

(1981) 09 OHC CK 0017

In the Orissa High Court

Case No : Original Jurn. Case No. 1356 of 1981

State of Orissa

APPELLANT

Vs

Laxminarayan Samantaray and Another

RESPONDENT

Date of Decision : 29-09-1981

Acts Referred:

Arbitration Act, 1940 — Section 13, 2, 21, 24, 8
Constitution of India, 1950 — Article 226

Citation : AIR 1982 Ori 93

Hon'ble Judges : R.N. Misra, C.J.;N.K. Das, J

Bench : Division Bench

Advocate : Additional Government Advocate, for the Appellant; R.K. Rath and B.K. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, C.J.—This application under Article 226 of the Constitution by the State of Orissa through an Executive Engineer calls in question the order passed on 11th of February, 1981 (Annexure 5) by the Arbitrator (opposite party No. 2) in a dispute referred to the said Arbitrator in terms of Clause 23 of an F-2 contract between the petitioner and opposite party No. 1.

2. Opposite party No. 1, a contractor, undertook execution of the work entitled "Improvement to Sikhar-Karuo Road under M. N. P. from Kilometre 0/0 to 8/0." and F-2 contract No. 10 of 1978-79 was executed between the parties. Incorporated in the contract was an arbitration clause to the following effect:--

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawing and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work or the execution or failure to execute the same,

whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department, unconnected with the work at any stage nominated by the concerned Chief Engineer.

XX XX XX XX"

The Chief Engineer rescinded the said contract on 4-4-1980, as in his opinion the contractor did not stick, to the time schedule for the completion of the work and entrusted the work to a new agency and called upon the contractor to show cause as to why he may not be required to meet the difference in the costs of the execution of the work. Opposite Party No. 1 thereupon raised disputes relating to the contract and asked the Chief Engineer to appoint an arbitrator in terms of the arbitration clause. The Chief Engineer nominated opposite party No. 2 as the Arbitrator by order under Annexure 1 and stated therein:--

"The reference of the disputes as may be required will be made by the parties themselves.""

When appointment of the Arbitrator was duly notified, the Arbitrator called upon the contractor (opposite party No. 1) to file his statement of claims and called upon the State represented by the Executive Engineer to file counter statement thereto. The contractor laid claim but the petitioner made an application to the Arbitrator to stay further proceedings till disputes were validly and legally referred to him. He also informed the Arbitrator that as long as there was no joint reference by both the parties, he had no jurisdiction to entertain the claim and enter upon the reference. The Arbitrator rejected the application of the petitioner as not maintainable and called upon it to file its counter statement by 15-5-1980. The State Government, in the meantime, with a view to sustaining a counter claim against the contractor went before the Subordinate Judge of Cuttack in an application u/s 20 of the Arbitration Act and by that court's order dated 2-9-1980, the claims of the State Government were referred to the same Arbitrator for adjudication. Petitioner moved this Court by filing an application under Article 226 of the Constitution in O. J. C. No. 1977 of 1989 challenging , the action of the Arbitrator and a Bench of this Court without going into the merits of the matter disposed of the said application by saying :--

"The Chief Engineer, in exercise of authority conferred upon him under Clause 23 of the standard F-2 Agreement, appointed an arbitrator in the person of opposite party No. 2 and directed the parties to raise their disputes before him. The appointed arbitrator has now called upon the State to file its claim/ counter statement. The State challenges the direction in Annexure 4 by which notice has been given by the arbitrator fixing a date and requiring compliance.

After parties are heard, there does not seem to be any dispute that the arbitrator can be called upon to clearly specify the disputes which he wants to examine and after the same is determined and indicated, the State (petitioner before us) is prepared to file its counter statement/claim. In that view of the matter which we

think is in order, Annexure 4 should stand superseded with a direction that the arbitrator would at first determine the scope of enquiry clearly indicating the dispute which he intends to investigate and after that is done, the State would file its counter statement/claim, as it may be.

XX XX XX XX"

On receipt of the direction aforesaid, the Arbitrator passed an order on 11th February, 1981 (Annexure 5) and communicated copies thereof to the parties.

In the said order, the Arbitrator clearly specified:--

"Keeping the above order (of this Court) in view the disputes as mentioned by the claimant in his claim statement (copy already forwarded by the claimant.....) from page 7 to page 14 of the claim statement vide paragraph 15 of the same bearing claim item Nos. 1 to 18 (a & b) are now determined to be investigated."

This order of the Arbitrator is challenged on the ground that the Arbitrator failed to afford an opportunity of hearing to the petitioner before he came to the conclusion regarding which items were to be investigated. It is stated that that act of the Arbitrator was a quasi-judicial one and the impugned order made without hearing the petitioner could not be compliance of the direction of this Court.

3. Counsel for opposite party No. 1 took the stand that --

(1) the Arbitrator was not amenable to the extraordinary jurisdiction of this Court;

(2) the writ application was barred by constructive res judicata; and

(3) the stand taken by the petitioner, that the arbitrator got jurisdiction only when there was a joint reference by the parties, was an erroneous proposition in law and the Arbitrator's action, therefore, was not open to challenge.

We are inclined to take the view that on the earlier occasion, the matter was not examined at length and from all aspects as would appear from the second paragraph of the order extracted already. Learned Additional Government Advocate appearing for the petitioner does not dispute this position. In fact, counsel for both parties have placed a catena of precedents in support of their respective stands -- petitioner contending that the Arbitrator is amenable to our extraordinary jurisdiction and the Arbitrator gets jurisdiction to entertain and enter upon a reference only when both the parties jointly make it and the opposite party No. 1 submitting that the Arbitrator does not come within our extraordinary jurisdiction and it is not necessary that there should be a joint reference of the dispute for the Arbitrator to enable him to entertain the same. We have, therefore, thought it appropriate not to dispose of this writ application by deciding the limited question as to whether the order of the Arbitrator in identifying the disputes without hearing the parties is correct and shall proceed

to examine the two propositions formulated hereunder :--

(i) Is the Arbitrator amenable to the extraordinary jurisdiction of this Court under Article 226 of the Constitution? and

(ii) Is it necessary that there should be a joint reference of the disputes to enable the Arbitrator to entertain the same and enter upon the same for adjudication?

along with the question whether the action of the Arbitrator in identifying the disputes without hearing the parties is bad for want of compliance with rules of natural justice.

We shall not turn to examine the propositions. The matter we shall first examine is whether the Arbitrator is amenable to the extraordinary jurisdiction under Article 226 of the Constitution.

As already pointed out, the Arbitrator in the instant case is a person nominated by the Chief Engineer under the arbitration clause in a contract. It was pointed out by Lord Chief Justice Goddard in *Rule v. Disputes Commr. of Dental Tech.* (1953) 1 All ER 327 thus :--

"That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English law, but in all the centuries that have passed since the decisions of English courts first began there is no trace of an arbitrator being controlled by this court by writ of either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by Parliament. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort. It would be an enormous departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator, whether he be a single arbitrator or a body of gentlemen called a committee or council, and I am of opinion that we must dismiss these applications on the ground that they are wholly misconceived."

The view expressed by Lord Goddard, C. J. seems to hold the field in England.

In the *English and Empire Digest*, Vol. 3 (1978 Re-issue) at page 152, this authority has been relied upon for the proposition that the court has no power to direct the issue of orders or certiorari to an Arbitrator.

In *De Smith's Judicial Review of Administrative Action*, 4th Edition (1980) at page 385, the following observation has been made :--

"For this purpose, "legal authority" generally means statutory authority. Neither certiorari nor prohibition will issue to a private arbitral body which derives its jurisdiction from contract ... On the other hand, a body invested by statute with jurisdiction over persons who have entered into contractual relationships with it may be subject to certiorari and prohibition, although the occasion for the exercise of its jurisdiction does not arise until the contractual relationship is formed."

Several authorities have been indicated at page 385 for the proposition. In relation to arbitral bodies, it has been held that certiorari and prohibition will not lie unless resort to the arbitral jurisdiction is not only provided for but also mandatorily prescribed by statute.

In his classic work "Administrative Law", Professor Wade in the 4th Edition (1977) of the Book at page 604 has also expressed the same view relying upon the decision of Lord Chief Justice Goddard.

In Halsbury's Laws of England, 4th Edition (1973), Vol. 2, paragraph 615 it has also been said that the court has no power to make orders of certiorari or prohibition addressed to an arbitrator unless he is acting under statutory powers.

We may refer to a single Judge decision of the Delhi High Court in the case of *Balkishan Vs. Pannalal Sud and Others*, , where Sachar, J. quoted with approval what Lord Chief Justice Goddard had spoken, and observed (at p. 112) :--

"12. Mr. Marwah suggested that the fact that the award given by the arbitrator is liable to be set aside or to be made a rule of the Court under the provision of the Arbitration Act makes the Arbitration a statutory one. In my view there is no merit in the argument. The learned counsel's submission that the Courts have been given power under the Arbitration Act to deal with the arbitrator or his award does not mean that the arbitrator is a statutory arbitrator in the sense of being a public body to whom either the arbitration has necessarily to be referred to or in the sense that his award by itself has been given a finality and recognition by a statute. It is these vital differences between a private arbitrator and an arbitrator u/s 10-A of the Industrial Disputes Act that make all the difference and make the private arbitrator not amenable to the jurisdiction of this Court under Article 226 of the Constitution. I can find no injustice or harshness in arriving at the conclusion that the private arbitrator is not subject to the writ jurisdiction of this Court. This is because the Arbitration Act, 1940 is a complete code which provides for control over the powers and functions of the arbitrator and any party aggrieved by it has ample remedy provided under the Act. The fact that the petitioner might have, for reasons into which it is not necessary to go into debarred himself because of limitation to move the Court to give him relief, does not entitle him to invoke the jurisdiction of this Court against an arbitrator who is no more than a private person. It has been held that the writ of mandamus does not issue to a private individual and only issues to a person directing him to do a particular thing specified in the order which appertains to

his office and is in the nature of public duty vide *Sohanlal Vs. The Union of India (UOI)*, .

13. I would, therefore, hold that the arbitrator appointed under the Arbitration Act, 1940, is not amenable to the jurisdiction of this Court under Article 226 of the Constitution.

XX XX XX XX""

On the basis of these authorities and in the absence of any authority to the contrary, we must hold that the Arbitrator in the instant case is not amenable to the extraordinary jurisdiction of this Court.

4. It is proper that at this stage we deal with the question canvassed by learned Additional Government Advocate before us as to whether the Arbitrator violated rules of natural justice in identifying the disputes which he was to adjudicate upon without affording a hearing.

In England law has been settled as early as the 19th century that the Arbitrator who has judicial functions to discharge is bound to hear parties before he decides the disputes referred to him. There can be no second opinion to this proposition. In fact, there are abundant authorities of the Supreme Court which go to support the position that where there are two parties and a dispute, unless rules of natural justice have been kept away by a particular procedure being prescribed, the adjudicator must adopt rules of natural justice as his procedure. Without examining the amenability of the Arbitrator to the Court's extraordinary jurisdiction, there was a direction on the earlier occasion that the Arbitrator should identify the disputes, and the Arbitrator in the instant case has done so by naming the disputes he intends to adjudicate upon, but in doing so he did not hear the parties. The Arbitrator has not decided the disputes. All that he has done is, he has indicated in specific terms as to what disputes he shall entertain for adjudication.

We do not think for merely naming the disputes there was necessity to hear the parties. After all, these are matters with reference to which parties will have full liberty to lead evidence in such manner as the Arbitrator will permit, hearing will be extended and decision will be reached. In course of such hearing it would be open to any of the parties to satisfy the Arbitrator that what has been named as a dispute is not a dispute and with reference to the item, claimant would have no case, Merely because the Arbitrator has now identified the disputes for convenience of the parties, no decision has been reached which prejudices one party or the other and such action of the Arbitrator by which he has identified the disputes, we do not think, can be called in question for want of natural justice even if the Arbitrator became amenable to our jurisdiction. We are, therefore, of the view that the Arbitrator's action is not open on merit to challenge on the ground that he did not extend a hearing to the petitioner when he proceeded to do so.

5. The only other question left for consideration is whether it is necessary that there should be a joint reference of the dispute/s in order to entitle the Arbitrator to entertain the same and enter upon adjudication thereof. The learned Addl. Government Advocate has placed before us certain authorities in support of this proposition. The first is the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), , Reliance has also been placed on a Bench decision of the Delhi High Court in the case of Madhubala Private Ltd. Vs. Naaz Cinema and Others, and Dilip Construction Company Vs. Hindustan Steel Ltd., . Several decisions of the different High Courts have drawn support for the proposition from the observations of the Supreme Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), where Bose, J., speaking for the Court, stated (at p. 474) :--

"A reference requires the assent of "both" sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4).

In the absence of either, agreement by "both" sides about the terms of reference, or an order of the Court u/s 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

This observation of Supreme Court has been relied upon in the cases of the different High Courts in support of the proposition that where there is no joint reference of the disputes, the Arbitrator does not get jurisdiction to entertain the matter for adjudication.

In paragraph. 18 of the decision of the Delhi High Court in Madhubala Private Ltd. Vs. Naaz Cinema and Others, , the learned Judges quoted the aforesaid paragraph from the Supreme Court judgment and came to the conclusion thus :--

"18. The reference to arbitration having unilaterally been made by the exhibitors alone and no consent to the terms of the reference having been given by the other side the reference was not competent without recourse to the provisions of Section 20(4) of the Arbitration Act for compelling the recalcitrant party to submit to the arbitration proceedings. The arbitrators appointed by the Motion Pictures Association had no jurisdiction to arbitrate on the dispute on a unilateral reference made by one of the parties.".

A Full Bench of the Delhi High Court in P.C. Aggarwal Vs. Banwari Lal Kotiya, referred to an earlier Punjab case reported in (1966) 2 DLT 123 (Madhusudan Limited v. Ram Pra-kash) and quoted the observations of the Supreme Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), and observed:--

"The law laid down by the Supreme Court is binding on all Courts. We are clearly of the opinion that the said quotation covers all references to arbitration and not merely a reference to arbitration only on a question of law".

The Division Bench of the Madhya Pradesh High Court in the case of Dilip Construction Company (supra) in paragraph 18 of its judgment quoted the same observations of the Supreme Court in Thawardas's case for its conclusion that the two sides have to join for making a reference of the disputes in order to give jurisdiction to the Arbitrator under the Act.

In Thawardas's case, the observation wherein seems to be the foundation for the judicial view on which the learned Additional Government Advocate places reliance in support of his proposition, the question for consideration was whether the Arbitrator had jurisdiction to finally decide the question of law. The Supreme Court found that unburnt bricks were not the subject matter of contract. The arbitration clause contained in the contract, therefore, could not cover a dispute relating to unburnt bricks. In order that the Arbitrator may have jurisdiction to deal with a dispute relating to unburnt bricks as a proposition of law, it became necessary that such a question should have been referred by both the parties, otherwise it would have been outside the ambit of the arbitration clause and such a dispute could not be before the Arbitrator.

6. The question for consideration is whether the Supreme Court intended to say something of general application or made the observation in the setting of the case before it.

The Supreme Court nowhere indicated that they intended to say something of general application when they proceeded to make the observation which has been quoted from their judgment. Any observation of the Supreme Court which is intended to cover the field must be taken as a binding statement of the law and every High Court is bound to accept it as final in view of what have been said in Article 141 of the Constitution. In a hierarchical system of judicial administration it is necessary for each lower tier to accept loyally the decision of the higher tiers, as was rightly pointed out by the Lord Chancellor in *Broome v. Castle & Co.* (1972) 1 All ER 801. The oft quoted dictum of Lord Halsbury in *Quinn v. Leathern* 1901 AC 495 may be usefully recalled here :

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides, I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a form of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that the law is not always logical at all".

In the case of *P.C. Aggarwal Vs. K.N. Khosia etc.*, , a Division Bench examined the selfsame question, After quoting the relevant paragraph from *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, ", *Deshpande, ff.*, who spoke for the Court indicated (at p. 60) :--

"With respect, it seems to us that the above observation of the Supreme Court

has been wrongly understood in some decisions as laying down the wide proposition that there can be no reference to arbitration except through the Court u/s 20 unless both the parties join in it."

Reference was made to certain cases and it was observed (at p, .60) :--

"The observation of the Supreme Court does not mean that no reference to arbitration can be made except u/s 20 of the Act unless all the parties (join in making the reference. Our reasons are as follows :--

(1) In the case of Thawardas itself the arbitration provision was invoked by the Government while the reference was proceeded with by the contractor alone, The Government and the contractor did not join in making a reference to arbitration, On the contrary, the reference was initiated by the contractor basing himself on the consent of the parties to the reference contained in the original arbitration agreement

(2) The Supreme Court did not hold that the award was bad because the initial reference to the arbitration was itself bad being unilateral.

(3) On the contrary, the Supreme Court held that the award was bad because it disclosed an error of law apparent on the face of the record,

(4) The Court further expressed the view that the arbitrator would have been entitled to commit such an error of law apparent on the face of the record and the award would still have been binding between the parties if a specific question of law had been referred by the parties for the decision of the arbitrator. Such a specific question of law could not be expected to be referred to arbitration in the original arbitration agreement containing the reference inasmuch as the question would not be known to the parties unless and until the dispute actually arises, Such-a question can be formulated only after the dispute arises, Since the question was not contained in the original reference, it has to be referred to arbitration by both the parties. It is in this context that the Supreme Court considered the necessity of the making of such a reference by both the parties. Even if the general observation of the Supreme Court is construed to apply to all references and is not restricted to the reference of a specific question of law, still the said observation cannot mean that no reference to arbitration can be made except through Section 20 unless it is jointly made by the parties."

Deshpande, J., referred to a decision of the Supreme Court in the case of Bhusawal Borough Municipality Vs. Amalgamated Electricity Co. Ltd. and Another, . The second proviso to Clause 5 of the Surcharge Order as appearing at page 1653 of the Reporter read thus :--

"Provided further that no War Costs Surcharge shall be effective upon the charges for the supply of energy under any contract entered into after the 1st May, 1942, unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee or sanction holder concerned (as to which in the event of dispute by any

party interested, the decision of the pro-vincial Government shall be final) or unless and to such extent as such application may be expressly ordered by the Provincial Government".

At page 1654, the Supreme Court observed :--

"Then Mr. Pathak said that under the Surcharge Order itself the dispute had to be referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the proviso which says :

"In the event of dispute by any party interested, the decision of the Proving trial Government shall be final.""

Paragraph 3 of the first schedule to the Arbitration Act states :--

"The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

Referring to this clause, Desai, C. J., speaking for a Full Bench of the Allahabad High Court in the case of Mangal Prasad Vs. Lachhman Prasad, (at p. 111) observed :--

"A party or the parties could itself or themselves, without intervention of the Court, call upon the arbitrator by, notice in writing to make an award, vide Clause 3 of the first schedule. But the remedy given by Section 20(1) is an alternative to that provided by Chapter II, which means that Chapter II also applies to a case in which a difference arises after the agreement has been entered into. It cannot be disputed that the Act governs an arbitration agreement preceding a difference and if Chapter II does not exclusively deal with a difference preceding an agreement it cannot be said that Section 28(1) exclusively deals with a difference arising after an agreement."

7. Deshpande, J. has referred to the historical background and the development of the law through a series of cases. Keeping the historical background in view and taking the statutory provisions into consideration we are inclined to agree with the analysis made by the Delhi High Court in the case of P.C. Aggarwal Vs. K.N. Khosia etc., and we are also in agreement with the conclusion of the Delhi High Court that the Supreme Court in Tha-wardas"s case never intended to say that for every matter of arbitration there must be a joint reference of the disputes, otherwise the Arbitrator would have no jurisdiction to entertain the disputes. We may point out that there are series of authorities of this Court following the principle in the case of Union of India(UOI) Vs. D.P. Singh, , that the arbitration clause vesting power in the Chief Engineer to appoint an arbitrator makes the nomination of the Arbitrator by such agency on the basis of consent of both the parties.

The arbitration clause states that all disputes relating to the contract are to be

referred to such Arbitrator, who, when appointed, must be deemed to be the appointed Arbitrator by consent of parties.

Once the Arbitrator is named, the forum is available for raising disputes. The claimant goes before the Arbitrator with a set of claims, and the other party either resists the claims by the filing a counter or advances counter claims, if there be any. This has been the age-old practice, and the learned Additional Government Advocate has also conceded before us that this practice has been obtaining before all Arbitrators appointed under Clause 23 of the F-2 agreement, though for some time the learned Additional Government Advocate has been trying to canvass relying upon the observations of the Supreme Court in Thawardas's case that a joint reference of the disputes is a condition precedent to the Arbitrator's action.

It is useful to take note of what was observed by a Division Bench of the Allahabad High Court in the case of Radha Kishan and Another Vs. Sapattar Singh, :--

""In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate, when necessary, their disputes before the arbitrators and seek their decision on those points of differences."

8. From the discussion which we have raised above, it must follow that there is no foundation for the submission that unless the two parties join in making a combined reference, the Arbitrator, though appointed by consent under the arbitration clause, would have no jurisdiction to entertain the dispute and enter upon the reference.

9. The writ application must accordingly fail and is dismissed with costs. Hearing fee is assessed at Rs. 250/- (Two hundred fifty).

N.K. Das, J.

10. I agree.