
(1979) 08 OHC CK 0004
In the Orissa High Court
Case No : Civil Revision No. 370 of 1978

Uchhab Pradhan

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 07-08-1979

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 8, 8(1), 8(2)

Citation : (1979) 48 CLT 615

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : R.K. Rath and N.C Panigrahi, for the Appellant; B.K. Pal and B. Pal, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Das, J.—This Civil Revision arises out of an order of the Subordinate Judge, Berhampur dismissing an application u/s 8(1)(b) of the Arbitration Act. The Petitioner is a Contractor and he entered into an agreement in the year 1964 with the President of India relating to South-Eastern Rail way for execution of earth work, construction of bridges and quarters in between Rambha and Humma Railway Stations in connection with doubling and diversion of rail way line. The Petitioner executed the work. Some disputes arose relating to the claim made by the Petitioner. He, therefore, insisted to refer the disputes for arbitration as per the term of the contract. On 4-7-1970, the Petitioner asked the General Manager, South-Eastern Railway to appoint an arbitrator to settle the disputes and opposite party No. 2 was appointed as the arbitrator on 20-4-1972. The Petitioner filed his claim for three items of work, but only one item was referred to the arbitrator by the General Manager. The arbitrator was moved to include the two other items of claim, but as no action was taken by the arbitrator, the Petitioner filed Title Suit No. 83 of 1975 praying for inclusion of those two items of claim along with the other claim. On the basis of the observations made by the Subordinate Judge, Berhampur in the aforesaid suit, the two other items were

included in the reference. The decision of the Subordinate Judge was made on 3-5-1977. In the meantime, opposite party No. 2 was transferred from South-Eastern Railway to South-Central Railway with headquarters at Secunderabad. He intimated the Petitioner by his letter dated 28-7-1977 that it would not be possible for him to take any part in the arbitration at Berhampur and it would not be possible for him to have any sitting at any other place except Waltair or Secunderabad. Till then nothing was done by the arbitrator. Thereafter, the Petitioner gave notice to opposite party No. 1 for changing the arbitrator as there was inordinate delay made by him and that it would not be possible nor convenient for hearing of the cases at Waltair or Secunderabad and the arbitration would necessarily require spot visit and examination of local witnesses. As there was no response to it, the Petitioner filed application in the Court of the Subordinate Judge, Berhampur for removing the arbitrator and to appoint another arbitrator on the grounds that

(i) the period fixed for submission of the award was over and no steps had been taken by the arbitrator after that;

(ii) the arbitrator was unable to spare time to hold any sitting at the locality;

(iii) the Petitioner cannot prove his claims by taking his witnesses to Waltair or Secunderabad as the costs to be incurred would be prohibitive and beyond the reach of the Petitioner; and

(iv) the arbitrator was incapable of acting as arbitrator in the present dispute.

In the counter filed on behalf of opposite party No. 1, only it was stated that there was no delay on the part of the arbitrator in taking appropriate steps for disposal of the disputes and as the parties had already filed their respective statements, it would not be said that there was any delay.

2. The learned Subordinate Judge dismissed the application holding that only because the arbitrator will hold sittings in the arbitration proceeding at Waltair or Secunderabad that would not amount to refusal or negligence.

3. The grounds on which the Petitioner has prayed for revocation of the authority of the arbitrator and for appointment of a fresh arbitrator are that there has been inordinate delay on the part of the arbitrator in disposing of the proceeding and that it will not be possible on the part of the Petitioner to get the witnesses examined at Waltair or Secunderabad and that would be beyond his financial capacity. When opposite party No. 2 was appointed as the arbitrator, the considerations must have been that it would be convenient for the parties to adduce their evidence and for examination of witnesses at the locality. But the arbitrator now states that he would hold his sittings only at Waltair or Secunderabad. The contract work was executed between Rambha and Humma, which are very near to Berhampur and undisputedly, far away from Waltair or Secunderabad. Naturally witnesses to those two places would be highly expensive. The considerations which prevailed the appointment of opposite party

No. 2 as arbitrator have naturally undergone change. That apart, though the arbitrator was appointed since 1972 till 1975 when the case was filed he had not made any satisfactory progress in the matter. Undisputedly, he did not entertain two claims of the Petitioners and ultimately the Petitioner was compelled to file a suit in Court and thereafter the two items were accepted by the arbitrator for reference. The contract is that all disputes are to be decided by the arbitrator. But in spite of that the arbitrator did not entertain two items of dispute simply because the General Manager had not referred those to him. This shows that the arbitrator is not aware of his position and jurisdiction.

4. It is contended by Mr. Rath, the learned Counsel for the Petitioner, that the arbitrator is guilty of misconduct, inasmuch as he has not entered upon the reference for a number of years and has misconducted himself in not entertaining two items of claim, for which the Petitioner had to run to Court and take recourse to litigation.

5. The position as to the interpretation of the wordings "entering on the reference" was a controversial question basis on two judgments of England. According to *Baker v. Stephens* (1867) 2 Q.B. 523, the arbitrator enters on reference not, when he accounts or assumes office, or when he issues notice to parties to appear and make statement of their claims, but when he has occasion to hear all the parties to the dispute about the merits. But according to *Ipssifoglu v. Coumantaros* (1941) 1 K.B. 396, the arbitrator enters on reference when he accepts the office and communicates. Some High Courts in India followed the *Bakers* case and some the latter case. A Full Bench of the Calcutta High Court in *Ramanath Agarwalla Vs. Goenka and Co. and Others*, , laid down the principles as to when the arbitrator is said to have entered on the reference. It has laid down as follows:

An Arbitrator does not enter on the reference as soon as he assumes the office of on Arbitrator. An Arbitrator does not necessarily enter on the reference when he actually commences the decision of the matter in the presence of both parties or ex parte. An Arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case.

This would show that *Baker's* case was almost followed by the Full Bench. The aforesaid decision of the Calcutta High Court has also been followed by a Division Bench of the Bombay High Court in *Jolly Steel Industries Pvt. Ltd., Poona Vs. Union of India and Another*, . It has been laid down that the arbitration proceeding consists of two stages. One such stage consists of merely ministerial acts while the second stage consists of effective adjudicative acts in furtherance of the work of arbitration, namely of proceedings to decide controversies in between the parties, whether arising out of the main dispute or procedural aspects in the disposal thereof. The arbitrator cannot be said to have entered on the reference unless the second stage can be said to have been reached somehow or the other. In that case, it was held that the arbitrator cannot be said

to have entered on the reference when he issued notices to the parties to file their statements and that no effective steps were taken by the arbitrator till the commencement of the hearing of the dispute. In this connection, it was observed that each one of the earlier stages covered merely some or other of the ministerial acts such as issuing of notice, acceptance of statement of claims and adjourning the case to suit the convenience of the parties and 21st day of February, 1972 must be held to be the date on which the arbitrator had entered on reference, as on this date the hearing of the dispute commenced. Also in *Federal Republic of Germany Vs. S. Dey and Associates and Another*, , it has been held that during the pendency of an arbitration, the Court may, on application of any party, remove an Arbitrator or Umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award and this power can be exercised u/s 11 of the Arbitration Act. The Court can also remove an arbitrator who misconducts himself of the proceedings under the same section, u/s 12 of the Act, the Court can not only remove the Arbitrator or the Umpire but appoint anybody to act as an Arbitrator in place of the person removed and the Court has also power to order that the arbitration agreement will cease to have any effect. Under the Act, the Court at an stages retains jurisdiction over arbitrators without the interventions of Court if the subject-matter thereof is within its jurisdiction. The" Court assumes seisin over the proceedings on the application of the parties as provided in the Act and this seisin does not necessarily depend whether the award of the arbitration agreement is filed in the Court. In this Calcutta case, the delay was not more than a year. Even then, the Court held that it was such a delay as entitled any of the parties to the arbitration to remove the arbitrator. Also in *Keshavsingh Dwarkadas Vs. Indian Engineering Co.*, , it has been held that if the arbitrator fails to make the award within the time fixed, it can be a matter of plain language be said that he has neglected to do what he bad undertaken. From the aforesaid decisions, it is abundantly clear that if the arbitrator delays the matter unreasonably and without sufficient justification, any of the parties to the arbitration would be justified in revoking the reference. This Court had occasion to consider such a question in the case of *Consolidated Construction Company v. State of Orissa* and Ors. 48 (1979) C.L.T. 138. In this case, the arbitrator did not take any peremptory step for compelling the parties to file their counter statements within a reasonable time and there was a delay of more than four months. There was no explanation by the arbitrator for the delay and it was held that the arbitrator had misconducted himself and neglected and so is authority was revoked. This Court also took into consideration the aforesaid Calcutta case reported in *Federal Republic of Germany Vs. S. Dey and Associates and Another*, , the Bombay case reported in *Keshavsingh Dwarkadas Vs. Indian Engineering Co.*, and a Nagpur case reported in AIR 1940 386 (Nagpur) .

6. Considering the facts and circumstances of the instant case, on the principles laid down above, it is clear that the arbitrator has not yet entered on the reference even though he was appointed in 1972. All the actions of the arbitrator

till now can be said to be ministerial acts, as decided in the case of Jolly Steel Industries Pvt. Ltd., Poona Vs. Union of India and Another, , following the Full Bench decision of the Calcutta High Court. This Court has also laid down that the delay amounts to negligence and misconduct. Though the arbitrator is a patty, yet he has not come forward with any explanation for the delay. Accordingly, it is held that the arbitrator has neglected and, as such, he is to be removed and another arbitrator is to be appointed. I have also discussed earlier that the consideration which prevailed for appointing him as arbitrator in the year 1972 are no more in existence and the situations have changed after his transfer to Waltair. Therefore, in the interest of the parties also, it is not fair to continue him as arbitrator.

7. Section 8(1)(b) of the Arbitrator Act provides that if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does, not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case, may be, do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

Clause (2) of Section 8 provides that if the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by the consent of all parties.

Section 11 of the Act provides that the Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. The Court may remove an arbitrator or umpire who has misconducted himself or the proceeding. According to Section 12 of the Act, where the Court removes an umpire who has not intend on the reference, the Court may, on the application of any party to the arbitration agreement, appoint another person to fill the vacancy.

From the aforesaid provisions, it would appear that the Court has wide powers to remove the arbitrator if he neglects or misconducts himself or has not entered on the reference. It is contended by Mr. Pal, the learned Counsel for the opposite parties, that once opposite party No. 2 was appointed as arbitrator the Court cannot appoint any other arbitrator without the consent of the other party. This contention has no force. Once the Court is in seisin of the proceeding, it has ample power to appoint another arbitrator after removing one. In that case, consent of the other side is not necessary. In the instant case, notice has already been given by the Petitioner to the General Manager, as provided u/s 8(2) of the Act. It is also admitted that there is no stipulation that the vacancy shall not be filled up. It has been held in the case of Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., , that if the agreement is silent as regards

supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. It is not disputed that there was no stipulation between the parties that the vacancy should not be filled up. On the other hand, it is clear that the vacancy is to be filled up. In *Fertiliser Corporation of India Ltd. v. Ravi Kumar Ohri* AIR 1967 Ori 19, after considering decisions of Patna, Madras and Jammu & Kashmir High Courts, this Court has held that after arbitrator is removed, the matter remains with the Court and u/s 12 either the Court can appoint a new arbitrator or supersede the reference itself. The Court cannot surrender its power and delegate the same to an officer however highly placed he be. It is argued by Mr. Pal that in the body of the petition Section 8(1)(b) has been mentioned and, as such, the Petitioner cannot attract application of other sections of the Act for exercising the power of the Court. This position is no longer *res integra* It has been held by the Supreme Court in *Indian Aluminium Company Vs. Kerala State Electricity Board*, , as follows:

...if there is one principal more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power - mere wrong label - cannot invalidate the action of an authority, if it is otherwise within its power.

8. In view of the aforesaid dictum, the contention of the opposite parties as aforesaid is not tenable. I have already held that the Court has ample power to appoint another arbitrator if one arbitrator is removed by the Court. It is immaterial what section is quoted in the application for removal of one arbitrator and appointment of another when the Court has authority under law to appoint another arbitrator while resolving one.

9. Mr. Pal also relies on certain decisions. The case of *Sunil Mukherjee Vs. Union of India (UOI)*, , it not applicable to the present case, inasmuch as it was not a case" for appointment of one arbitrator after removal of the arbitrator already appointed previously. Also this case has been distinguished by the Calcutta High Court in *V.G. Ghawda Pvt. Ltd. Vs. Union of India (UOI)*, , and it has been held that the Court has power to appoint an arbitrator while removing one. The principles laid down in *East India Construction Co. (P) Ltd. Vs. Union of India (UOI)*, , have been followed. Mr. Pal also relies on a case of this Court *Union of India v. Banka Behari Das* 31 (1965) C.L.T. 1026. This case relates to Section 8(1)(a) of the Arbitration Act. Admittedly, the present case is not covered by Section 8(1)(a) and, therefore, this decision has no application to the present case.

10. It is contended by Mr. Pal that the petition filed in the Court below does not contain sufficient allegations for removal of the arbitrator. But as I have discussed above, from the contents of paragraphs 10 and 13 of the petition it

appears that detailed grounds have been given for removal of the arbitrator and I have discussed those points.

11. On the aforesaid analysis, I hold that opposite party No. 2 should be removed from the position of arbitrator and another arbitrator is to be appointed.

12. In the result, the Civil Revision is allowed with costs. The order dated 27-7-1978 of the Court below is set aside. Opposite party No. 2 is removed from the position of arbitrator and his authority is hereby revoked. The application of the Petitioner in the Court below is allowed and the Court below is directed to appoint another arbitrator unconnected with the opposite parties.

As the arbitration proceeding is long delayed, it is necessary that the Court should dispose of the proceeding as quickly as possible.

The records be remitted back immediately and the Court below is directed to take early steps for appointment of another arbitrator, after hearing both sides.