbitrator does not become functus officio soon after the expiry of four months of entering upon the reference. The power vested in the arbitrator to decide the dispute between the parties unless withdrawn continues to be there and enables the arbitrator to act on the reference in expectation that the period for making the award would be extended by the Court. In this view of the matter, in the facts and circumstances of the present case, the arbitration proceeding after expiry of four months from entering upon the reference cannot be held to be ipso facto invalid particularly when the order sheet reveals that it is at the behest of the petitioner, the arbitrator has granted several adjournments to enable him to file his objection. The first contention of Mr. Kar is, therefore, rejected.

6. Coming to the second contention, the same is based on the provision of Section 28 of the Arbitration Act. It is no doubt true that Section 28 of the Arbitration Act authorises the court alone to extend the time for making an award. But as has been held by Kerala High Court in the case of The State of Kerala and Another Vs. K.P. Poulouse, where such power is exercised with consent of all the parties, then the extension is valid. The Supreme Court considered this aspect in the case of Hari Krishna Wattal Vs. Vaikunth Nath Pandya (Dead) by Lrs. and Another, . It was held therein that an arbitrator is entitled to enlarge time if after he has entered on the reference the parties consented to such enlargement. It has also been held in several case that where parties after expiry of the stipulated time submitted themselves to the jurisdiction of the Arbitrator and took part in the proceedings enabling him to pass an award then it cannot be said that the arbitrator acted without jurisdiction. So far as the present case is concerned, according to Mr. Kar, the petitioner has never consented for extension of time in writing even though the petitioner might have appeared in the proceedings with protest. But the aforesaid contention does not require any further probe, in view of the order of the Subordinate Judge dt. 30-11-84 by which order the Court itself has extended the time for making the award. Consequently the second contention of Mr. Kar is devoid of any force. So far as the third contention is concerned, Mr. Kar's main plank of argument is that an arbitrator is bound to maintain an order sheet of the proceeding and non-maintenance of the order sheet ipso facto vitiates the proceeding on the ground

that the arbitrator has misconducted himself in the proceeding. Section 11 of the Arbitration Act authorises the Court to remove an arbitrator who misconducted himself or the proceedings. The expression "who has misconducted himself or the proceedings" used in Sub-section (2) of Section 11 has also been used in Section 30 of the Arbitration Act for which an award passed by the Arbitrator can be set aside. Therefore, a misconduct which enables the party to have an award set aside u/s 30 of the Arbitration Act will be sufficient to have an arbitrator removed under Sub-section (2) of Section 11. The expression "misconduct" is of wide import and it does not necessarily imply immoral turpitude, dishonesty, partiality or bias. It means misconduct in the judicial sense of the word and not from a moral point of view. There may be ample misconduct in the legal mense even though there is no ground for imputing the slightest improper motive to the arbitrator. Legal misconduct would thus mean neglect of duties and responsibilities of the arbitrator. If the legal misconduct does not in any way reflect on the integrity or impartiality of the arbitrator, he cannot be said to be guilty of such misconduct as is likely to affect the confidence of the parties. The allegation of misconduct by the petitioner is that the arbitrator had not maintained any order sheet of day to day proceedings. An arbitrator is not a court of law. Therefore, though it may be desirable for an arbitrator to maintain an order sheet indicating steps taken by him on each day but non-maintenance of an order sheet itself cannot be the basis for coming to a conclusion that the arbitrator has misconducted in the proceedings. From the records of the arbitrator it appears that the arbitrator on each date was passing some order and was intimating the same to the parties concerned retaining one in his file, such a procedure cannot be said to be illegal and, therefore, I am unable to accept the contention of Mr. Kar that the arbitrator misconducted the proceedings not having maintained an order sheet. The said contention is accordingly rejected.

7. The only other submission which remains for consideration is an apprehension of bias on the ground that the arbitrator is an employee of opposite party 1. The appointment of opposite party 2 as an arbitrator is in accordance with the arbitration clause in the agreement and opposite party 2 is the named arbitrator. The petitioner having agreed to go to such an arbitrator in the event of a dispute between him and opposite party I cannot now resile from the same on a fanciful apprehension that he would not get justice in the hands of such an arbitrator who happens to be an employee of opposite party 1. No doubt opposite party 2 is an employee under opposite party 1. But that by itself would not be sufficient to hold that the arbitrator has any interest in the subject matter of the lis, so as to vitiate the proceedings. A court cannot come to a conclusion that an arbitrator will not act fairly merely because the arbitrator happens to be an employee under one of the parties. An apprehension in the mind of a party that the arbitrator would be biased must be well founded on materials proved and not ipso facto on the ground that the arbitrator happens to be an employee of one of the parties. No data or materials have been placed before me by the learned counsel for the petitioner from which even a biased of the arbitrator can be

inferred. It is of course true that a reasonable apprehension in the mind of a party would be sufficient for removal of an arbitrator but the apprehension must be that of a reasonable man and must be well founded. There is no material before this Court to come to a conclusion that the petitioners apprehension is either reasonable or well founded. In that view of the matter, I do not find any force in the said submission of the learned counsel for the petitioner and the same is accordingly rejected.

8. All the contentions having failed, this revision is dismissed, but there would be no order as to costs. The records may now be remitted back to the arbitrator who will immediately take up the proceedings and dispose it of as expeditiously as possible.