

(1982) 07 OHC CK 0003

In the Orissa High Court

Case No : Civil Revision No. 258 of 1982

State of Orissa and Others

APPELLANT

Vs

Gangaram Chhapolia and Another

RESPONDENT

Date of Decision : 26-07-1982

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : AIR 1982 Ori 277 : (1982) 54 CLT 214

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

Bench : Single Bench

Advocate : Addl. Govt., Addl. Standing Counsel and Standing Counsel, for the Appellant; B.H. Mohanty, Ganeswar Pati, R.N. Panda and M. Jain, for the Respondent

Judgement

R.C. Patnaik, J.—Disputes in relation to the work "FDR to Nabuda Ringh Bundha at Ranpal" undertaken by the opposite party No. 1 -- contractor under agreement No. 51 F-2 of 1968-60 having arisen, the contractor issued notice following the arbitration clause in the contract for appointment of an arbitrator. On failure of the Chief Engineer to appoint arbitrator, the contractor moved the learned Subordinate Judge, Cuttack, u/s 8 of the Arbitration Act for appointment of an arbitrator. The learned Subordinate Judge by judgment dated 10-2-1982 in Misc. Case No. 387 of 1980 granted the prayer and directed the parties to suggest names by 12-2-82 for selection of the personnel. On 12-2-82, the contractor filed a panel of names and the petitioners submitted in a memorandum that any member of the arbitration tribunal might be appointed as arbitrator. The learned Subordinate Judge, thereupon, appointed Sri R. C. Kar, a retired District Judge, and one from the panel of names submitted by the contractor by a cryptic order to the following effect:--

"Both the parties file the names of arbitrator. Sri R. C. Kar, retired District Judge is appointed as arbitrator to settle the dispute between the parties."

2. The grievance of the State is that after the panel of names was filed by the

contractor and the State intimated to the Court that any member of the arbitration tribunal could be appointed as arbitrator, there should have been a hearing on this question. Selection of the personnel of the arbitrator is not of less importance. The arbitrator is the king-pin in the scheme of arbitration. Not only must he be competent, but it is no less imperative that he is sans bias, sans prejudice towards any of the parties. Selection made by the Court is deemed in law to be a voluntary selection of the parties. The Court, therefore, must be very cautious in not imposing an incompetent and undesirable person as an arbitrator. The power has been vested in the Court under the various provisions of the Arbitration Act relating to the selection of arbitrator in the trust that the said power shall be exercised judiciously and with circumspection. The arbitrator is not bound to give reasons and generally there is no appeal from his decision. Howsoever erroneous the Court may consider his decision to be, the Court is powerless. At the stage of adjudging the personnel, it is essential, therefore, that both sides must have their say. Each party should be given adequate opportunity to convey to the Court its views and reaction to the name suggested. If there is likelihood of some bias, prejudice, interestedness, however remote, in relation to the person suggested, the person is non-grata.

3. The grievance of the petitioners in this case is that the learned Subordinate Judge arbitrarily appointed Sri R. C. Kar as arbitrator without giving the petitioners an opportunity of having their say in regard to the names suggested. The petitioners contend that they had suggested that any member of the arbitration tribunal appointed by the State Government could be appointed. No reason has been given by the learned Subordinate Judge why none of the members was considered suitable by him, for appointment as arbitrator. Their grievance has been that there are a few persons circulating as stock arbitrators and somehow or other they are getting appointed by orders of court passed casually and mechanically without any application of mind, heedless of the grievance and wish of the State, which is no other than, the people of the State.

4. A pertinent question arises: Should a person compulsorily retired be appointed as arbitrator? A person is compulsorily retired on grounds of incompetence, questionable integrity, or on mental or health ground. It does not stand to reason how a person so dealt with can be adjudged competent for appointment as arbitrator. Very often persons in the employment of the Government appear on the arena and get appointed as arbitrators. Where the employer nominates or suggests the name of an employee, it is a different matter. The Orissa Government Servants' Conduct Rules provide in Rule 17:

"Private trade or employment -- (1) No Government servant shall except with the previous sanction of the Government, engage directly or indirectly in any trade or business or undertake any employment :

Provided that a Government servant may, without such sanction, undertake honorary work of a social or charitable nature of occasional work, a literary, artistic or scientific character, subject to the following conditions namely :--

(i) he shall, within one month of his undertaking any such work, report to the Government giving full details;

(ii) his official duties do not thereby suffer and

(iii) he shall discontinue any such work, if so directed by the Government."

This rule which has statutory force puts an embargo on the Government servant accepting or undertaking an employment. Appointment as arbitrator is not Government employment nor are the engagement and its acceptance commended in exercise of judicial power of the Court. Appointment is made upon expression of willingness. At this stage Rule 17 of the Conduct Rules comes into play. A Government servant cannot accept the appointment without the previous sanction of the Government. It is also the bounden duty of the Court, having regard to the statutory force of Rule 17, to ascertain if there is previous sanction by the Government to acceptance by the employee of engagement as arbitrator. I reiterate that the rule is not attracted where the Government (employer) itself suggests or nominates the name. The direction given by a Court is in the form of a request and is not a command. The request is not a judicial order and the Government servant is obliged to decline the offer if there is no sanction of the Government. One comes across instances of arbitration cases piling before some Government servants engaged as arbitrators without previous sanction of Government.

5. There is considerable weight in the submissions made by the counsel for the petitioners, that there is no presumption that the panel submitted by the contractor is sacred and that submitted by the State is profane. The matter boils down to the selection of a person worthy of being appointed as arbitrator. The person should have reputation of possessing an unimpeachable integrity and probity and not be open to approach by any of the parties and shall not bear even remotely, a bias, prejudice, animosity towards any of the parties. In such a person can both the parties repose their trust and confidence. In a case where parties themselves have chosen a person as arbitrator, they being the best judges of the person, the presumption is that the selection was made upon consideration of the pros and cons. Not so in the case of an appointment by the court, where by reason of the fiction, the person appointed as arbitrator is deemed to be one chosen by the parties. The Courts, therefore, must act in such a manner as the parties would be given a free choice.

6. From the proceedings of Feb. 12, 1982, it does not transpire that the learned Subordinate Judge was alive to the principles. By a bald order Sri Rule C. Kar, one of the persons named in the panel of names filed by the contractor, was appointed. It does not seem from the order that a hearing was given to the parties and the pros and cons in regard to the suggestion were considered. The Courts while selecting an arbitrator should bear in mind that the function is not just a routine function to be exercised casually or mechanically. Great stakes are very often involved and a correct adjudication is very much dependant on the

person, more on his integrity though no less on his competency. The State is not a "no party" before the law. Its exchequer is the exchequer of the people. It behoves us to remember that the parties before a court of law, the State as well as the private citizen, have the same rights and the same privileges.

7. It is permissible to deviate and consider a few related questions. If one were asked "what afflicts the State of Orissa?"

The answer could be:

"Inter alia, the malady of the racket of arbitration". Arbitration of late is being considered as a sure way to overnight riches and affluence. It has become a big business. Should not a judge take note of "the felt necessities of the time?" He can no longer be impervious to the winds that blow outside. Leaving the seclusion of his ivory tower, he should come out to the streets to feel "the total push and pressure of the cosmos". In a social welfare State, the need is social Justice. Let us recall to mind what Justice Car-dozo said: "It is true, I think, today in every department of law that the social value of a rule has become a test of growing power and importance."

8. The concept of arbitration is a laudable one and the system is in vogue in this country since the days of the Panch and Panchayats. There were three grades of arbitrators, namely, (a) puga, (b) Sreni and (c) Kula. These were the different degrees of Chanbasappa Gurushantappa Hiremath Vs. Baslingayya Gokurnaya Hiremath, :--

"It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to much greater extent than is the case in England. To refer matters to a panch is one of the natural ways of deciding many a dispute in India....."

The first attempt at codifying the law was made by the Bengal Regulations of 1772 and 1780 where provision was made for submission of disputed accounts to decision by arbitration. In 1781, Sir Elijah Impey's Regulation included a provision that "the Judge do recommend, and so far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by parties." In 1787, regulation for the Administration of Justice was passed and it contained rules for referring suits to arbitration with consent of parties. There was no detailed provision, however, to regulate the arbitration proceedings. In 1793 Regulation XVI was enacted with a view to promoting reference of disputes of certain categories to arbitration and to "encourage people of credit and character to act as arbitrators". Regulation VI of 1813 made some improvement to the Regulation of 1793 and arbitration was available in cases of disputes in regard to land. Bengal Regulation VII of 1822 authorised the Revenue Officers to refer rent and revenue disputes to arbitrators and the Collectors were enjoined to induce parties to agree to such arbitration. Bengal Regulation IX of 1883 authorised the Settlement Officers to refer disputes to arbitration.

In 1834, the Legislative Council for India was constituted and Act VIII of 1859, the first CPC for India, was enacted in 1859 and Chapter VI of the Code contained provisions relating to arbitration. The Code, however, was not applicable to the Supreme Court, or the Presidency Small Cause Courts or non-regulation provinces. The Act was repealed and consolidated by the Civil P. C. of 1877; but the provisions relating to arbitration remained unchanged. Act XIV of 1882 revising the Code did not touch the provisions. The arbitration provisions so far provided for arbitration of disputes after they had arisen. There was no provision for reference to arbitration of future disputes. To remedy this, Indian Arbitration Act, 1899 was enacted basing on the English Arbitration Act, 1889. Various sections of the English Act were verbatim transplanted to the Indian soil. The actual application of this Act was, however, originally limited to Presidency towns and was subsequently extended to a few more commercial towns. When the Civil P. C. of 1908 was enacted the clauses relating to arbitration were transferred from the body of the Code to the Sch. IT, Various committees noticed the drawbacks in the existing provisions and advocated for consolidation and amendment of the law and its codification in a separate enactment and that is how the Arbitration Act, 1940 came to the statute book and the Sch. II to the Civil P. C. was repealed.

9. An arbitrator is a tribunal of parties choosing. So, from his decisions--right or wrong--there is no appeal. In view of the concept and the system, the English common law said that he was not bound to give reasons. And this rule of the common law of the olden times was transplanted to our system. A nagging and disturbing thought, however, persists. Can a rule prevalent in a different time and in a different clime be considered to be healthy and wholesome for us today -- a time of eroded values and devalued norms. Or should the law cater to the needs of the present day community?

Vast changes are taking place with regard to concepts and systems. Should we continue to hold on to a principle because it is in vogue for scores of years or should we take cognizance of the changed times and the current demands and alter the rule, the law? The horizon of the concept of natural justice is widening day after day. Every Court, Tribunal or Authority adjudicating a dispute is enjoined by principles of natural justice to give reasons for its decision. Lord Denning has said in *Broen v. Amalgamated Engineering Union*. (1971) 1 All ER 1148:

"The giving of reasons is one of the fundamentals of good administration."

This observation has the approval of the Supreme Court in *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, . The requirement of furnishing "reason" is a shackle on arbitrariness or perversity. Why, pray, must the President of India, the Highest Court of the country and other instrumentalities support their decisions by reasons while disposing of disputes or a lis and not the arbitrator? Because the arbitrator is parties' own choosing". So what? An arbitrator is after all a human being and is susceptible to all the

frailties that human flesh is subject to (even Gods do err, mythology and the scriptures tell us).

We may take a leaf out of the experience of the people from whom we borrowed the rule. The English law has since been amended by incorporating a provision requiring the arbitrator to give reasons for its award.

It has been observed by Wheeler, J. in *Dwy v. Connecticut Co.* 89 Conn 74 (99):

"That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary Change of this character should not be left to the legislature."

If the mores of today are no longer those of yesterday and what was good for the past generation may not be good for the present, there needs to be a change. This is only plea for a change in the law either by judicial law making or by the intervention of the legislature. The rule has served its days. Let us give it a quiet and decent burial.

A kindred thinker, disturbed like me, has expressed himself in *Bhilwara Synthetics Ltd. v. Delhi Hindustani Mercantile Assn.* AIR 1982 Delhi 155 H. L. Anand, J. has observed (at pp, 156 157):--

"Bias, no doubt, is a vitiating element. It impairs the impartiality and objectivity of any Court or tribunal. It is also true that the actual bias and its impact on the decision are unnecessary the likelihood of bias is sufficient to constitute a fatal infirmity in any decisional process. However bias is not to be readily inferred and is difficult to detect, both in its effect and its likelihood, where there is no personal animus, monetary interest or similar apparent circumstances, it is difficult to infer the likelihood of bias merely from the class composition of the tribunal and association of persons or of the litigating parties.....

Silence no doubt, is a rare virtue and in the realm of spiritual thought has been sublimated to heights of bliss and divinity. Maunam Pandita Lakshnam, i.e. silence is an insignia of a wise man says the Indian scripture. While the rule and importance of silence in nature's scheme of things is still being explored, there is little doubt that in the present stage of law of arbitration in India, silence is truly golden. It is one of the well known anomalies of law of arbitration that while a speaking award is subjected to unrestricted justiciability, a non-speaking award enjoys near immunity from judicial control. In the expanding horizon of natural justice and the development of administrative law when every judicial, quasi-judicial, executive and administrative body, charged with the duty to make a

decision affecting rights and obligation, is considered under a duty to give reasons for its decision it is quite anachronistic that an arbitrator in India is still immune from any such obligation. It is important to remember that duty to give reasons enlightens the party, who is affected by the decision, as to why the decision was unfavourable to it, illumines the path of the appellate authority, controls the tribunal itself and constitutes a built-in safeguard against arbitrariness. It is for this reason that in England the right to know reasons has been given statutory recognition. In English law, an award by an arbitrator without reasons, even without adequate reasons, would be bad in law but not so in India. In international arbitration, the convention recognises the obligation to give reasons. While the rule that the arbitrator need give no reason for the award may have had its importance at one time, there is little doubt that the power to make a non-speaking award must have given undue protection to consider able incompetence, arbitrariness and even dishonesty in the arbitral process. Unfortunately, little legal thought has so far been devoted to the problem and it is high time the matter is considered afresh so as to bring the arbitral process in India in conformity with the norms accepted elsewhere. This is particularly necessary in view of the fact that in the present state of the Court system in India and its unfortunate characteristics of endemic delays, rising costs, technicality of procedure and plurality of appeals, there is a search for alternative decision making apparatus and a reoriented arbitration process, particularly under the auspices of organisations in industry, trade and commerce, could throw up an acceptable alternative, which would to an extent relieve the overburdened machinery of Courts. I have no doubt in my mind that in course of time the matter would receive attention at more articulate and effective and, preferably, authoritative levels"

I fully associate myself with every word uttered.

I may, with profit, give an extract from a decision of the Supreme Court u/s 10A of the Industrial Disputes Act. Their Lordships observed:--

"Let us put the proposition more expressively and explicitly. What is important is a question of law arising on the face of the facts found and its resolution ex facie or sub silentio. The arbitrator may not state the law as such.

Even then such mute silence confers no greater or subtler immunity on the award than plain speech. The need for a speaking order, where considerable numbers are affected in their substantial rights, may well be a facet of natural justice or fair procedure, although, in this case, we do not have to go so far. If, as here, you find an erroneous law as the necessary buckle between the facts found and the conclusions recorded, the award bears its condemnation on its bosom. Not a reference in a narrative but a clear legal nexus between the facts and the finding. The law sets no premium on juggling with facts or hiding the legal error by blanking out. The inscrutable face of the sphinx has no better title to invulnerability than a speaking face which is a candid index of the mind. We may, by way of aside, express hopefully the view that a minimal

judicialisation by statement, laconic or lengthy, of the essential law that guides the decision, is not only reasonable and desirable but has, over the ages, been observed by arbitrators and quasi-judicial tribunals as a norm of processual justice. *Arya Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious Institutions and Endowments, Hyderabad and Others*, .

A pregnant sentence comes to mind: "Awake, Arise, "O" Partha". How long shall you be in slumber?

10. Every adjudication shall conform to the principles of natural justice, and shall ensure to the parties just and fair play. The principle of just and fair play in action varies from facts to facts, situation to situation. However, it is essential in any adjudication that the parties should know what they are to meet in order to be able to focus their attention thereon. In such context, the question of framing of issues arises. The requirement of framing of issues under Order 14 of the Civil P. C. is not a dry, bookish or pedantic requirement. It subserves a purpose and the purpose is to pinpoint the real and substantial point of difference and focus attention of the parties and the Judge thereon. Call these issues, or points of difference or controversies, what you may. They are useful and efficacious. Framing of issues is in furtherance of the process of decision making. It enables the Judge, the arbitrator to rivet his mind to the essential question from amongst the forest of trivialities and unnecessary matters. Order 14 has been enacted with a view to achieving this purpose in the adjudicators' process. But the spirit behind the requirement, if I may say so, has application also in kindred fields, not governed by the Code.

I am not unaware that in some decisions, it has been held that Order 14, C.P.C. has no application to arbitration proceedings. With great respect to the learned Judges, I part company on this issue. In my view, the approach has to be functional and purposive.

The law permits an aggrieved party to question the validity of an award on the ground of lack of jurisdiction in the arbitrator. Lack of jurisdiction can be urged on various grounds, viz., on the ground as in *The Union of India (UOI) Vs. Shri Om Prakash*, , where it was held that reference to arbitration by the Court was bad after the appointment of an arbitrator u/s 8(2) or on the ground that the arbitrator lacked jurisdiction because the controversies were not arbitrable, or were "excepted matters."

In an application u/s 20, the Court has to adjudge if having regard to the arbitration clause, the dispute/disputes disclosed is/are covered by the arbitration agreement, viz., if the dispute/ disputes is/are arbitrable. If the dispute is not arbitrable, the Court cannot confer jurisdiction on the arbitrator. In a proceeding u/s 8, often questions arise if the disputes or some of them are arbitrable. If such question is raised, the principles of just and fair play require that the arbitrator cannot avoid or evade the question and must give his decision thereon. A denial of this procedure would tantamount to denial of justice to the

party raising the question. A arbitrator, though a chosen tribunal of the parties, is not above the principles of natural justice. If the end of all procedures is doing justice, exclusion of this requirement would not subserve the end.

Framing of issues on the points of differences ensures application of mind. Issues or give whatever name you please, crystallise the controversies, the points of difference. In any adjudicatory process, it is imperative to know what are the questions to decide. The necessity, therefore, arises for formulation of the points of difference, specification of the disputes, particularisation of the controversies and decision thereon. How does a party exercise his right if the controversy has not been specifically formulated and the decision thereon given by the arbitrator? Failure to formulate or specify and to record decision thereon would deprive a party of valuable right conferred by law.

11. With these observations, I quash the order dated 12-2-82 and remit the matter to the learned Subordinate Judge for a fresh disposal according to law after giving adequate opportunities of hearing to the parties. In the circumstances, there would be no order as to costs.