

(2004) 05 OHC CK 0007
In the Orissa High Court
Case No : Misc. Appeal No. 622 of 2000

State of Orissa

APPELLANT

Vs

Orient Paper Mills

RESPONDENT

Date of Decision : 07-05-2004

Acts Referred:

Arbitration Act, 1940 — Section 30, 39
Evidence Act, 1872 — Section 57

Citation : (2004) 97 CLT 825

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : Addl. Standing, for the Appellant; K.K. Jena and A.K. Biswal, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—This is an appeal by the State of Orissa u/s 39 of the Arbitration Act, 1940 (hereinafter referred to as the "Act") against the judgment and order dated 14.10.1999 passed by the Civil Judge (Senior Division), Bhubaneswar in O. S. No. 74 of 1979 by which the learned Civil Judge (Senior Division) dismissed the said suit on contest while allowing the Misc. Case No. 99/97 filed by the respondent u/s 30 read with Section 33 of the Act.

2. The short facts giving rise to this appeal are :

The respondent Orient Paper Mills filed O.S. No. 321 of 1988-I u/s 20 of the Act in the Court of Subordinate Judge [now Civil Judge (Senior Division)], Bhubaneswar, with a prayer to direct the State of Orissa to file the original agreement and to refer the dispute between the parties to the Orissa Arbitration Tribunal constituted u/s 41-A of the Act, for arbitration. The learned Civil Judge (Senior Division), by its judgment and order dated 9.8.1990 decreed the said suit with a direction to the State of Orissa to file the original agreement. After filing of the said agreement, by order dated 23.11.1991 the learned Civil Judge (Senior Division), referred the dispute for adjudication to the Arbitration Tribunal,

Orissa. By majority, the learned Arbitration Tribunal passed a Nil award on 29.11.1996 which was filed before the learned Civil Judge (Senior Division), Bhubaneswar u/s 17 of the Act, for making the said Nil award a rule of the Court, which was registered as O.S. No. 74 of 1997. On receiving summons in the said suit the respondent Orient Paper Mills filed an application u/s 30 read with Section 33 of the Act alleging legal misconduct on the part of the Arbitration Tribunal and praying for remand of the dispute to the Tribunal for fresh adjudication on merits.

3. During pendency of the aforesaid Misc. Case the respondent filed an application on 17.1.98 to issue summons to the Chairman, Arbitration Tribunal Orissa for being examined as a witness in the case. The State filed its objection to the aforesaid application and as the matter was being repeatedly adjourned, the respondent preferred O.J.C. No. 4631 of 1999 before this Court. By judgment dated 14.5.1999 a Division Bench of this Court dismissed the said writ application, but made certain observations in the said judgment which are as follows :

"The award rendered by the Arbitration Tribunal is a speaking one. The reasons in rejecting the claim of petitioner No. 1 have been indicated therein. The grievance of the petitioner No. 1 that documents referred to in the award were not cited or placed before it by any party can be examined on perusal of the records of the Arbitration proceedings. Whether any evidence or document was taken into account by the Arbitration Tribunal without notice to petitioner No. 1 or behind its back is a question which can be resolved by looking into the records. If any document or material was considered behind the back of petitioner No. 1 and was utilized against it, it may constitute a valid ground for setting aside the award itself on the ground of infraction of the principles of natural justice. Similarly, if any irrelevant document or evidence was referred to in the award, the Court while considering the objection to the award can examine the same.

For the reasons aforesaid, the prayer of petitioner No. 1 to summon the then Chairman of the Arbitration Tribunal to be examined as a witness has no legal basis and is otherwise misconceived. Consequently the application dated 17.1.1998 pending before the learned Civil Judge stands rejected.

Registry is directed to send a copy of this judgment to the learned Civil Judge (Senior Division), Bhubaneswar for passing consequential order on the said application on the date fixed for hearing."

4. The learned Court below keeping the above observations made by this Court in the aforesaid judgment and after hearing the parties has passed the impugned judgment and order by setting aside the disputed award and remitting the matter back to the arbitration Tribunal for consideration and disposal on merits.

5. The Orient Paper Mills was granted a lease of bamboo forest in Ghumsur North Forest Division under Ext. 16 dated 2.4.83 for a period of 12 years with

retrospective effect from 10.10.1997. Previous to this lease, there was another lease granted by the State in favour of the respondent. In the new lease under Ext. 16, the rate of royalty was enhanced affecting a period of five years of the previous lease period. The subsequent lease was rescinded by the State with effect from 1.10.1988 under the provisions of Orissa Forest Produce (Control of Trade) Act, 1981. The Orient Paper Mills claimed refund of Rs. 25, 52, 214.26 on account of non-availability of adequate bamboos to cover up the minimum royalty already paid and on account of retrospective enhancement of the royalty etc.

6. Mr. Misra, learned Standing Counsel on behalf of the State submitted that the jurisdiction of a Court under Sections 30 and 33 of the Act is limited and the learned trial Court had no jurisdiction to pass the impugned judgment sitting in appeal over the award passed by the Arbitration Tribunal and examining the correctness of the award on merit. He further contended that the conclusions by the learned trial Court while setting aside the Nil award that the Tribunal has committed "legal misconduct" by referring to various materials such as (1) the Wealth of India, Raw Materials, Vol. III, Silviculture of India Trees by R. S. Troup Vol. III; (ii) The Botany of Bihar and Orissa by H. H. Haines, Part IV, the Indian Forests Bamboo Special-1, Vol. 114, No. 9, an article, viz. "Management of Bamboo Forests" written by A. N. Chaturvedi ; and (iii) Revised Working Plan in the Reserved and Demarcated Protected Forest of Angul Forest Division from 1990-1991 to 1999-2000 behind the back of the respondent is not sustainable in law in view of the provisions of Section 57 of the Indian Evidence Act. It was submitted by him that the learned Arbitration Tribunal has acted within the parameters of law by referring to the above materials which can be said to be appropriate books or documents of reference on matters of science as provided in Section 57 of the Indian Evidence Act.

7. Mr. K. K. Jena, learned counsel on behalf of the respondent-Orient Paper Mills on the other hand submitted that, all the above materials referred to by the Arbitration Tribunal while passing the nil award were never brought to the notice of the respondent at the time of hearing before the said Tribunal and further the learned Arbitration Tribunal has not taken into consideration Ext. 12 which is a vital document and on consideration of which the learned Arbitration Tribunal could have arrived at a different conclusion and would have accepted the claim of the respondent. He further submitted that in O.J.C. No. 4631 of 1999 which was filed by the respondent (reported in Orient Paper Mills and Another Vs. Civil Judge (Senior Division) and Another, it was conclusively held that if any document or material was considered behind the back of petitioner and was utilised against it, it may constitute a valid ground for setting aside the award itself, on the ground of infraction of provisions of natural justice and if any irrelevant document or evidence was referred to in the award, the Court while considering the objection to the award can examine the same. The State having not challenged the said judgment of this Court, it is bound by the same and thus the learned Court below by taking the above observations of this Court as a

guideline and on finding that the above materials were considered by the Arbitration Tribunal behind the back of the respondent, which violated the principles of natural justice, has rightly set aside the award and remanded the matter for fresh adjudication on merit.

8. Mr. Jena, learned counsel for the respondent, further submitted that the appeal itself is not maintainable u/s 39 of the Act as no appeal is provided under law against the order remitting the matter back to the Arbitrator for fresh adjudication.

9. In order to consider the rival submissions made by the parties, I would first consider the question of maintainability of the appeal.

Section 39 of the Arbitration Act, 1940 is quoted hereunder :

"39. Appealable orders : (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order :

An order :

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award :

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

10. A plain reading of the above Section shows that an appeal lies when an award is set aside. In the case of Chowdhury and Co. Vs. Government of Orissa, this Court being posed with a similar question has held :

"Admittedly, Section 39 does not provide an appeal against an order of the Court remitting or refusing to remit an award and in a simple case of remission of the award, no appeal as such would lie. Where, however, the award has been made a rule of the Court in part and on certain items of claim the Court has refused to set aside the award and direct a remand, an appeal would lie on the ground that the Court has refused to set aside the other part of the award."

11. In the instant case as the impugned judgment and order is not a remittance of the award for fresh adjudication simplicitor, but the award itself has been set aside and then the matter has been remitted, an appeal u/s 39 of the Act is maintainable.

12. For considering the other limb of submission made by the learned counsel for the parties, the relevant portion of Section 57 of the Indian Evidence Act is quoted below :

"57. Facts of which Court must take judicial notice : The Court shall take judicial notice of the following facts :

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In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference."

13. A reading of the above provision clearly shows that the Court can take judicial notice of all matters of science and may resort for its aid to appropriate books and documents of reference. The observation made by this Court in the judgment in O. J.C. No. 4631 of 1999 between the parties as quoted above should be read in consonance with the provisions of Section 57 of the Indian Evidence Act. I would, therefore, observe that this Court while stating that if any document or materials was considered behind the back of the petitioner (respondent) and was utilized against it, it may constitute a valid ground for setting aside the award itself for infraction of principles of natural justice, cannot be applied to such materials of which judicial notice is permissible u/s 57 of the Evidence Act. Thus, I find that the conclusion of the Court below that the disputed documents having been obtained and utilized by the Arbitration Tribunal behind the back of the claimant- petitioner the same constitutes a valid ground for setting aside the award on the ground of infraction of principles of natural justice, without analyzing the nature and character of the documents referred to by the Arbitration Tribunal, is unsustainable. In my considered view, no fault can be found with the Arbitration Tribunal in referring to the text books and articles on "Bamboo growth and Gregarious flowering". But the reference made by the Arbitration Tribunal to paragraph 493 at page 545 of the Revised Working Plan for the Reserved and Demarcated Protected Forest of Angul Forest Division from 1990-91 to 1999-2000 published by B. P. Singh, for coming to the conclusion that the flowering of bamboos in the leased bamboo forest in question is sporadic from year to year whereas gregarious flowering takes place after long intervals and the contention of the claimant that gregarious flowering of bamboos in the leased bamboo forest took place in each year is unacceptable, cannot be sustained in view of the fact that the said Revised Working Plan of Angul Forest Division was never brought to the notice of the claimant-respondent inasmuch as the said plan being not related to the Ghumsur Bamboo Forest leased in favour of the respondent could not have been referred to while adjudicating the dispute

between the parties. This, therefore is a document which was taken into consideration by this Court while making the observation regarding violation of the principles of nature justice in the judgment passed in the afore-mentioned writ application {O.J.C. No. 4631/1999}.

14. I also find that Ext. 12 which is a vital document produced by the respondent has not been taken into consideration by the Arbitration Tribunal. Ext. 12 is a letter/report of the D. F. O. addressed to the Conservator of Forest intimating him as follows :

"With reference to your D. O. letter cited above, I would inform that the flowering bamboo areas which are part of the lease area of M/s Orient Paper Mills Ltd. have been affected by gregarious flowering as reported by the respective Range Officer by personal inspection....."

15. In my considered opinion had this piece of document been taken into consideration by the Arbitration Tribunal, the conclusion of the said Tribunal could have been otherwise.

16. Mr. A. K. Misra, learned Standing Counsel relying upon the decisions reported in Sudarsan Trading Co. Vs. Government of Kerala and Another, and Puri Construction Pvt. Ltd. Vs. Union of India (UOI), submitted that the Arbitrator is the sole Judge of the quality as well as quantity of evidence and it is not proper for the Court to take upon itself a task of being a Judge on the evidence before the Arbitrator and the scope of a Court to decide the objection raised by a party against the arbitration award is very limited and it has got no jurisdiction to sit in appeal and examine the correctness of the award on merit.

17. Mr. Jena, learned counsel for the appellant while having no quarrel on the proposition of law as laid down in the above cited decisions, relying upon a decision reported in The Fertilizer Corporation of India Ltd. Vs. Bharat Painters, submitted that the question of considering the quantity and quality of evidence adduced before the Arbitration Tribunal does not arise in the instant case nor the question of sitting in appeal over the award arises. He further submitted that a Court of law, in the peculiar facts and circumstances of this case can be justified in interfering with the award even with the limited power of interference it possesses. It is always open for the Court to examine as to whether there has been non-application of mind of the arbitrator in passing the award and if this is found in the affirmative, the award passed by the Arbitrator should not be sustained in law, as this would be covered by the expression "otherwise invalid" used in Section 30 of the Arbitration Act. This submission of Mr. Jena is supported by the ratio of the decision in the case of The Fertiliser Corporation of India Ltd. (supra) where this Court by referring to various judgments has held as follows :

"It is no doubt true that the scope of interference by a Court in case of a non-reasoned award is rather very limited and a Court has no jurisdiction to investigate into the merits of a case and to examine the evidence on record for

the purpose of finding out whether or not the arbitrator has committed an error of law. But yet in facts and circumstances of a case, a Court of law would be justified to interfere with the award even with the limited power of interference a Court possesses.

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An award which is the produce of non-application of the mind of the arbitrator cannot be permitted to be sustained in law, since this would come within the expression "otherwise invalid" used in Section 30 of the Arbitration Act. Non-application of mind to the materials on record suggests absence of fair play and indicates that the arbitrator did not function in a manner befitting his role."

18. Considering the facts and circumstances of the present case and the rival submissions made at the bar I am of the view that the learned Court below has neither committed any illegality nor has acted in excess of its jurisdiction in passing the impugned judgment setting aside the award passed by the Arbitration Tribunal, Orissa Bhubaneswar and in remitting the matter back to the said Tribunal for fresh adjudication of the dispute on merit.

I, therefore, dismiss this appeal, but in the circumstances without costs.