

(1983) 01 OHC CK 0022
In the Orissa High Court
Case No : Civil Revision No. 189 of 1980

State of Orissa

APPELLANT

Vs

S.B. Joshi and Corporation Ltd. and Another

RESPONDENT

Date of Decision : 03-01-1983

Acts Referred:

Arbitration Act, 1940 — Section 11, 14, 14(1), 14(2), 38

Citation : (1983) 55 CLT 184

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Advocate : Addl. Government Advocate, for the Appellant; Devananda Misra and Deepak Misra, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanti, J.—This revisional application is directed against an order of the learned Subordinate Judge, Cuttack dismissing an application under Sections 5 and 11 of the Indian Arbitration Act for removal of an Arbitrator.

2. In order to understand how the question involved in the case arises, it is necessary to state certain facts. It appears that the opposite party No. 1 had entered into an agreement with the State of Orissa for construction of a High Level Bridge over the river Brahmani on National Highway near Dharmasala, Clause 19 of the agreement provides as follows:

Any dispute that shall arise out of this contract the settlement of which is not herein provided for, shall be decided by two arbitrators, one to be appointed by each party or an Umpire to be appointed by the arbitrators before proceeding with reference and the provisions of the Indian Arbitration Act, 1940 as amended shall apply to any such reference.

3. The opposite party No. 1 appointed Shri G.D. Taskar as the arbitrator and called upon the State of Orissa to appoint its arbitrator. The State of Orissa appointed Shri Premananda Misra, a Superintending Engineer as arbitrator. The

two arbitrators appointed Shri K.C. Das, a retired Additional Chief Engineer as Umpire. Subsequently, due to unwillingness of Shri Taskar, the opposite party No. 1 appointed Shri. M.C. Pani, a related Chief Engineer as arbitrator.

4. On 10th August, 1979 the State of Orissa represented by the Chief Engineer, National Highways and Projects. Orissa tiled an application for removal of the arbitrator on the ground of misconduct. The misconduct alleged was that Shri M.C. Pani, the arbitrator had accepted from the opposite party No. 1 Rs. 250/- as his fees and Rs. 25/- as T.A. for each day of hearing without the knowledge of the Petitioner. It was alleged that the Petitioner came to know about such payment for the first time on 9th July, 1978 when it was disclosed by Shri Pani during the hearing of the arbitration proceeding. It was contended that receipt of remuneration by Shri Pani behind the back of the Petitioner constitutes a grave misconduct and the Petitioner reasonably apprehended that Shri Pani would be biased in favour of opposite party No. 1 in allowing his claims in the award.

5. The opposite party No. 1 hide counter contending, inter alia, that in cases where both parties appoint two different arbitrators the remuneration and other payment should be made by each party to his own nominee It was also contended that the State of Orissa were paying the Traveling Allowances to Shri P.N. Misra, the arbitrator nominated by them for attending each sitting. It is further contended that the remuneration paid to Shri Pani being fair and reasonable the question of attacking his integrity on that score did not arise.

6. The learned Subordinate Judge held that in the absence of any stipulation in the agreement regarding the payment of fees and Travelling Allowances of the arbitrators it was appropriate for the contractor to pay the same and the arbitrator has not misconducted himself by accepting the fees and Travelling Allowances. Upon such finding the application under Sections 5 and 11 of the Act was dismissed. Aggrieved by this decision the State of Orissa has came up in revision.

7. It is urged on behalf of the Petitioner that in case of a reference to two arbitrators one to be chosen by each party there is an implied promise by the parties to pay the arbitrators jointly for their services and that when one of the arbitrators took money from one party behind the back of the other party even for his remuneration and T.A. this constitutes grave misconduct.

8. The relevant law with regard to the remuneration or the fee of the arbitrator is contained in para 8 of the First Schedule as well as in Section 14(2) of the Indian Arbitration Act Under para 8 of the Fast Schedule, the costs of the reference and award shall be in the discretion of the arbitrator who may direct to, and by whom and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client. Thus, the costs of the reference and award which also includes the remuneration or fee at the arbitrator is within it he discretion of the arbitrator. Under Sub-section (1) of Sections 14 of

the Act, after the arbitrator has made an award, he has to sign it and give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. Sub-section (2) of Section 14 provides that upon payment of the fees and charges due in respect of the arbitration and award and the costs and charges of the same at the request of any of the parties to the arbitration agreement, the arbitrator has to file the award in the Court. The dispute as to the arbitrator's remuneration or costs are to be decided by the Court u/s 38 on application of any of the parties.

9. There is nothing in Sections 14 and 38 of the Act which compel the arbitrator to act without payment of fees. Receipt of the fees in advance by the arbitrator does not amount to misconduct unless, of course, the demand is excessive. Section 14 does not say that the arbitrator must proceed with the arbitration proceeding without payment of fees in case he wanted them to be paid before acting in the arbitration proceedings. It does not also say that fees cannot be demanded at an earlier stage. Where a party has chosen his own arbitrator he must be taken to have entered into an agreement with him to pay his reasonable fees.

10. The opposite party No. 1 has filed a xerox copy of letter No. 18111/A. dated 4th September, 1968 issued by the Government of Orissa in the Works and Transport Department to the Government General Manager of opposite party No. 1 in connection with arbitration for another project. The relevant portion of the letter is extracted below:

Two arbitrators are to be appointed, one by each party to the contract. Hence Government do not consider it necessary to refer the matter regarding payment of fees and its appointment between Government and the contractors to the arbitrators. Instead it is considered proper that each party should bear the fees and other expenditure if any of the arbitrator appointed by them.

It also appears that the opposite party No. 1 by his letter dated 15th April, 1974 addressed to Shri M.C. Pani, the arbitrator offered to pay Rs. 250/- as fees for each sitting and other incidental charges. The opposite party No. 1 is a limited Company and it is no secret that the arbitrator Shri Pani was being paid Rs. 250/- as fees and Rs. 25/- as his travelling expenses for each sitting from the Company's accounts since the date of his appointment in 1974, Shri Pani is a retired Chief Engineer. The arbitration proceedings involve a heavy claim and were protracted. It cannot, therefore, be said that the amount paid as fees and T.A. are excessive. There is no stipulation in the agreement between the parties regarding payment of fees and T.A. of the arbitrator.

In the absence of such stipulation each party was to pay the remuneration of the arbitrator nominated by him and acceptance of such remuneration by the arbitrator does not amount to misconduct. Apprehension entertained by the Petitioner that Shri Pani will be biased in favour of opposite party No. 1 seems to be unfounded. The learned Subordinate Judge was justified in dismissing the

application for removal of the arbitrator.

11. The Civil revision fails and is dismissed with costs.