
(2002) 03 OHC CK 0030

In the Orissa High Court

Case No : Misc. Case No. 238 of 2001 (Arising out of M.J.C. No. 336 of 2000)

The Indian Oil Corporation Ltd. and Another

APPELLANT

Vs

D.K. Gupta and Co.

RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12, 13, 16

Constitution of India, 1950 — Article 136

Orissa High Court Rules, 1948 — Rule 6, 6(1)

Citation : (2002) 03 OHC CK 0030

Hon'ble Judges : P.K. Balasubramanyan, C.J

Bench : Single Bench

Advocate : Sanjit Mohanty, S.C. Samantaray and S. Pattnaik, for the Appellant;
P.K. Ray, P.K. Panda, B.B. Acharya and J. Sahoo, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanyan, C.J.—This is an application filed by the opposite parties in M.J.C. No. 338 of 2000 praying that the order of this Court passed on 24.8.2001 in said M.J.C. be recalled or revoked. The ground mentioned for recalling the order includes the ground that the order dated 24.8.2001 was passed by this Court without notice of M.J.C. No. 336 of 2000 being served on the opposite parties. On going through the order-sheet, it is seen that M.J.C. No. 336 of 2000 came up for orders on 22.1.2001 before the then Acting Chief Justice. The learned Acting Chief Justice directed the petitioner in M.J.C. No. 336 of 2000 (opposite party herein) to remove the defects within three days, and also directed issue of notice on the question of admission indicating that the matter was likely to be disposed of at the stage of admission itself. Requisites for issue of notice to the opposite parties were to be filed in two days. By 24.1.2001 the petitioner in M.J.C. No. 336 of 2000 removed the defect and produced the requisites. Notice was issued by this Court to the opposite parties (petitioners herein) fixing 8.3.2001 as the date for their appearance. The notice was presumably sent in terms of Rule 6 of the Rules of the High Court of Orissa.

Under Rule 6(1) notice in civil matters shall be taken out through Court and on subsequent occasion through Court or by registered post with A.D, The addresses of the opposite parties in M.J.C No 336 of 2000 was given as on as in Calcutta. The notices sent were not served. In other words, the acknowledgments showing service of notice were not returned of this Court. The notices were thereupon re-issued from this Court fixing tS.4.2001 as the date for appearance or the opposite parties. It is not clear what was the method adopted for issue of the second notice. But that notice was also not served. The notices were again issued fixing 30.7.2001 as the date of appearance of the opposite parties. The service report of the notices was not returned with the result that it was not clear whether the notices had been served on the opposite parties. The matter was sent up before the Chief Justice on 24.8.2001. The learned Chief Justice then passed an order appointing an Arbitrator and directing the Registry to send all the papers to the Arbitrator immediately.

2. As noticed, this Misc. Case is filed by the opposite parties in M.J.C. No. 33S of 2000 on the ground that they had no notice of the application made u/s 11 of the Arbitrator and Conciliation Article 136. They had serious objections to the order directing appointment of an Arbitrator. The appointment was not sustainable as per the contract between the parties. Even otherwise, no ground was made out for invoking Section 11 of the Act. It was further submitted that since the order dated 24.3.2000 was passed without hearing the opposite parties it had to be revoked or retailed since the opposite parties were entitled to be heard on the motion of the petitioner by way of M.J.C. No 336 of 2000 before this Court.

3. Learned Counsel for the petitioner in M.J.C. No. 336 of 2000 submitted that the question is whether notice was served in M.J.C. No. 336 of 2000 on the opposite parties, and it is difficult to presume that the Indian Oil Corporation Ltd. and its Deputy General Manager having their office at Calcutta were not served with notice which was sent thrice from this Court. Alternatively it is contended that in the light of the decision of the Supreme Court in *Konkan Railways Corporation Ltd. v. Rani Construction Pvt. Ltd.* 2002 (1) Supreme 419 2002 (I) Scale 465, even an appointment of an Arbitrator without notice can be valid and binding on the opposite parties and that whatever objections the opposite parties may have, to the appointment of the Arbitrator or of the existence of an arbitration clause, or on the arbitrability of the dispute concerned, can be raised before the Arbitrator in terms of Sections 12, 13 and 16 of the Act, and hence there was no justification in recalling the earlier order.

4. The learned Counsel went to the extent of submitting that in the light of the decision of the Supreme Court in *Konkan Railways Corporation Ltd.*'s case (*supra*), the order passed was only an administrative order and it was doubtful whether such an order can be reviewed or recalled by the Chief Justice once it has been made.

5. It is no doubt true that in *Konkan Railways Corporation Ltd.*'s case (*supra*), the Supreme Court has said that the order passed by the Chief Justice on the

application u/s 11 of the Act is only an administrative order and does not affect the rights of the parties. They have also held that all questions relating to the existence of an arbitration clause or arbitrability of the dispute, can be raised before the Arbitrator named by the Chief Justice. Since such contentions are available to the party feeling aggrieved by the appointment of Arbitrator before the Arbitrator itself, it has to be held that the order appointing the Arbitrator was only administrative in nature, and was not even appealable by approaching to the Supreme Court under Article 136 of the Constitution of India. It is submitted on behalf of the opposite parties that even if the order is administrative in nature, it is not correct to say that the opposite parties are not entitled to be heard when such an order is being passed, when such an order is likely to affect at least to some extent that party or is likely to cause some loss to him, monetary or otherwise. According to them, an Arbitrator would not have been appointed, had they been "heard" in the matter. It is submitted that even if objection to jurisdiction is decided by the Arbitrator in their favour, they have to raise and argue that question before him and this is sure to entail avoidable expenditure. They would have to pay the fees of the Arbitrator and to share the expenses of the Arbitrator and the proceeding. In such a situation, it would be just and proper for the Chief Justice when he is called upon to exercise jurisdiction u/s 11 of the Act, to hear the opposite side before taking a decision on the prayer made in the application. In my view, it would be proper to pass an order on an application u/s 11 of the Act after hearing the other party to the contract arrayed as a respondent, even though the order of appointment by itself may not affect any substantive right of the party and will still leave the party with the right to agitate his contention before the Arbitrator and thereafter before the Court while seeking to challenge the award that may be passed. I had occasion to consider this aspect in my order dated 18.2.2002 in Civil Review No. 86 of 2001, wherein I have held that rules of natural justice warranted the hearing of the opposite parties before exercise of power by the Chief Justice u/s 11 of the Act, and exercise of power u/s 11 of the Act without notice to the opposite side is liable to be revoked by the Chief Justice if moved in that behalf. I am, therefore, inclined to overrule the contention raised on behalf of the petitioner (opposite party herein) in M.J.C. No. 336 of 2000, and hold that the order passed on 24.8.2001 can be recalled if the circumstances justify such recall.

6. In the case on hand, as a matter of fact, the learned Acting Chief Justice before whom the matter originally appeared for admission had directed issue of notices to the opposite parties in M.J.C. No. 336 of 2000. Therefore, the learned Acting Chief Justice did not dispense with notice. Once notice was ordered to be issued, then the matter could be finally adjudicated upon only after such notice is really served or the Court finds that there is sufficient service of notice or declares that there has been due service of notice. In such a case, it is necessary for the Court to record that it is satisfied that there has been sufficient service of notice before proceeding further, and if an order is passed thereon, it would be binding. In the case on hand, this Court did not declare that there has been

sufficient service of notice on opposite parties in M.J.C. No. 336 of 2000, or raise a presumption that there has been service of notice on the opposite parties. There is nothing to show that this Court dispensed with further notice. In such a situation, in my view, the order passed on 24.8.2001 has to be taken to be an order passed without notice to the opposite parties. Since the fundamental principles of natural justice have not been followed and in our procedural jurisprudence, no order can be passed without notice to the parties, the order dated 24.8.2001 calls for review in the circumstances of the case since. I find that there has been no sufficient or proper service of notice on the opposite parties in M.J.C. No. 336 of 2000 before it was finally disposed of, I recall the order dated 24.8.2001 and reopen M.J.C. No. 336 of 2000.

The Miscellaneous case is thus allowed.