

ORISSA HIGH COURT

Executive Engineer

Vs

Gangaram Chhapolia

Civil Revns. Nos. 216 and 238 of 1979

(S. Acharya, J.)

20.08.1979

ORDER

S. Acharya, J.

1. These two revisions are directed against the orders dated 7-3-1979 and 9-3-1979 passed try the Subordinate Judge, Cuttack in Misc. Case No. 386 of 1978. In pursuance of the order dated 26-4-79 passed by this Court in Civil Revision No. 238 of 1979 both the cases were heard together, one set of argument was advanced by the counsel appearing for the parties, and both these revisions accordingly are disposed of by this common judgment.

2. The Executive Engineer, Prachi Division, Bhubaneswar (the petitioner) and Opposite Party No. 1 (O.P. No. 1) entered into the agreement No. 50-F/2 of 1968-69 for the Construction of solid spurs at Eranch village Devi Right' by O.P. No. 1. The claims of O.P. No. 1 in connection with that work could not be settled amicably, and so O.P. No. 1 issued notice to the Chief Engineer, Irrigation, to appoint an arbitrator in accordance with Clause 23 of the agreement to arbitrate the disputes arising out of his said claims and to settle his claims in respect thereof. The Chief Engineer nominated Sri P.N. Misra, a Superintending Engineer of the Irrigation Department, as the arbitrator for that propose. Opposite Party No. 1 filed Misc. Case No. 386/78 under sections . 8 and 20 of the Arbitration Act 1940 (hereinafter referred to as the 'Act') in the court of the Subordinate Judge, Cuttack for appointment of a proper arbitrator. In that application it was urged that the Chief Engineer did not appoint any arbitrator within 15 days of the receipt of the notice; and that the appointment of the arbitrator ultimately made by the Chief Engineer was not in accordance with the arbitration Clause 23 of the F-2 agreement. The petitioner opposed the said petition *inter alia* on the grounds that the Subordinate Judge had no territorial jurisdiction to entertain the said petition or to pass any order thereon; and that the Chief Engineer had appointed a proper arbitrator within time and so the court should not intervene in the matter. The court below, on consideration of the facts and materials before it, arrived at the findings that (1) the Chief Engineer, Irrigation, by his letter dated 2-11-78 appointed Sri P.N. Misra as the arbitrator in this case after receiving the notice to that effect from opp. party No. 1 on 1-11-78, and therefore the appointment of the arbitrator by the Chief Engineer was within time as provided under Section 8 of the Act; and that (2) on the doctrine that the debtor may follow the

creditor and the fact that the contract was executed within the territorial jurisdiction of the court below, the court had jurisdiction to entertain the said application filed by O.P. No. 1. Regarding the objection against the appointment of Sri P.N. Misra as the arbitrator in this case, the court below held that Sri Misra was an Engineer of the Irrigation Department and clause 23 of the F-2 agreement explicitly mentioned that the Chief Engineer would appoint only 'a Superintending Engineer of the State Public Works Department unconnected with the work at any stage'; and that being so, the appointment of Sri P.N. Misra was contrary to the terms of the arbitration Clause 23 of the F-2 agreement and so the said appointment was invalid. On the last-mentioned finding, the court below appointed Sri M.K. Dey, an Advocate of this bar, as the arbitrator in this case, as both the parties could not suggest a common name, nor could they agree to appoint any one out of the two panels of names separately submitted by the parties.

3. At the hearing of these revisions, the only question which was agitated against the impugned orders was that in view of the nature of the work and the complicated questions involved in deciding the disputes between the parties the court below should not have appointed Sri M.R. Dey as an arbitrator in this case as Sri Dey has not the technical knowledge or expertise in the line to properly adjudicate the disputes between the parties or properly gauge the claims of the contractor arising out of the complicated technical nature of the work giving rise to the said claims. It is submitted by the counsel for the State that the court, in the facts of this case instead of appointing an Advocate as arbitrator in this case, should have either referred the matter again to the concerned Chief Engineer to appoint a proper arbitrator in accordance with Clause 23 of the F-2 agreement, or it should have appointed a technical personnel of the Public Works Department as the arbitrator in this case.

4. It is well settled that when the parties do not concur in the appointment of an arbitrator or arbitrators, or the party who was to appoint the arbitrator does not make a proper appointment in accordance with the agreement within time, the court may, on the application of the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator or arbitrators, as the case may be, who shall have the like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties. There is no doubt that on the failure of the Chief Engineer to appoint a proper arbitrator in accordance with the clause 23 of the F-2 agreement within 15 days of due service of notice, as provided in Sub-section (2) of Section 8 of the Act, the court below had the jurisdiction to appoint an arbitrator, and it actually did so by appointing Sri Dey as the arbitrator in this case. As the Chief Engineer did not make a proper appointment within time, he forfeited his right to appoint the arbitrator, and the court, in due exercise of its power vested on it under the Act, has already appointed an arbitrator. The arbitrator therefore has the power to act in the reference made or to be made to him and to pass an award on that matter as if he had been appointed by the consent of all the parties.

5. It is well settled that before the court exercises its jurisdiction to revoke the authority of a legally appointed arbitrator it should be satisfied that substantial miscarriage of justice will take place if the said arbitrator is not removed. The court's discretion to remove an arbitrator appointed by a competent court should be exercised very cautiously and sparingly. The Supreme Court in Amarchand Lalitkumar's case (AIR 1966 Supreme Court 1036) has observed :-

"The grounds on which leave to revoke may be given have been put under five heads : (1)

excess or refusal of jurisdiction or authority by arbitrator; (2) misconduct of arbitrator; (3) disqualification of arbitrator; (4) charges of fraud and (5) exceptional cases."

In this case nothing is alleged against the arbitrator to bring his case under the first, second or the fourth abovementioned grounds. Nothing is placed before me to justify removal of the arbitrator on any exceptional ground. The only ground on which the removal of the appointed arbitrator is sought for is his alleged disqualification due to lack of technical knowledge and expertise in the subject-matter of the dispute. To meet the contention of the petitioner in this respect the opposite party No. 1 on 26-7-79 filed an affidavit in this Court. The relevant portions of that affidavit are as follows:-

Para (2) "x x x After completion of the work as per the agreement, I was required by the Engineer in charge to execute some extra works under the authority of Clause 11 of the agreement."

Para (3) "This extra work was duly measured and entered into a supplementary agreement executed by the parties. The rate of payment has also been mentioned in the supplementary agreement. I do not dispute this measurement and the rate of payment as mentioned in the supplementary agreement."

Para (4) "While making payment of a sum of Rs. 2,00,527 in respect of the original work, a sum of about Rs. 40,000 has been paid towards part satisfaction of my dues for the extra item of works mentioned in the supplementary agreement. In the present dispute before the arbitrator, I simply claim the balance which may be found payable to me after due and proper calculation."

Para (5) "That there is thus no necessity of any technical hand."

In reply to the above affidavit, an affidavit dated 27-7-79 was filed on behalf of the petitioner. Paras 2 and 3 thereof which only are relevant are as follows :

"2. That the statement made in paras, 3 and 4 of the affidavit filed by opposite party No. 1 is not correct. No supplementary agreement to the agreement No. 50-F-2 of 1968-69 has been executed between the parties for any extra work. The correct state of affairs is that as per the tender the opp. party No. 1 was required to supply 6,832 cum. of rubble stone (1/2 cft. to 1 cft.) @ Rs. 23.50 per cum. The amount as per the tender was fixed at Rs. 1,60,552 but as per the execution the opp. party No. 1 exceeded the limit and supplied 8,533.06 cum. of rubble stone. For this excess quantity of supply, the concerned Chief Engineer approved the deviation statement and accordingly for the entire supply of rubble stone of 8,533,06, a sum of Rupees 2,00,526.00 has been paid to the opp. party No. 1 @ Rs. 23.50 per 1 cum. as per the final bill. It is therefore incorrect to say that part payment has been made to the opp. party No. 1. The petitioner does not say in his affidavit that he does not dispute the measurement and rate of payment which has been done as per the agreement No. 50-F-2 of 1968-69.

3. That it may not be correct to say that there is no necessity of any technical hands. Under what rate the amount is payable, it is only Executive Engineer in charge or any

engineer having knowledge about the different types of work can say about the rate prevailing in the area in question."

On 1-8-79 the learned counsel for opp. party No. 1 filed a memo in this Court, as follows :-

"The opp. party (contractor-claimant) does hereby submit that his claim before the arbitrator shall be confined to the work executed in excess of the work mentioned in the original agreement. This excess work has been measured and entered in an agreement which is supplementary to the original agreement. The opposite party does further submit that beyond this measurement and the supplementary agreement he shall not claim anything more except interest and costs which may be legally payable."

On the above statements of facts and without knowing the details of the claims preferred before the arbitrator it becomes difficult for me to gauge the nature of the work the arbitrator is required to do in this case. If his work involves only calculation of the claim on the undisputed measurements and at the rate of payment already agreed to between the parties, as asserted by O.P. No. 1, then the decision of the disputes relating to the claims in question would not require any technical knowledge, expertise or skill in engineering work on the part of the arbitrator. So, Mr. M.K. Dey, Advocate, can very conveniently give an award in this matter within a short time. If the arbitration work requires some technical knowledge, as urged by the petitioner, even then it cannot be said that the Advocate arbitrator cannot properly perform his job. Advocates, in course of their profession and because of the same, acquire knowledge about men and matters of various nature. Their profession calls upon them to deal with and tackle various types of complicated or technical matters, in many of which they may not have prior learning, knowledge or expertise. They in such cases consult experts in the line and equip themselves to meet the requirements of the job entrusted to them. Therefore, merely because the claims are in respect of engineering work, or the assessment of the same may require some technical knowledge, it cannot be said that an Advocate of standing cannot do that work. Moreover, nothing prevents the arbitrator to take the assistance of the services of an engineer or of a technical man of competence so that the arbitrator can take a proper view of the engineering or the technical aspects of the matter, enabling him to make proper assessment of the claims preferred before him. It cannot, therefore, be said that the advocate arbitrator is not qualified to arbitrate this matter. The arbitrator, who is a party in these revisions, does not express his inability or unwillingness to do the job entrusted to him. The petitioner does not allege any special or personal disqualification against Mr. Dey. I, therefore, do not see any reason to revoke the appointment of Sri M.R. Dey, Advocate, as the arbitrator in this case.

6. In the impugned order the court below has in advance fixed the remuneration of the arbitrator in this case. In fitness of things I am of the opinion that in this case it would be proper to assess the remuneration of the arbitrator after he submits the award, as the assessment of the same would depend on the nature, type and magnitude of the work done by him and by the technical assistant, if any. Moreover, the total remuneration to be paid in this case should also be in proportion to the work done by one or both of them. Accordingly the remuneration of the arbitrator already fixed by the court below is set aside. It shall be fixed and paid as mentioned above, and each party shall bear the same in equal shares.

7. Both the revisions are dismissed. Each party shall bear his own cots of this Court.
Revisions dismissed.