

Executive Engineer, Irrigation Division, Puri

Vs

Gangaram Chhapolia

Civil Appeal No. 7446 of 1983

24.10.1983

JUDGMENT

A. P. SEN, J. -

1. This appeal by special leave is directed against an order of the Orissa High Court dated November 6, 1980 summarily dismissing a revisions filed by the appellant and upholding the order of the Subordinate Judge, Cuttack dated march 26, 1980 allowing an application made by the respondent under Section 8 read with Section 20 of the Arbitration Act, 1940, by which the learned Subordinate Judge has set aside the appointment of the Superintending Engineer, Irrigation by the Chief Engineer to be the arbitrator and instead appointed a retired District and Sessions Judge of Cuttack as the arbitrator.

2. Put briefly, the essential facts are these. The respondent herein is a contractor and had entered into an agreement being Agreement No. 1 F-2 of 1970-71 within the State Government of Orissa relating to the Excavation of Satankha Distributory with its minor and sub-minor from O. M. to Tail. The respondent raised a dispute and served a notice on the Chief Engineer for the appointment of an arbitrator under Clause 23 of the Agreement. Subsequent to the said notice, he filed an application under Section 8 read with Section 20 of the Act before the Subordinate Judge, Cuttack praying for the appointment of an arbitrator by the Court alleging that the Chief Engineer had not appointed an arbitrator under Clause 23 within the stipulated period of 15 days and therefore lost his power to appoint an arbitrator. The appellant entered appearance in the proceedings and raised an objection against the maintainability of the application under Section 8 read with Section 20 of the Act on the ground that the Chief Engineer had already appointed D. Sahu, Superintending Engineer, Irrigation to be the arbitrator, fact of which was intimated to the respondent on November 20, 1978 and as such there was no occasion for the Court to appoint an arbitrator. On December 19, 1979, the respondent filed another application contending that the appointment of D. Sahu, Superintending Engineer, Irrigation as arbitrator was illegal and improper and hence liable to be set aside. It was asserted by the respondent that as per Clause 23 of the Agreement, the Chief Engineer could appoint a Superintending Engineer belonging to the State Public Works Department, and none else.

3. The learned Subordinate Judge by the impugned order held that under Clause 23 of the Agreement, the Chief Engineer was empowered to appoint a Superintending Engineer of Works Department who was not connected with the work, as arbitrator and in case no such Superintending Engineer was available, the Chief Engineer had himself to enter upon the reference. He further held that D. Sahu, Superintending Engineer, Irrigation being directly subordinate to the Chief Engineer, his appointment as arbitrator was invalid. The learned Subordinate Judge accordingly set aside the order of the Chief Engineer appointing D. Sahu, Superintending Engineer, Irrigation to be the arbitrator, and further held that the Chief Engineer having failed to appoint an arbitrator within 15 days of the receipt of the notice, he had no power to appoint an arbitrator, and instead directed B. S. Patnaik, retired District and Sessions Judge, Cuttack to be the arbitrator. Dissatisfied with the

decision of the learned Subordinate Judge, the appellant went up in revision before the High Court but the High Court declined to interfere saying that it found no justification for the same.

4. The appeal must turn on a proper construction of the words 'Superintending Engineer, State Public Works Department unconnected with the work' appearing in Clause 23 of the Agreement. The question involved has now become purely academic in view of the subsequent legislation by the State Legislature inserting new Section 41-A to the Act. But it is necessary to deal with the question as the decision may affect the validity of similar reference by the Chief Engineer to a Superintending Engineer under Clause 23 of the Agreement.

5. By Clause 23 of the Agreement, it is provided :

Clause 23 - 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 in the work, or as to any other questions, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the work or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to these contract.

6. The learned Subordinate Judge by the impugned order accepted the contention advanced by the respondent as to the invalidity of the appointment of D. Sahu, Superintending Engineer, Irrigation to be the arbitrator. On a reading of the arbitration clause, the learned Subordinate Judge observes :

It is seen that as per the above clause, the Chief Engineer is under a legal obligation to appoint an S. E. of Works Department unconnected with the work in question and if such S. E. is not available he himself should enter into such reference. There is no denial that Sri. D. Sahu is an S. E. of Irrigation Department who is direct subordinate to the Chief Engineer, Irrigation and so the appointment of Sri. D. Sahu who is the S. E. of the Irrigation is in violation of the terms of the Agreement as per Clause 23 and so in the eye of law, it is not a valid appointment. An appointment of an arbitrator which is invalid one is no appointment. It therefore follows that the Chief Engineer has not made a valid appointment in term of Clause 23 of the deed of agreement within 15 days and so his right to appointment as arbitrator to adjudicate the dispute between the parties is extinguished. Therefore, the reference made by the Chief Engineer to Sri D. Sahu, the S. E. of Irrigation Department is void.

7. There can be no doubt whatever that the order passed by the learned Subordinate Judge was based on a construction of Clause 23 which was patently erroneous. The learned Subordinate Judge failed to appreciate that the expression "State Public Works Department" in Clause 23 of the Agreement was a wider connotation and he wrongly assumed that D. Sahu, Superintending Engineer, Irrigation

did not belong to the State Public Works Department. The Public Works Department has different wings like Irrigation and Power, Public Health and Works Department etc. In the Orissa Public Works Department Code, Volume 1, Revised Edn., 1976 in the definition clause at 1.2 of Chapter 1 are given the meaning of the expressions "Public Works" and "Public Works Department". Paragraphs 21 and 22 are extracted below :

21. "Public Works" means several works, public health, engineering works, irrigation, navigation, embankment and drainage works and electricity works.

22. "Public Works Department" means the Department of the State Government in administrative charge of Public Works.

8. There was really no illegality on the part of the Chief Engineer in appointing D. Sahu, Superintending Engineer, Irrigation to be the arbitrator since he belongs to the Public Works Department. There is no such department called Works Department in the State of Orissa. The term "State Public Works Department" used in Clause 23 is not apparently non-existent because it is now split into several departments of the Government, one of which is the Department of Irrigation. Further, the words "unconnected with the work" appearing in Clause 23 did not imply that the Chief Engineer could not appoint D. Sahu, Superintending Engineer, Irrigation to be the arbitrator or that he was not competent to adjudicate upon the dispute between the parties as he was not he was admittedly not connected with the works in question viz. Excavation of Satankha Distributory with its minor and sub-minor from O. M. to Tail. The words "unconnected with the work" in Clause 23 do not relate to the department concerned dealing with a works contract in question viz. the Department of Irrigation as here, but to the particular works contract in relation to which the dispute has arisen between the parties.

9. The general rule that grammatical and ordinary sense of the contract is to be adhered to unless such adherence would lead to such manifest absurdity or such repugnance or inconsistency, applies also to building and construction contracts. The meaning and intention of the parties has to be gathered from the language used. The use of the expression "Superintending Engineer, State Public Works Department" in Clause 23 qualified by the restrictive words "unconnected with the work" clearly manifests an intention of the parties that all questions and disputes arising out of a work contract shall be referred to the sole arbitration of a Superintending Engineer of the concerned department. From the very nature of things, a dispute arising out of a works contract relating to the Department of Irrigation as he is an expert on the subject and it cannot obviously be referred to a Superintending engineer, Building and Roads. The only limitation on the power of the Chief Engineer under Clause 23 was that he had to appoint a "Superintending Engineer unconnected with the work" i.e. unconnected with the works contract in relation to which the dispute has arisen. The learned Subordinate Judge was obviously wrong in assuming that since D. Sahu, Superintending Engineer, Irrigation was subordinate to the Chief Engineer, he was not competent to act as an arbitrator or since he was a Superintending Engineer, Irrigation, he could not adjudicate upon the dispute between the parties. The impugned order passed by the learned Subordinate Judge is accordingly set aside.

10. We must next advert to the change in the law. During pendency of the appeal, the State Legislature of Orissa enacted the Arbitration (Orissa Amendment) Act, 1982 which was reserved for the assent of the President of India and received such assent on March 21, 1983. By Section 3 of the Amendment Act, a new Section 41-A is inserted which reads :

41-A. Constitution of any reference to the Arbitration Tribunal. - (1)
Notwithstanding anything contained in this Act or in any provisions contained in Section 47, in all case where the State Government, a local or other authority controlled by the State Government, a statutory corporation or a Government company is a party to the dispute, all references to arbitration shall be made to the Arbitration Tribunal.

(2) The State Government shall constitute an Arbitration Tribunal constitute an Arbitration Tribunal consisting of the following members, namely :

(a) one member chosen from among the officers belonging to the Orissa Superior Judicial Service (Senior Branch);

(b) one member chosen from among the officers of the Public Works Department of the State Government not below the rank of a Superintending Engineer;

(c) one member chosen from among the officers belonging to the Orissa Finance Service not below the Superior Administrative Cadre in Class I.

(3) The member chosen from the Superior Judicial Service (Senior Branch) shall be the Chairman of the Tribunal.

(4) The terms and conditions of appointment of the members of the Tribunal and the headquarters thereof shall be as may be determined by the State Government from time to time.

(5) The business of the Arbitration Tribunal shall be conducted in such manner as the Tribunal may determine.

(6) The Arbitration Tribunal constituted by the State Government under the Arbitration Tribunal Rules, 1979 with its members holding office immediately prior to the commencement of the Arbitration (Orissa Amendment) Act, 1982 shall be deemed to be the Arbitration Tribunal constituted under this Act and shall continue to hold office till the Tribunal is re-constituted by the State Government.

(7) All arbitration proceedings relating to a dispute of the nature specified in sub-section (1) which are pending before any arbitrator on the date of commencement of the Arbitration (Orissa Amendment) Act, 1982 and in which no award has been made by the said date, shall stand transferred to and disposed of by Arbitration Tribunal.

11. By reason of the non obstante clause contained in sub-section (1) of Section 41-A of the Act, all references to arbitration in which the State Government, a local or other authority controlled by the State Government, a statutory corporation or a Government company is a party have to be made to the statutory Arbitration Tribunal constituted under sub-section (2) thereof. Sub-section (7) of Section 41-A provides that all arbitration proceedings relating to a dispute of the nature specified in sub-section (1), on or before the date of commencement of the Act in which is the date of publication of the Act in the Official Gazette, shall stand transferred to and disposed of by the said Arbitration Tribunal.

12. In the result, the appeal succeeds and is allowed. The impugned order passed by the Orissa High

Court dated November 6, 1980 as also the order passed by the Subordinate Judge, Cuttack dated March 26, 1980 are set aside and the dispute is referred to the Arbitration Tribunal constituted under sub-section (2) of Section 41-A of the Arbitration Act, 1940 as amended by the Arbitration (Orissa Amendment) Act, 1982 as enjoined by sub-section (7) of Section 41-A of the Act. There shall be no order as to costs.

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