

(2008) 06 OHC CK 0006
In the Orissa High Court
Case No : Civil Revision No. 34 of 2002

Yogaraj Paul

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(1), 8(2)
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Contract Act, 1872 — Section 26
Limitation Act, 1963 — Article 137

Citation : (2008) CLT 720 Supp

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : R.K. Rath and N.R. Rout, for the Appellant; Subhasish Das, A.S.C. (Central), for the Respondent

Final Decision : Allowed

Judgement

Sanju Panda, J.—This civil revision is directed against the order dated 27.11.2001 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Misc. Case No. 85 of 1994 dismissing the application filed by the Petitioner u/s 8 of the Indian Arbitration Act, 1940 (hereinafter referred to as "the Act") for appointment of Arbitrator.

2. The facts of the case, as narrated in the records, are as follows:

The Petitioner being a contractor, entered into a contract with opposite party No. 2 for construction of Dairy-cum-Administrative Building for Central Breeding Firm at Semiliguda, Sunabeda in the district of Koraput for the year 1977-1978. As disputes arose between the parties in respect of the said contract, on 20.12.1988 the Petitioner requested opposite party No. 1 for appointment of an Arbitrator. On such application being made, opposite party No. 1 who is the appointing authority, appointed Shri T.K. Mishra as Arbitrator and referred the matter to the Arbitrator for adjudication of the disputes between the parties. On 24.1.1992 the

Arbitrator passed an award that he would not adjudicate certain claims of the Petitioner-contractor as those were not referred to him by the appointing authority for adjudication. He further directed that the contractor may obtain necessary reference within one month with regard to the claims not mentioned in the letter of appointment, if he wishes to get them adjudicated by the same Arbitrator. Immediately, the contractor moved an application before opposite party No. 2 but he did not respond to the same. Therefore, he filed a petition u/s 8 of the Act before the Court below for appointment of a new Arbitrator to adjudicate the disputes.

3. The main contention of the Petitioner is that the Court below has rejected his application on two grounds, i.e., limitation and res judicata.

The learned Counsel appearing for the Petitioner submitted that as per Article 137 of the Indian Limitation Act, the period of limitation is three years and through an agreement one cannot reduce the statutory period of limitation. He further submitted that if an agreement is made against the Statute, the same will be void in view of Section 26 of the Indian Contract Act. Therefore, the finding of the Court below that the petition u/s 8 of the Act should have been filed within one month or within ninety days as per the agreement, is not sustainable.

So far as the res judicata is concerned, it was submitted that opposite party No. 1 while appointing the Arbitrator referred certain disputes to the Arbitrator, but the Arbitrator did not entertain the other disputes which were to mentioned by the appointing authority in the appointment letter. As per the law as well as under the agreement, the appointing authority has no power to make any reference for adjudication. He is the only authority who will appoint the Arbitrator and the parties will raise their disputes by filing their applications before the Arbitrator for adjudication.

So far as the remaining un-adjudicated disputes are concerned, the learned Counsel for the Petitioner submitted, parties can make further reference for adjudication of those disputes and as the Arbitrator has not adjudicated those disputes earlier and there is no finding on those un-adjudicated disputes between the parties, the same cannot be treated as res judicata. In support of his argument, he cited a decision of the Calcutta High Court in the case of Seth Kerorimall Vs. Union of India (UOI), wherein it has been held that "if successive references are not prohibited, there is legal authority for the proposition that failure to raise any dispute in one reference does not debar a party from raising other disputes to be adjusted in a subsequent reference".

4. The learned Counsel appearing for the opposite parties submitted that as the Petitioner's case does not come within the purview of Section 8 of the Act and he has not fulfilled the three essential conditions, namely, (a) there must be a valid arbitration agreement; (b) there must be a provision in the arbitration agreement for appointment of an Arbitrator by the consent of the parties; and

(c) all the parties do not concur in the appointment of an Arbitrator despite notice to the other party given, the Court cannot appoint an Arbitrator. Since in the present case, those three conditions have not been fulfilled, the petition u/s 8 of the Act is not maintainable. As the provision u/s 8(1) of the Act was not attracted, consequently the provision of Section 8(2) of the Act cannot be invoked. In support of his submission, he has cited a decision of this Court in the case of Dhirendranath Biswal Vs. Rahas Behari Mishra and Another, wherein it has been held that unless the requirements of Section 8(1) of the Act are fulfilled, the power u/s 8(2) thereof cannot be exercised.

5. It appears that the Petitioner made a request to opposite party No. 1 for appointment of Arbitrator on 20.12.1988 and on such request opposite party No. 1 appointed the Arbitrator. The Petitioner raised some disputes and those were referred to the Arbitrator by the appointing authority. The Petitioner, while appearing before the Arbitrator, raised some more disputes than what he had raised earlier. The Arbitrator by order dated 24.1.1992 directed the Petitioner that as those disputes were not referred by the appointing authority, he will not adjudicate the said disputes unless the same are referred to him by the appointing authority. Thereafter, the Petitioner moved the authority to refer those disputes for adjudication by the Arbitrator. Since the Petitioner did not take any step within the time stipulated, the Arbitrator passed an award with regard to the disputes referred to him on 31st August, 1992 and the said award was made rule of the Court by the Court below on 16th January, 1993.

6. For better appreciation, Clauses 24 and 25 of the Contract are quoted below:

Clause 24. All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of the Engineer-in-Charge who shall be entitled to direct at what point or points and in what manner they are to be commenced and from time to time carried on.

Clause 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, 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, designs, 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 abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department, in charge of the work at the time of dispute or if there be no Chief Engineer, the administrative head of the said Central Public Works Department at the time of such appointment.

xxx xxx xxx

(Emphasis added)

7. In view of the above marked portion of Clause-25 of the agreement, the authorities shall refer the matter to the Arbitrator which are specified by the party who has invoked the arbitration clause. In view of the said clause of the agreement, the party who is invoking the arbitration clause has to specify his claims and those are to be referred to the Arbitrator. In view of the decision of the Calcutta High Court in Seth Kororimall (*supra*) and the decision of this Court in Dhirendranath Biswal (*supra*) and in the case of Hindusthan Steel Ltd. v. P. Boner alias Pravash Chandra Banerjee reported in ILR 1973 Cut 1218 that if successive references are not prohibited, there is legal authority for the proposition that failure to raise any dispute in one reference does not debar a party from raising other disputes to be adjusted in a subsequent reference. As Order 2, Rule 2 of the CPC is not applicable to the arbitration proceeding and the Arbitrator did not adjudicate the disputes, the principle of *res judicata* will not apply in the present case.

8. So far as the limitation is concerned, since the dispute is within the arbitration clause, it is open to the Arbitrator to deal with the same while adjudicating the disputes. Therefore, this Court does not want to give any opinion on the ground of limitation.

9. Accordingly, the impugned order dated 27.11.2001 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Misc. Case No. 85 of 1994 is set aside and the matter is remanded to the Court below for appointment of a new Arbitrator.

The Civil Revision is allowed. No costs.