
AIR 1961 Ori 88

Orissa High Court

Case No: Civil Revision No. 311 of 1958

Union of India (UOI)

APPELLANT

Vs

S.S. Samal and Ali
Mahammad

RESPONDENT

Date of Decision: April 1, 1960

Acts Referred:

- Arbitration Act, 1940 - Section 11, 11(2), 12, 12(1), 12(2)

Citation: AIR 1961 Ori 88

Hon'ble Judges: G.C. Das, J

Bench: Single Bench

Advocate: Advocate General and Government Advocate, for the Appellant; S.K. Ray, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

G.C. Das, J.

The defendant Government in this application raised the sole question whether the learned Subordinate Judge, Sambalpur, had the jurisdiction to order the appointment of a fresh arbitrator while setting aside the award given by the arbitrator, Sri Ripudaman Singh in Title Suit No. 30 of 1955.

2. The facts are short and simple. The opposite party Messrs. S. S. Samal and Ali Mahammad entered into an agreement with the Union Government for executing certain works under the Hirakud Dam Project. Disputes having arisen between them the matter was referred to the sole Arbitrator, Sri Ripudaman Singh as contemplated under clause 25 of the agreement. The arbitrator gave his award in due course. The opposite party filed a suit (T. S. No. 30 of 1956J) challenging the said award given by the aforementioned arbitrator on the ground of misconduct. The learned Subordinate Judge set aside the said award by his order dated 21-9-1957. The order passed by him was;

"The award given by the arbitrator Sri Ripudaman Singh be set aside and the matter be referred to the arbitration of a fresh arbitrator to be appointed".

The Union Government by an application filed before the learned Subordinate Judge sought for recalling the order of appointment of a fresh arbitrator u/s 151 of the CPC or in the alternative for review of the above order. This application was rejected on 7-5-1956. It is against this order that the present application is filed.

3. Advocate-General on behalf of the petitioner contended that the learned Subordinate Judge not having superseded the reference u/s 19, the reference still subsists subject to the agreement under Clause (25) of the agreement. The Court doubtless has the power to supersede the reference when the award becomes void or is set aside on other grounds.

Section 19 of the Arbitration Act lays down in clear terms that where an award has become void under Sub-section (2) of Section 16, or has been set aside, the Court may, by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. Sub-section (3) of Section 16, it may be mentioned, gives the Court the power to remit an award for purposes of reconsideration.

The learned subordinate Judge it appears, had passed the impugned order under Sub-section (2) of Section 11 and under the same sub-section of Section 12. According to Sub-section (2) of Section 11 the Court may remove an arbitrator or umpire who has misconducted himself or the proceedings; whereas Subsection (2) of Section 12 refers to the removal or revocation of the authority of the arbitrator. Sub-section (2) of Section 12 thus states that where the authority of the arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may on the application of any party to the arbitration agreement, either (a) appoint a person to act as a sole arbitrator in place of the person or persons displaced, or (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred. Neither Sub-section (2) of Section 11 nor Sub-section (2) of Section 12 of the Arbitration Act (Act X of 1940) contemplates a case as the present one. Chapter II of the Arbitration Act deals with the arbitration without intervention of a court (Ss. 3 to 19), In the present case we are concerned with this Chapter only.

4. Mr. S. K. Ray, learned counsel on behalf of the opposite party contended that Section 5 deals with the authority of appointing an arbitrator or umpire which is irrevocable except by leave of the Court. Sections 8 and 9 deal with the power of the Court to appoint arbitrator or umpire. Sections 11 and 12, as I have stated earlier, give the power to Court to remove the arbitrators or umpires in certain circumstances and to appoint an arbitrator on certain conditions as laid down in sub-sections (1) and (2) of Section 12 on the application of any party to the arbitration agreement.

Thus it was contended that Section 12 gives the power to court to appoint a fresh arbitrator and the learned subordinate Judge purported to have ordered for the appointment of a fresh arbitrator by virtue of Sub-section (2) of Section 12. This argument, I am afraid, cannot be accented. Section 12(2) is limited to the provisions made therein. Thus, the only question that falls to be considered is where an award has become void or has been set aside and the Court has not superseded the reference whether it has the power to order the appointment of a fresh arbitrator.

5. In support of his contention the learned Advocate General relied upon a decision of the Madras High Court and two decisions of the Calcutta High Court. In the case of *Rallis India Ltd. v. B.V. Manickam Chetti and Co.* AIR 1956 Mad 369, a Division Bench of the Madras High Court held that so long as the judges did not supersede the arbitration agreement, it must be presumed that the arbitration agreement is subsisting. Therefore the contention that once the award was set aside the parties could no longer resort to the arbitration clause cannot be accepted.

In the case of [The Baranagore Jute Factory Co. Ltd. Vs. Hulaschand Rupchand](#), a Division Bench of the Calcutta High Court took the view that it is clear from S, 19 of the Act that the setting aside of an award does not, by itself terminate the reference, except obviously where the award is set aside on a finding that the reference itself was invalid. In other cases, that is, where the reference is valid and only the award is bad, after the award is set aside, the reference has to be superseded by a further order, if it is desired to terminate it. If there is no order of supersession, the reference and the agreement both survive.

In such a case there can be no question of either the reference coming to an end or the arbitration agreement having been exhausted by the reference, already made. If the Court makes a further order superseding the reference, it must direct that the agreement as well shall cease to have effect so that both come to an end. The combined effect of the two orders which must always be jointly made is that the provision for arbitration is superseded altogether and it is because of such effect that Section 25 of the Act describes an order u/s 11 as an order superseding the arbitration. The same learned judges in the case of [Morgan Walker and Co. Vs. Khardah Co. Ltd.](#), reiterated their view as taken in [The Baranagore Jute Factory Co. Ltd. Vs. Hulaschand Rupchand](#).

6. The only other decision that I need refer to is a Division Bench decision of the Punjab High Court in the case of [Union of India \(UOI\) Vs. New India Constructors, Delhi and Others](#). In this case the usual clause as in the present case was entered in the contract between the Union of India and the New India Constructors.

Their Lordships of the Punjab High Court held that where the arbitration clause in a Government construction contract concerning disputes arising out of it provided that the Chief Engineer was to act as the sole arbitrator and provided further that if the Chief Engineer was unable or unwilling to act as the sole arbitrator then he must appoint

another person in his place as an arbitrator.

Under the arbitration agreement the Chief Engineer has to perform two duties. Firstly, it is his duty to as an arbitrator himself, and if he does not do so, he clearly refuses or neglects to perform the duties of the arbitrator. His second function is if the Chief Engineer is unable or unwilling to act as the sole arbitrator, then he must appoint another person in his place as an arbitrator. The second function of the Chief Engineer is a function which is performed by him not as an arbitrator but as a person designate having certain duties-to perform not as an arbitrator but as a person appointing somebody else to act as an arbitrator.

In the event of the Chief Engineer not himself functioning as an arbitrator, the case becomes one contemplated by Section 4 of the Arbitration Act. The Arbitration Act provides no machinery on the failure of the persons designate u/s 4 failing to act. The parties must, in these circumstances, approach the Court in the ordinary manner and either bring a suit for a mandatory injunction or take such other steps in a Civil Suit as they may be advised, but no appointment can be made by the Court under the Arbitration Act.

7. From the above discussion of the position in law it appears that the learned Subordinate Judge not having superseded the reference both the agreement as well as the contract subsist and the parties must be relegated to their old position and take recourse to clause 25 of the agreement. The learned subordinate Judge not having superseded the reference, was clearly in the wrong in ordering the appointment of a fresh arbitrator. The order being ultra vires and without jurisdiction all steps taken by him in furtherance of the said order are invalid In the result, I would set aside the order of the learned Subordinate Judge dated 21-9-59 and hold that the subordinate Judge had no power to direct appointment of a fresh arbitrator. The Rule is made absolute with costs. Hearing fee Rs. 48/-.