

(1995) 05 OHC CK 0023

In the Orissa High Court

Case No : Civil Rev. No's. 130-132 and Miscellaneous Appeal No's. 275-277 of 1994

Union of India (UOI) and Another

APPELLANT

Vs

Prahallad Moharana

RESPONDENT

Date of Decision : 17-05-1995

Acts Referred:

Arbitration Act, 1940 — Section 13, 20, 20(4), 39(1), 8
Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Article 137

Citation : (1995) 05 OHC CK 0023

Hon'ble Judges : D.M. Patnaik, J

Bench : Single Bench

Advocate : B.K. Behura and U.C. Behura, for the Appellant; Y. Mohanty, B.N. Mohanty and P. Biswal, for the Respondent

Judgement

D.M. Patnaik, J.—Since common question of fact and law arises in the above appeals and revisions, they are disposed of by this common judgment.

The question for examination is whether the order of the learned Subordinate Judge u/s 20(4) of the Arbitration Act (for short, "the Act") directing appointment of an arbitrator of his choice is legal and correct.

2. The plaintiff, a Special Class Contractor, pursuant to three agreements on different date with the Union of India through its General Manager, South Eastern Railway, carried on the work of laying railway lines and also supplying certain quantity of hard broken stone ballast. On account of the enhanced labour charges and rise in prices of diesel etc. he claimed enhanced rate to carry on the rest part of the work. This being not accepted, he discontinued the work and so the defendants terminated the contract by their letter dated 7-11-1991 and imposed a penalty of Rs. 20,000/- for breach of the contract. On 7-9-1992 the plaintiff issued a notice for appointment of an arbitrator as per Clause 64(1) of the General Conditions of Contract which the defendant received on 14-9-1992

and since there was no response to such notice, the plaintiff filed the suit on 21-10-1992 after expiry of 15 days.

3. The defendant railway filed a written statement in which it admitted such termination of the contract and imposition of penalty, but it challenged the maintainability of the suit on various grounds including limitation, the suit being premature and the matter for arbitration being specifically "ex-cepted" in the agreement.

4. Neither party adduced any oral evidence. The Court found that there was a written agreement which contained an arbitration clause and further the difference being a difference relating to the terms and conditions of the agreement, the same was a dispute which was arbitrable and lastly, the defendant having failed to show sufficient cause for not filing the arbitration agreement, the Court was competent to appoint an arbitrator of its choice. Accordingly, the Court directed appointment of Sri P. M. Mohanti, Retired Judge of the Orissa High court as Arbitrator. This order is being assailed by the railway before this Court.

5. Though extensive argument with reference to various decisions of this Court and the apex Court was advanced by Mr. B. K. Behura, learned Counsel for the defendant, it would be idle to discuss those points except the crux of his argument (a) that the Court was incompetent to appoint an arbitrator of its own choice while the parties had agreed for appointment of a sole named arbitrator, i.e., the General Manager or a Gazetted Railway Officer nominated by him on his behalf, (b) in terms of Clause 64(3)(a)(iii) of the General Conditions of Contract, if for any reason that was not possible the matter was not to be referred to arbitration at all, (c) sufficient time not having been given by the plaintiff for referring the matter for arbitration, the Court committed gross error in appointing an arbitrator of its choice.

6. The above contentions of Mr. Behura were refuted by Mr. Y. Mohanty, learned Counsel for the plaintiff-respondent on the ground that the Court's direction fully finds support in the case of G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, .

The above rival contentions need careful examination.

7. Before going through the above contentions raised by Mr. Behura, it would be appropriate to dispose of the following three preliminary points canvassed by him.

(a) The three revisions have been filed against the impugned order and it is submitted by Mr. Behura that they have been so filed as an abundant caution, since, according to him, there are divergent views of different High Courts as to whether an appeal lies against an order u/s 20(4) of the Act and this Court should lay down the correct position of law in this regard.

It does not require any nicety of interpretation of Section 39(1)(v) of the Arbitration Act which clearly predicates that an appeal is maintainable against an

order directing to file the arbitration agreement in the Court. But so far as the rest part of the Section is concerned, i.e., the direction appointing the arbitrator and making a reference of the dispute to the arbitrator, no appeal lies, vide decision reported in the case of Fertilizer Corporation of India Limited Vs. Domestic Engineering Installation, .

In the case at hand the impugned order is a composite order, i.e., a direction to file the arbitration agreement for which the present appeals are maintainable and the rest part of the order appointing an arbitrator and referring the matter for arbitration for which appeal is incompetent and, therefore, so far as that part of the order is concerned, this Court in exercise of power of revision u/s 115, C.P.C. is competent to judge the legality and propriety of the order in question. So the appeals and the revisions are both competent in the present case for the reasons indicated above.

(b) The submission of Mr. Behura that the claim of the plaintiff is taking resort to the provisions u/s 24 of the Arbitration Act is barred by limitation cannot be accepted since the contract was terminated by the defendant railway on 7-11-1992. In such a case, Article 137 of the Limitation Act is applicable and, therefore, the suit having been filed within three years from the date of rescission of contract, the same is not barred by limitation. That apart, a Division Bench of this Court in the case of A. C. Parija v. Secretary in Charge of the General PWD of Union of India, reported in (1970) 36 Cut LT 1089, held that the question of limitation is not one for decision by the Court but is a matter for accession of the Arbitrator. The contention of the learned Counsel, therefore, fails.

(c) It was strenuously urged by Mr. Behura that the claim of the plaintiff was outside the scope of arbitration clause inasmuch as the nature of the claim as excepted under the agreement and, therefore, could not have been the subject-matter of arbitration. It will be unnecessary to drift into the interpretation of that clause since following the decision in the case of A. C. Parija (supra), I hold that the dispute whether it is included in the agreement or excluded from the agreement, is a matter to be decided by the arbitrator and not by the Court. The contention of Mr. Behura, therefore, is not accepted.

8. Now we may switch on to the main points raised by Mr. Behura. Admittedly under Clause 64(3)(a)(i) of the agreement, in respect of claim below Rs. 5 lakh and where the issue involved was not that complicated, the General Manager or his sole nominee would be the sole arbitrator and in case of claim above Rs. 5 lakhs, two Gazetted Railway Officers and another Gazetted Railway Officer as an umpire.

Under Clause 64(3)(a)(iii) it was stipulated that no person other than a Gazetted Railway Officer appointed by the General Manager as aforesaid will act as an arbitrator/umpire and if for any reason that was not possible, the matter was not to be referred to arbitration at all.

Section 20(4) of the Arbitration Act is quoted below for the purpose of proper

appreciation :

"20. Application to file in Court the Arbitration Agreement.

(1) Where any persons have entered into arbitration agreement before institution of any suit with respect to the subject matter of the agreement or any part thereof, and where differences have arisen to the agreement, they or any of them instead of proceeding under Chapter II may apply to a Court having jurisdiction in the matter to which the agreement relates that agreement to be filed in Court.

(2) to (3) xxxxx

(4) 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."

9. To take up the first point of Mr. Behura i.e. whether the Court is competent to appoint an arbitrator of its own choice when the parties agreed to appoint a named arbitrator in the written agreement.

A direct decision on the point in the case of G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, has been cited to support the view that the Court is competent to appoint an arbitrator of its own choice in the peculiar facts and circumstances of a given case. In that case, the contract was terminated by the authorities. The contractor exercised his option under the General Conditions of Contract and called upon the appellants to appoint the sole arbitrator in terms of the agreement. When no action was taken by the authorities, the respondent filed a suit u/s 20 of the Act for appointment of arbitrator by the Court. The Court appointed a Retired Judge of the High Court as the sole arbitrator. That was reversed by a Division Bench of the High Court. The Apex Court following its earlier decision reported in Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, held in para-6 of the judgment that when a notice was given by the contractor to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he had neglected to act upon the contract. It further held that when no agreement was reached even in the court between the parties, the Court would get jurisdiction and power to appoint an arbitrator. Even if Section 8(1)(a) of the Arbitration Act per se does not apply, yet it was a notice indicating the opposite party to act upon the terms of the contract and in spite of this notice when it does not act in strict terms of the contract, this amounts to forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the Court's jurisdiction u/s 20 of the Act.

Mr. Behura during course of argument very much relied on the case of Union of India (UOI) Vs. Prafulla Kumar Sanyal, and submitted that the Court shall always make an endeavour to find out the feasibility of appointing an arbitrator agreed

by the parties. The Apex Court in the case of G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, distinguished the Prafulla's case from the case before them inasmuch as they observed that in Prafulla's case, the parties agreed that the arbitrator should be appointed by the President and that too, even before the Court they agreed for such appointment, and such a situation was neither before the Apex Court in the case of G. Ramachandra Reddy (supra) nor the same situation is also before us in the case at hand. In the case before this Court, the defendant railway did not respond to the notice though admittedly they received the same. The non-response to the plaintiff's notice for appointing the named arbitrator in the agreement amounts, as has been held by the Apex Court, to forfeiture of the right to appoint an arbitrator so named in the agreement. Therefore, I have no hesitation to hold that the Court is competent to appoint an arbitrator of its own choice in a given situation as is found in the present case.

10. The second contention of Mr. Behura is with regard to Clause 64(3)(a)(iii) of the General Conditions of Contract which is extracted below for the purpose of better appreciation.

"64(3)(a)(iii). It is a term of this contract that no person other than a Gazetted Railway Officer appointed by the General Manager as aforesaid should act as an arbitrator/umpire and if for any reason that is not possible, the matter is not to be referred to arbitration at all."

Mr. Behura submitted that when there is a specific clause that if for any reason the named arbitrator cannot be appointed, the matter shall not be referred to arbitration at all. This contention is wholly unacceptable for the reasons given below.

To support his case Mr. Behura has relied on a decision of this Court in the case of Union of India v. Lingaraj Dash reported in 52 (1981) CLT 146 : (AIR 1981 NOC 227, where a Single Bench of this Court following two decisions of the Delhi High Court reported in Kishanchand Vs. The Union of India and Another, and AIR 1972 Delhi 220, Raibahadur Basakha Singh v. Indian Drugs and Pharmaceuticals Limited, held that on the basis of such a clause even though it is a case of non-response to the notice, the matter cannot be referred to arbitration at all and therefore, this Court set aside the order of the Subordinate Judge holding that he had no jurisdiction to appoint an arbitrator in such a situation.

To further fortify his argument, Mr. Behura also relied as a decision of a Single Bench of this Court in the case of Food Corporation of India Vs. Ghanashyamdas Agarwal, . The Hon'ble Single Judge of this Court followed earlier Single Bench decision in the case of Lingaraj Dash (AIR 1981 NOC 227) (Orissa) (supra). That was also a case where the contractor served 15 days'notice u/s 8 of the Arbitration Act and when the matter was not responded to, he filed an application u/s 8(2) of the Act for appointment of an arbitrator.

11. In view of the decision of the Apex Court in the case of G. Ramachandra

Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, holding that Section 20, Sub-section (4) of the Act directly applies to a case where the contracting party does not respond to the notice of the contractor for appointment of the named arbitrator in the agreement, the two Single Bench decisions of this Court should be held to have been overruled. That apart, the two decisions of the Delhi High Court which were followed by this Court in the case of Lingaraj Dash (supra) were overruled in the Full Bench decision of the Delhi High Court in the case of Ved Prakash Mittal Vs. Union of India and Others, . In that case the Court held that in a situation as in the case at hand, the Court would not be powerless to make an appointment of an arbitrator itself. The Court is competent u/s 20(4) of the Act to appoint the arbitrator of its own choice because it would be a case where the parties cannot agree upon to appoint an arbitrator. It further held that if the so named arbitrator was not appointed by the parties, such a case was contemplated by the authors of Section 20(4). The Full Bench further held that to such a case, neither Section 8(1)(a) nor Section 8(1)(b) of the Act applied. I have no hesitation in following the proposition laid down by the Full Bench since a bare reading of Section 8 of the Act it would be amply clear that the section would not apply to a case as at hand. The reason is as follows :--

12. Section 8(1)(a) of the Act provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties and if all the parties do not after differences have arisen concur in the appointment or appointments, any of them can move under this section. It is not the case at hand. Therefore, Sub-clause (a) is not applicable.

Sub-clause (b) comes into play only when an arbitrator already appointed either neglects or refuses to act or is incapable of acting, or dies, and then only the question of supplying the vacancy would arise and that would itself depend on the peculiar facts and circumstances of each case and on the interpretation of the arbitration clause and we are not concerned with such a situation here.

Sub-clause (c) prescribes a situation where the parties or arbitrators do not appoint an umpire. The question of supplying the vacancy would only arise in a case u/s 8(1)(b) and not u/s 20(4) of the Act, because Section 20, Sub-section (1) clearly predicates that action under that section can be taken by either of the parties even if the party does not proceed under Chapter II in which Section 8 is included. Therefore, it is abundantly clear that the power u/s 20(4) of the Act and the power u/s 8 are distinct powers prescribed for meeting different situations and there is no reason to hold that both the sections overlap each other. To give the real effect and to serve better the purpose of arbitration, the provisions of both the sections can be resorted to independently. Therefore, the contention of Mr. Behura cannot be accepted.

13. The third point raised by Mr. Behura is that there was sufficient cause on the part of the railways in not appointing the named arbitrator inasmuch as the plaintiff had been duly intimated that his matter for appointment of arbitrator

was being considered. In other words, the authorities had not taken a final decision in the matter and that is because, the fifteen-days" time given in the notice was not sufficient to take steps for appointing the named arbitrator.

I cannot accept this contention because irrespective of the fact whether the 15 days" notice given by the plaintiff was one u/s 8(2), it was definitely a notice to appoint the named arbitrator in the agreement and nowhere it has been pleaded by the defendant that such a notice did not give sufficient time for enabling them to appoint an arbitrator. To me it seems, the defendants failed to give any reason whatsoever for not appointing the named arbitrator in the case. Therefore, the finding of the lower court that there was no sufficient cause for not appointing the arbitrator is upheld. I do not find any reason to interfere with the decision of the Sower court.

14. In the result, for the reasons indicated above, the appeals as well as the revisions are dismissed, but in the peculiar facts and circumstances, the parties to bear their own costs.