ORISSA HIGH COURT

State (Orissa)

Vs

D.C. Routray

Civil Revn. Nos. 744 and 745 of 1981

(R.C. Patnaik, J.)

13.04.1983

ORDER

R.C. Patnaik, J.

1. These revisions arise out of orders passed by the learned Subordinate Judge of Bhubaneswar in Original Suit Nos. 220 and 221 of 1981 refusing the prayer of the petitioner to examine the arbitrator as a witness.

2. Disputes arose between the parties in connection with the execution of the work under agreements Number 33 P-2 of 1972-73 and Number 34 P-2 of 1972-73 and were referred to arbitration in Misc. Case Numbers 244 and 245 of 1977. The arbitrator submitted the awards in favour of the opposite party for a sum of Rs. 19,87,646/- in the former, and for Rs. 20,11,625/- in the latter. The petitioner filed petitions in both the cases questioning the validity of the awards on the ground that the arbitrator had no jurisdiction to entertain some of the claims as those were not arbitrable. It was also alleged that the arbitrator had mis-conducted the proceedings by his failure to state or incorporate in the awards his answers to the questions raised in the petitions filed by the petitioner on 21-6-1980. It was alleged that the petitioner had filed in each of the cases before the arbitrator a petition challenging his jurisdiction on the ground that some of the claims were not covered by the terms of the agreement and thus were beyond his arbitrator authority. The arbitrator heard the parties on the petitions and recorded his order dated 8-7-1980, in each of the cases as under-

> "Both parties present. Perused the written argument G.P. and heard the submission of the advocate for the claimant on the petition filed by the G.P. dt. 21-6-1980. My answer will be given at the time of giving the award...".

3. It was urged before the learned Subordinate Judge that the arbitrator misconducted the proceedings and showed bias by not dealing with the petitions challenging his jurisdiction in the awards. It was not apparent from the awards what impelled the arbitrator not to deal with the said petitions or what transpired in course of the proceedings after 8-7-1980, for which,

notwithstanding his categorical assurance that he would deal with the petitions in the awards, he failed to do so. Besides, it was also urged that it was necessary to examine the arbitrator to ascertain on what materials he passed the awards in favour of the opposite party. The learned Subordinate Judge, however, rejected the said petitions holding that no reason having been given in the awards it was not permissible to summon the arbitrator for examination as witness.

4. Mr. Indrajit Ray, the learned Standing Counsel for the petitioner, has contended that the learned Subordinate Judge misconceived the position in law by his refusal to summon the arbitrator for examination. The petitioner did not want to probe the mental process of the arbitrator as to how he reached his conclusion. The petitioner wanted to know from the arbitrator the circumstances under which he failed to answer in the awards the questions raised in the petitions dated 21-6-1980. It has been submitted that in his orders dated 8-7-1980 the arbitrator categorically observed that he would answer the questions raised in the petitions in the awards themselves. The purpose of summoning the arbitrator was to examine him with reference to the conduct of the proceedings before him and not on merits of the awards. He was to show over what subject-matter he was exercising jurisdiction.

5. Mr. Ranjit Mohanty, the learned counsel for the opposite party, has opposed the motion on the ground that an arbitrator is the substitute for a Judge and public policy discountenanced examination of arbitrator as witness. According to the learned counsel, law is by now well settled that except in cases of misconduct an arbitrator should not be summoned as a witness. In support of his contention, he has referred me to the following decisions; *(Union of India v. Orient Engg. and Commercial Co. Ltd[1].)*; *(Khub Lal v. Bishambhar Sahai[2])*; *(In the matter of Arbitration Act[3])*; *(Dutton Massey and Co. v. Jamnadas Harparsad[4])*; *(Attorney-General for Manitoba v. Kelly[5])* and *(Mt. Amir Begam v. Syed Badr-ud-din Hussain[6]).* Learned Standing Counsel has drawn my attention to the leading authority of the House of Lords in *Duke of Buccleuch v. Metropolitan Board of Works[7],* and also to the case of *O'Rourke v. The Commissioner for Railways[8],*

6. In Orient Engineering's case (supra), in a proceeding commencing after filing of the award, a list of witnesses was furnished for issue of summonses. One of such witnesses was the arbitrator and summons was issued to the arbitrator in a routine manner. The Supreme Court held that summons to the arbitrator should not have been issued without application of mind and in a mechanical manner. It was observed (at p.2447):-

> ".....When an arbitrator has given an award, if grounds justifying his being called as a witness are affirmatively made out, the Court may exercise its power, otherwise not. It is not right that everyone who is included in the witness list is automatically summoned; but the true rule is that, if grounds are made out for summoning a witness he will be called; not it the demand is belated, vexatious or frivolous.....
> The short point is that the Court must realise that its process should be used sparingly and after careful deliberation, if the arbitrator should be brought into
> the witness box. In no case can he be summoned merely to show how he arrived at the conclusions he did. In the present case, we have been told that the arbitrator had gone wrong in his calculation and this had to be extracted from his mouth by being examined or cross-examined. We do not think that every Munsif and every Judge, every

> Commissioner and every arbitrator has to undergo a cross-examination before his judgment or award can be upheld by the appellate Court. How vicious such an approach would be is apparent on the slightest reflection."

Two points are settled. First, the prayer for summoning the arbitrator should not be allowed in a mechanical or casual manner, and second, he should not be summoned for ascertaining from him how he arrived at the decision. The grounds on which an arbitrator can be examined are set out in the following excerpt :-

> "Of course, if a party has a case of mala fides and makes not prima that it is not a frivolous charge or has other reasonably relevant matters to be brought out the Court may, in given circumstances, exercise its power to summon even an arbitrator, because nobody is beyond the reach of truth or trial by Court....."

(Underlining, mine) The position is, therefore, clear that there is no absolute taboo. Examination of an arbitrator is permissible where misconduct is alleged, but not frivolously, or when reasonably relevant matter are to be brought out in relation to the arbitration proceeding. The ultimate deciding factor is the quest for truth.

7. In Duke's case (1872-LR 5 HL 418) (Supra) an umpire selected by two arbitrators had passed an award for compensation under the Thames Embankment Act of 1862 and given the award to the Duke for # 8325 as compensation. The Metropolitan Board wanted the umpire to be examined as a witness. The umpire was summoned and was examined as to how the sum named in the award had been made up. The question was raised in appeal before the Exchequer Chamber and then in the House of Lords. The Judges of the Courts below were summoned to attend the hearing and were asked to answer two questions, the first of which is relevant for our purpose namely;

> "First : Whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose?" Mr. Baron Cleasby answered :
> "First ; With regard to the competency of the umpire as a witness, I am not aware of any real objection to it. With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent them being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence. The practice entirely agrees with this: for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection.
> Secondly : Being competent generally, it follows that he may be questioned as to what took place before him, so as to shew over what subject-matter he was exercising

jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter. A., and also in respect of another matter, B., and that both were entertained without objection; or he might prove that claim B. was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of shewing what was the subject-matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given. And it deserves notice, that as to this evidence the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award. He could be corrected by any other person present at the proceedings, including the short-hand writer, if there was one.

"Thirdly: As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award."

A little later, he observed :-

> ".....We can properly investigate the acts of a Judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions ?....."

He concluded by observing :-

> ".....that the umpire was a competent witness, that he might properly be questioned as to the subject of claim put forward and inquired into before him, and that he could not properly be questioned as to the matters which he included in or excluded from his award."

Mr. Baron Martin gave his opinion as :-

> ".....The object of calling him was to prove the seventh plea, viz., that the sum awarded by him included damages and compensation for matters in respect of which he had no power or right to award or assess compensation Now if this matter is to be the subject of judicial inquiry, there is no person who possesses the same means of proving the truth as the umpire. He must know in respect of what he awarded, and to exclude him would seem like excluding the truth....."

In the House of Lords, there were separate concurring opinions Lord Cheimsford, the Lord Chancellor, held :-

> ".....The umpire being a competent witness, the only question is, to what extent the defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. To prevent the defendants from questioning him so far would have been to deprive them of information to which they were entitled by shutting them off from the only source of it, in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But this having been ascertained, the defendants were not at liberty to go farther, and to ask the umpire what were the elements which entered into his consideration in determining the quantum of compensation, within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire.....
> To ask the umpire, as the counsel for the defendants did, what led him to the conclusion as to the proper sum to be awarded, was really to inquire what passed through his mind before he formed his judgment....."

Lord Cairns in a concurring judgment approving the reasonings of Mr. Baron Cleasby observed :-

> ".....It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken-what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. .... "

The Privy Council in *O'Rourke v. The Commissioner for Railways, (1890-15 AC 371)* (supra), followed the Duke's case (1872-LR 5 HL 418) and quoted with approval the observations of Lord Cairns. In *Mt. Amir Begam v. Syed Badr-ud-din Hussain, (AIR 1914 PC 105)* (supra), the charge was one of dishonesty or partiality. The arbitrator was summoned as a witness. Lord Parmoor observed:

> "..... where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and which his decision is final....." and Duke's case was followed.

In *Attorney General for Manitoba v. Kelly, (1922-AC 268)* (supra), the Privy Council observed:-

> "Has the umpire included in his report any items not within the terms of the agreement of reference as above construed? The report is a written document which speaks for itself

> and which cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject matter into which he was inquiring, in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and, in the words of Lord Cairns, 'is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument': *Duke of Buccleuch v. Metropolitan Board of Works.*"

In Halsbury's Laws of England, 4th Edn. at page 326 (para 616), the law has been summarized as hereunder :-

> ".....The evidence of an arbitrator or umpire is admissible upon every point which may be considered to be a matter of fact with reference to the making of the award. He may state what course the proceedings took before him, what claims were made by either party, and what claims were admitted; but his evidence is not admissible to explain, aid or contradict his award, unless perhaps on the question whether the award should be set aside altogether or simply remitted."

In the matter of Arbitration Act (AIR 1924 Madras 274), it was held that where the parties were at variance on the question as to what had taken place before the arbitrators, the proper course was to take the statement at the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what had taken place at the time of the enquiry unless there was very strong reason for doubting the accuracy of their statement. In *Dutton Massey and Co. v. Jamnadas Harprasad (AIR 1924 Sind 51)* (Supra), one of the arbitrators was examined to find out the date with reference to which the rate of exchange was fixed for the purpose at the award. This was frowned upon as the evidence related to the decision over which they had jurisdiction.
In *Khub Lal v. Bishambhar Sahai (AIR 1925 Allahabad 103)* (supra), it was observed :-

> ".....In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision, and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable.... .. "

This decision was approved by the Supreme Court in Orient Engineering's case (AIR 1977 Supreme Court 2445).
According to Russell's Law of Arbitration, 19th, Edn. pages 392, 393, the principle relating to examination of arbitrator is stated to be as in the Duke's case. It is stated that an arbitrator who was called as a witness might be asked to prove what matters were matters in difference in the reference. *(Ravee v. Farmer[9])* and *(Trimingham v. Trimingham[10])* are cited as authorities. The law

that can be culled from the above authorities may be stated thus : An arbitrator is a competent witness and his evidence is admissible to show over what subject-matter he was exercising jurisdiction, into which he was inquiring. He can be examined as to the course of the proceeding before him what claims were made, what claims were admitted, to investigate if he took into consideration any matter not included in the reference and, therefore, not within the limits of his jurisdiction, and also where a charge of dishonesty or partiality is made. He cannot be examined as to the elements which entered into his consideration in determining the quantum of compensation or as to the exercise by him of any discretionary power to award compensation or for the purpose of showing what he intended to be included. The power is to be exercised cautiously and sparingly and not in a routine manner.

8. Keeping the aforesaid law in mind, let us scrutinize the grievances of the petitioner. On 21-6-1980 a petition was; filed in each case before the arbitrator challenging his jurisdiction on several grounds. One of they grounds was that some of the claims were outside his jurisdiction. Whether or not there was worth in the objections, the arbitrator was obliged to decide and he did in fact, agree to do so by stating in his order dated 8-7-1980 that his answers would find place in the awards themselves. However, we find none there. A proceeding may be misconducted by bias or dishonesty. It may even be misconducted by legal misconduct not being personal to the arbitrator. The petitioner wanted to know what transpired after 8-7-1980, that the arbitrator failed to answer objections in the awards. The object of the petitioner was not to probe the mental process. It was not to find out what elements entered into the arbitrator's consideration in determining the amount payable. To prevent the petitioner from questioning him so far, in the words of Lord Chelmsford, the Lord Chancellor, would be to deprive it of information to which it was entitled, by shutting it off from the only source of it, in the breast of the umpire.

9. In my opinion, by the refusal the petitioner has been prevented from reaching at the truth and a valuable right has been denied to it. I, therefore, vacate the impugned order passed by the learned Subordinate Judge in each of the cases and allow both the revisions. The learned Subordinate Judge is directed to summon the arbitrator to appear before him as a witness for the purpose of examination. The examination should, however, be kept within the bounds of law stated above.
There would, however, be no order as to costs.
Order accordingly.

Cases Referred.

[1] AIR 1977 SC 2445
[2] AIR 1925 All 103
[3] AIR 1924 Mad 274
[4] AIR 1924 Sind 51
[5](1922) 1 AC 268
[6] AIR 1914 PC 105
[7](1872) LR 5 HL 418
[8](1890) 15 AC 371
[9](1791) 4 TR 146
[10](1835) 4 Nev and MKB 786