

**ORISSA HIGH COURT**

State (State)

Vs

Civien Construction Co

Civil Revn. No. 310 of 1980

(R.N. Misra, C.J.)

14.09.1982

**ORDER**

**R.N. Misra, C.J.**

1. The plaintiffs in an application under Section 20 of the Arbitration Act of 1940 in the court of the Subordinate Judge, Bhubaneswar are petitioners.

2. Opposite Party No. 1, a firm of contractors had undertaken construction of the Orissa Bhawan at New Delhi on behalf of the State of Orissa under a written agreement and the lump sum amount had been stipulated at Rupees 23,34,000/-. The work is said to have begun in Feb., 1977, but in Sept., 1979 the State Government rescinded the contract and levied liquidated damages of Rs. 46,68,000/-. The contractor served a notice under Section 8 of the Arbitration Act on the Chief Engineer concerned and demanded that the disputes indicated in the notice be referred for arbitration. The Chief Engineer had not taken any action on the notice when on behalf of the State and the Executive Engineer an application under Section 20 of the Arbitration Act was filed before the learned Subordinate Judge of Bhubaneswar. On 15-12-1979 the court allowed the prayer of the State and directed the contractor to produce the original agreement and asked the parties to submit an agreed name for being appointed as Arbitrator. He further directed that the disputes as raised in the plaint by the State and as raised by the defendant (contractor) in the claim statement filed should be referred to the Arbitrator for adjudication. The learned Subordinate Judge appointed Sri M.C. Pani, a retired Chief Engineer, as Arbitrator. On behalf of the State the appointment of Sri Pani was challenged in Civil Revision No.39 of 1980 and this Court directed substitution of Sri Pani by Sri A.B. Jena, a Superintending Engineer in the employment of the State Government as Arbitrator. The State Government then filed an application before the Subordinate Judge on 19-12-1979 for a review of the direction on 15-12-1979 regarding reference of the contractor's disputes for arbitration. On 5-2-1980 the learned Subordinate Judge made the following order :-

"Received the record from the Hon'ble Court today. Seen the orders passed in C.R. Nos. 703/79 and 39/80. In place of Sri M.C. Pani the Hon'ble Court appointed Sri A.B. Jena, Superintending Engineer, Eastern Circle, Killa Fort Cuttack to act as Arbitrator."

2. As regards the review petition, the petitioner seeks to delete the following portion of the judgment :-

'The dispute as raised by the defendant in the claim filed today shall be referred to the Arbitrator for adjudication.'

"It is argued before me that the court can refer for arbitration only those disputes which are pre-existent. Since the claim filed by the defendants are disputes arising subsequently, they cannot be referred. I am unable to subscribe to this view. The Court's discretion to refer all disputes in question to the Arbitrator is not fettered anywhere. Moreover, I find from the plaint itself that in the notice issued by the defendants to the petitioner to concur in the appointment of an Arbitrator it is specifically mentioned that the disputes and the amounts referred therein are subject to variation and addition on verification if occasion so demands. The defendants are, therefore, at liberty to raise all the disputes before this Court for reference to the Arbitrator. There is no merit in the review petition. It is therefore, rejected."

This order is assailed in the present revision petition.

3. Ground No. 1 in the revision petition runs thus :-

"For that the Subordinate Judge has no Jurisdiction to entertain any disputes which were not there before the Chief Engineer and as such the claims made by the contractor before the Chief Engineer can only be referred for arbitration to the Arbitrator."

From this ground it is clear that there was no objection to refer the disputes which the contractor had specified in his notice to the Chief Engineer. It is interesting to note that in para 14 of the application under Section 20 of the Arbitration Act filed before the learned Subordinate Judge the following averment was made :-

"That the application is valued at Rs. 59,98,000/- which includes the claim of the plaintiffs as liquidated damages on the defendant to the tune of Rupees 46,68,000/- and the claim of the defendant on the plaintiffs to the tune of Rs, 13, 80, 000/- ... .. "

The learned Government Advocate at the hearing strenuously contended that at the instance of the contractor no dispute had been raised and, therefore, no reference was competent. This submission seems to be clearly misconceived in view of the stand taken in the petition under Section 20 of the Arbitration Act before the learned Subordinate Judge and ground No.1 raised in the Civil revision petition before this Court. There is force in the submission of Mr. Palit that the State and the Executive Engineer were estopped from challenging the reference of the disputes included in the notice to the Chief Engineer for reference to arbitration.

In Para 8 of the original application before the learned Subordinate Judge, the notice issued by the contractor has been extracted. At the bottom of page 5 of the application under Section 20, the following occurs as a part of the notice :-

"And whereas as per the contract an Arbitrator is to be chosen by both parties to it for adjudication of the said disputes, we are suggesting hear below the names of the Arbitrators out of whom any one may be chosen. The list of disputes and the amounts mentioned against them are subject to variation on addition on verification if occasion so demands....."

The application filed by the contractor on 15-12-1979 was one on the basis of the aforesaid statement in the notice. An attempt has been made by the contractor to extend the scope of disputes as also the extent of claim. The learned Subordinate Judge in my opinion rightly relied upon the special features indicated above while he rejected the review petition of the State and the Executive Engineer on 5-2-1980. The trial court appears to have been impressed by the fact that the State had no objection to the disputes already raised in the notice under Section 8 of the Arbitration Act to be referred to the Arbitrator and those disputes in terms of the notice could be modified or varied. The petition of 15th Dec. 1979 was, therefore, not one without foundation or basis. It may be that there has been embellishment of the claim, but that must be a matter left to the Arbitrator to decide. The entire dispute should appropriately go before the Arbitrator. It is open to him on the basis of materials placed to come to the conclusion that the claim raised subsequently by the contractor is an embellishment and without foundation, particularly when in the notice under Section 8 of the Arbitration Act amounts had been indicated. If the claimant is able to show that variations were reasonable and justified, the Arbitrator is free to come to his own conclusion. I do not think, in the facts and circumstances indicated above it would be proper for me at this stage to interfere with the order of the learned Subordinate Judge in exercise of revisional jurisdiction.

4. The revision fails and is dismissed and the order of the learned Subordinate Judge is upheld. Parties are, however, directed to bear their own costs of this proceedings.  
Revision dismissed.