
(1982) 08 OHC CK 0016

In the Orissa High Court

Case No : Misc. Appeal No. 276 of 1981 and Civil Revision No. 756 of 1981

The State of Orissa and Others

APPELLANT

Vs

Paramananda Pradhan

RESPONDENT

Date of Decision : 20-08-1982

Acts Referred:

Arbitration Act, 1940 — Section 20(4)

Orissa Government Servants Conduct Rules, 1959 — Rule 17

Citation : AIR 1982 Ori 285

Hon'ble Judges : B.K. Behera, J

Bench : Single Bench

Advocate : R.K. Patra, in Misc. Appeal No. 276 of 1981 and Civil Revn. No. 756 of 1981, for the Appellant; P.K. Patnaik, for Respondent in Misc. Appeal No. 276 of 1981 and for Opposite Party No. 1, S.K. Das and B.P. Patnaik, in Misc. Appeal No. 276 of 1981, for the Respondent

Judgement

B.K. Behera, J.—The appeal and the revision arising out of Title Suit No. 46 of 1980 of the Court of the Subordinate Judge, Bhubaneswar. have been heard analogously and will be governed by this common judgment.

2. The respondent in the appeal, who is the opposite party No. 1 in the revision, made an application under S. 20 of the Arbitration Act ("the Act" for short) to call for the agreement and appoint an arbitrator to adjudicate upon the dispute between him and the appellants in the appeal, who are the petitioners in the revision. According to the claimant, he was entrusted with the work "Construction of Sewerage Scheme to Gou-tam Nagar and Part of Panthanibas, Bhubaneswar" and he entered into an agreement with the Executive Engineer, Public Health Construction Division, Bhubaneswar. Certain disputes having arisen between the parties, the Chief Engineer was requested to appoint an arbitrator under Clause 25 of the agreement and since the Chief Engineer did not make any appointment, an application was made before the learned Subordinate Judge who did not accept the contention raised by the State that the agreement did not contain any arbitration clause and directed the filing of the agreement. It is this

order which is assailed in the appeal.

3. Clause 25 of the agreement would read thus :

"Decision of Public Health Engineer to be final : Except where otherwise specified in this contract the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to contract upon all questions relating to the meaning of specifications, drawings 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, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

At the stage of hearing of this appeal, the learned Additional Government Advocate has not pressed the appeal in view of the principles laid down by this Court in a similar case reported in *Praharaj Partners Vs. State of Orissa and Another*, in which the learned Chief Justice of this Court held that the provision made in the relevant clause, similar to this one, did constitute an arbitration clause. The Miscellaneous Appeal shall accordingly fail.

4. After an order was passed directing the petitioners in the Civil Revision to file the agreement, the following orders were passed in the aforesaid Title Suit :--

"1-9-81-- Plaintiff files panel of names. Defendant files a petition praying for time to bring stay order from the Hon"ble High Court. P. O. is on C. L. Put up on 7-9-81 before P. O. for orders."

"7-9-81-- Plaintiff files hazira. The petition filed by defendant on 1-9-1981 is put up today. Agreement has already been filed. Petition is rejected. Put up on 14-9-1981 when defendant to file panel of names."

"14-9-81- Plaintiff files hazira. Defendant does not file panel of names. Agreement has been filed. Defendant files a petition praying for time to bring stay order. Copy neither attached nor served. Heard. None appears for the defendant. The prayer for time is rejected. Perused the panel of names filed by the plaintiff for appointment of arbitrator. Sri Mu-kunda Prasad Mohapatra, S. E., Cuttack Barrage Irrigation Circle, Cuttack is appointed as arbitrator. The claims as mentioned in Annexure-A of the application be referred to the arbitrator."

The order dated 14-9-198L has been challenged in the Civil Revision.

5. The learned Additional Government Advocate has invited my attention to the principles laid down in *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., . Union of India v. Prafulla Kumar*, (1983) 1 LLJ 304 and *Union of India (UOI) Vs. Himco (India) Private Ltd.*, and has submitted that the learned Subordinate Judge after making the direction to file the agreement, had to proceed, but had not

proceeded in accordance with the mandatory provisions contained in Section 20(4) of the Act. Section 20(4) reads :

"Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

Explanation.-- Where the arbitration agreement provides for reference to a person by name or designation, the fact that the arbitrator or the umpire was named or designated, is an employee of or is otherwise connected with, one of the parties, shall not by itself, be deemed to be a person for not referring the matter to the arbitrator or an umpire so named or designated."

It has been submitted that the order of the learned Subordinate Judge appointing the arbitrator is not in accordance with law and he has exercised his jurisdiction with material irregularity. The learned counsel for the opposite party has submitted that as the identity of the arbitrator in Clause 25 of the agreement is vague and uncertain in that the designation "Public Health Engineer" has been mentioned therein, it was open to the learned Subordinate Judge to proceed with the appointment of an arbitrator and he had so done.

6, It would be noticed from the impugned order that the learned Subordinate Judge had not applied his mind to the provisions of Section 20(4) of the Act. That apart, as has been laid down in *State of Orissa and Others Vs. Gangaram Chhapolia and Another*, by my learned brother. Mr. Justice R. C. Patnaik, a Government servant cannot accept the appointment without the previous sanction of the Government as required under Rule 17 of the Orissa Government Servants Conduct Rules unless his name has been sponsored by the State Government and it is also the bounden duty of the court to ascertain if there is previous sanction by the Government to acceptance by the employee of engagement as arbitrator, In the instant case, the learned Subordinate Judge has appointed Mr. Mukunda Prasad Mohapatra, Superintending Engineer, Cuttack Barrage Irrigation Circle. Cultack, as arbitrator. There is nothing to show that the State Government had sanctioned this engagement or that the learned Subordinate Judge had made an enquiry in that regard. The order of appointment is, therefore, bad in law, on the principles laid down in the aforesaid reported case,

7. There is also nothing to show from the impugned order that the learned Subordinate Judge had applied his mind before selecting the arbitrator. He has not recorded reasons as to why out of the panel of names submitted by the claimant, he selected Mr. Mohapatra. I am completely at one with my learned brother R. C. Patnaik, J., as observed in *State of Orissa and Others Vs. Gangaram Chhapolia and Another*, that the court, while selecting an arbitrator, should bear in mind that its function is not just of a routine nature to be exercised casually or mechanically. As great stakes are often involved, a correct

adjudication is very much dependent while selecting the person, more on his integrity, though no less on his competency. The pros and cons with regard to the suggestions for the appointment of an arbitrator are to be considered before an appointment is made.

8. For the aforesaid reasons, I am of the view that the learned Subordinate Judge, without complying with the provisions contained in Section 20 of the Act, appointed an arbitrator in the manner indicated above and he had thus exercised his jurisdiction with material irregularity and the impugned order does call for interference by this Court in revision.

9. In the result, the Miscellaneous Appeal fails and is dismissed. The order dated 13-8-1981 passed by the learned Subordinate Judge is maintained. The Civil Revision is allowed and the impugned order appointing the arbitrator is set aside. The learned Subordinate Judge is directed to proceed in accordance with law keeping in mind the observations made in this judgment. In the circumstances of the case, the parties are left to bear their own costs of the appeal and the revision.