
(2005) 09 OHC CK 0062
In the Orissa High Court
Case No : ARBA No. 27 of 2004

State of Orissa and Others

APPELLANT

Vs

Gokul Chandra Kanungo

RESPONDENT

Date of Decision : 02-09-2005

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11, 16, 34

Citation : (2005) 09 OHC CK 0062

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : D.R. Mohapatra, Addl. Government Advocate, for the Appellant; Milan Kanungo, D. Pradhan, S. Nanda, B.B. Panda and B.K. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—This appeal is directed against the order dated 3.9.2004 passed by the learned District Judge, Keonjhar rejecting the application filed by the Appellants u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act").

2. The claimant-Respondent is a Special Class Contractor and had been entrusted with the work "Improvement to low grade Section reach-III (Part-II) from Keonjhar to Kanjipani on N.H. 6 from 371/0 to 373/516 K.Ms. "Agreement was entered into in the year 1971-72 and the work commenced from 18.12.1971. The stipulated period for completion of the work was one year. Case of the claimant-Respondent is that he commenced the work in time, but could not complete the same within the stipulated period of time because of the reasons mentioned in the award. Further case of the claimant-Respondent is that the bills were not finalized and he was penalized by forfeiture of security deposit. It is the case of the claimant-Respondent that though he moved the authorities several times for finalisation of bills and by letter dated 25.7.1989 demanded payment

within a specified date, no payment was made. Having no other way he approached the learned Subordinate Judge, Bhubaneswar in an application u/s 20 of the Arbitration Act, 1940 and the same was registered as O.S. No. 207 of 1989. The application u/s 20 of the Old Act was filed for reference of the disputes to arbitration in view of the Arbitration clause contained in the agreement. The said suit was decreed and the Appellants were directed to file agreement in Court for reference of the disputes to arbitration. The Appellants did not file agreement in Court and while the matter stood thus new Act came into force. The claimant-Respondent filed Anr. application before the learned Civil Judge (Senior Division), Bhubaneswar for reference of the matter to arbitration under the provisions of the new Act. However, the learned Civil Judge (Senior Division) having no jurisdiction under the new Act, by order dated 4.2.2000 directed the parties to approach the appropriate Court for appointment of arbitrator. Thereafter, claimant-Respondent moved this Court in M.J.C. No. 37 of 2000 for appointment of an arbitrator and by order dated 15.10.2001 this Court appointed Sri B.N. Dash, a retired Judge of this Court as Arbitrator to decide the dispute between the parties. Challenging such appointment, the Appellants filed O.J.C. No. 5325 of 2000 on the ground that the arbitral proceeding had already commenced before the new Act came into force and therefore this Court had no jurisdiction to appoint an Arbitrator under the new Act. This Court disposed of the writ application with observation that the Appellants may raise the question of jurisdiction before the Arbitrator u/s 16 of the new Act. After disposal of the aforesaid writ application the arbitration proceeding continued and the learned Arbitrator passed an award in favour of the claimant-Respondent. Challenging the award the Appellants filed an application u/s 34 of the new Act before the learned District Judge, Keonjhar and the said petition having been rejected, this appeal has been preferred.

3. The learned Additional Government Advocate challenging the impugned order submitted that the proceeding was initiated under the Arbitration Act, 1940 and the suit filed u/s 20 of the said Act having been decreed and the Appellants having been directed to produce agreement, the new Act has no application. It was also contended by the learned Counsel for the Appellants that in respect of certain items of claim, Arbitrator had no jurisdiction to pass award as same are not covered under the Agreement and therefore the Arbitrator has acted beyond the scope of the agreement. Sri Kanungo, learned Counsel appearing for the claimant-Respondent, on the other hand, submitted that the claimant-Respondent moved this Court for appointment of an Arbitrator under the new Act. Learned Counsel appearing for the State had conceded to the fact that the new Act has application to this case before the learned Civil Judge and after hearing the parties an Arbitrator was appointed. Said order was challenged in a writ application by the Appellants and liberty was given to the Appellants to raise the question of jurisdiction before the learned Arbitrator. The Appellants raised the question of jurisdiction u/s 16 of the new Act and the same has been answered by the Arbitrator in the award and therefore such a question cannot be

entertained in appeal.

So far as second ground of challenge is concerned, it was contended that some of the claims relate to extra items of work arising out of the agreement and therefore the learned Arbitrator was justified in passing the award in respect of some of these items of claim.

4. The first question raised by the learned Counsel for the State relates to the question of jurisdiction. Admittedly, the claimant-Respondent had filed an application u/s 20 of the Arbitration Act, 1940 in the Court of the learned Subordinate Judge, Bhubaneswar and the said petition which registered as a suit was decreed. The Appellants had been directed to produce a copy of the Agreement and while the matter stood thus the new Act came into force. It is, therefore, clear from the above that no reference had been made by the Court in the said suit due to non-filing of the agreement by the Appellants. After the new Act came into force, the claimant-Respondent initially approached the learned Civil Judge (Senior Division), Bhubaneswar for appointment of an Arbitrator, but the same was turned down on the ground that under the new Act learned Civil Judge has no jurisdiction to appoint an Arbitrator. Admittedly, the claimant-Respondent thereafter approached this Court in M.J.C. No. 37 of 2000 for appointment of an Arbitrator and by order dated 15.10.2001 Shri B.N. Dash, a retired Judge of this Court was appointed as the Arbitrator. The said order was again challenged by the Appellants in O.J.C. No. 5325 of 2000 but the Court did not interfere with or set aside the order dated 15.10.2001 and on the other hand, gave liberty to the Appellants to raise the question of jurisdiction before the Arbitrator. In this connection, the order passed by this Court on 15.10.2001 is required to be seen. From the records of M.J.C. No. 37 of 2000 filed by the claimant-Respondent for appointment of an Arbitrator u/s 11 of the Act, it appears that counter-affidavit was filed by the Appellants. In para-5 of the counter-affidavit it appears that a specific stand was taken by the Appellants regarding maintainability of the proceeding u/s 11 of the Act before this Court on the ground that the claimant-Respondent had approached the Civil Court for appointment of an Arbitrator u/s 20 of the Old Act. On the face of such an objection raised on behalf of the Appellants, this Court passed the following order on 15.10.2001:

Upon hearing the counsel for parties, I am of the opinion that disputes exists between the parties which should be decided by means of arbitration. I accordingly appoint Justice Shri B.N. Dash, a former Judge of this Court, to decide the disputes between the parties. He will fix his fees and other remuneration after hearing both sides.

Since time is the essence of arbitration proceeding, the arbitrator will conclude the proceedings within a period of six months from the date of appearance of the parties before him.

Office is directed to communicate this order and send all the relevant papers to

the arbitrator forthwith.

The M.J.C. is accordingly allowed.

Sd/-Acting Chief Justice.

It is, therefore, clear that this Court while passing the order dated 15.10.2001 had taken note of the objection regarding jurisdiction raised by the Appellants and passed the order appointing an Arbitrator. Admittedly, this order was again challenged by the Appellants in a writ application, but this Court did not interfere with the aforesaid order. I am, therefore, of the view that the order dated 15.10.2001 passed by this Court in M.J.C. No. 37 of 2000 appointing an Arbitrator u/s 11 of the Act has attained finality and is no more open to be challenged.

The learned Counsel appearing for the State relied upon a judgment of this Court in the case of Gayatri Projects Ltd. v. State of Orissa 2004 OLR 342 in ARBP No. 34 of 2002 disposed of on 20.2.2004 to say that the case is covered under the Arbitration Act of 1940 and the Arbitration Tribunal is competent to adjudicate the dispute. In view of discussions made earlier, the aforesaid decision loses its relevance so far as this appeal is concerned.

Though Sri Kanungo, learned Counsel appearing for the claimant-Respondent had submitted that the learned Counsel appearing for the State before the learned Civil Judge had conceded that the new Act is applicable to the case and the said question has been discussed in detail by the learned District Judge, in view of the discussions made earlier, I am of the view that this question need not be answered as the order dated 15.10.2001 passed by this Court appointing an Arbitrator u/s 11 of the new Act attained finality. The learned Arbitrator also in his award dealt with the question of jurisdiction raised by the Appellants pursuant to the liberty granted by this Court in the writ application referred to earlier and came to the conclusion that the proceeding under the new Act is maintainable. I do not find any reason to interfere with the said finding of the Arbitrator in this regard or the finding of the learned District Judge.

5. So far as the second ground taken by the learned Counsel for the Appellants is concerned, jurisdiction of this Court in interfering with the award is very limited u/s 34 of the new Act. In the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the Apex Court has laid down guidelines interpreting Section 34 of the new Act and if the case of the Appellants is examined in light of the guidelines laid down by the Apex Court in the aforesaid judgment, it appears that there is hardly any scope for this Court to interfere with the award. Learned Counsel appearing for the Appellants referring to the award submitted that the claimant-Respondent had claimed Rs. 3,82,600/- for removal of vegetable growth and decomposed soil from borrow areas for getting good earth away from the work site. Against this claim the learned Arbitrator granted an award of Rs. 44,000/-. In respect of Anr. claim of Rs. 2,40,000/- towards labour charges for excavation of 24,000 cubic meters of boulders and stacking them to clear the

work site, an award of Rs. 1,80,240/- was passed. Similarly, learned Additional Government Advocate referring to the award also submitted that against the claim Item No. 7, an award of Rs. 4,90,000/- has been passed towards carriage of water in truck for earth work. Learned Additional Government Advocate referring to the Clauses 27 and 49 of the Detailed Tender Call Notice submitted that the claims as aforesaid being extra items of work are not permissible and therefore no award could be passed in respect of the same. Though such a ground is not available to be taken or considered in an application u/s 34 of the Act, learned District Judge has dealt with the same and rejected the contention. From the very nature of the claim as aforesaid, it appears that they relate to execution of the work and arise out of the agreement and therefore cannot be treated as extra items of work. I do not find any reason to disagree with the findings arrived at by the learned District Judge in this regard.

6. No other point having been raised in this appeal, I do not find any merit in the appeal and accordingly the same is dismissed.