

**Gayatri Projects Ltd. Vs. State of Orissa Through the Executive Engineer,
Heads Works Division**

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Heads Works Division**

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Court : Orissa

Decided On : Feb-20-2004

Reported in : 2004(2)ARBLR394(Orissa); 97(2004)CLT665

Judge : Sujit Barman Roy, C.J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 85 and 85(2); Orissa Arbitration Tribunal Act, 1979; [General Clauses Act, 1897](#) - Sections 13(2); Orissa Arbitration Tribunal Rules

Appeal No. : ARBP No. 34 of 2002

Appellant : Gayatri Projects Ltd.

Respondent : State of Orissa Through the Executive Engineer, Heads Works Division

Advocate for Def. : D.C. Mohanty, Govt. Adv.

Advocate for Pet/Ap. : R.K. Rath, N.R. Rout

Disposition : Petition dismissed

Judgement :

Sujit Barman Roy, C.J.

1. This is an application under Section 11 of the [Arbitration and Conciliation Act, 1996](#) praying for a declaration that the opposite party is not entitled to refer the dispute between the parties to the Orissa Arbitration tribunal, and for a further order appointing an Arbitrator and to refer the dispute between the parties in terms of the relevant arbitration Clause to the said Arbitrator for adjudication thereof.

2. The petitioner dropped a tender for the work of 'Construction of Left Afflux Bundh from Rd 630-M to 1770-M of Rengali Irrigation Sub-Project W.R.C.P. Package No. 9'. The tender of the petitioner was accepted and work order was issued in favour of the petitioner, The Agreement was duly executed and signed by the parties which is at Annexure-1 to the petition. As a dispute arose between the parties, the petitioner by its letter dated 2.9.2002 made certain demand to the opposite party or to appoint an Arbitrator for referring the dispute for adjudication to the Arbitrator. In the said letter petitioner suggested some names from which one may be appointed as Arbitrator. The said request letter of the petitioner (Annexure - 4) was received by the opposite party on 5.9.2002. Despite passage of more than one month since the opposite party received the aforesaid letter, no . Arbitrator was appointed and for this reason petitioner has approached this Court in this petition seeking the relief, as already stated.

3. Further case of the petitioner , in brief, is that Para 24.1 of Section 5 of the Agreement between the parties stipulates that if the contractor believes that a decision taken by the Engineer was? either outside the authority given to the Engineer by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision. In accordance with the aforesaid provisions contained in the Agreement, the dispute between the parties was referred to the Adjudicator within the stipulated period. On 22.7.2002 the Adjudicator gave his decision and the same was communicated to the Executive Engineer who received it on 31.7.2002.

4. Para 25.1 of the said Agreement further provides that the adjudicator shall give a decision in writing within 28 days of receipt of the notification of the dispute. As already stated, the Adjudicator gave his decision within the stipulated period. Para 25.2 of the said Agreement further provides, inter alia, that either party may refer a

decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding. Para 25.3 thereof further provides that the arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the Contract Data. Section 4 of the said Agreement contains the Contract Data. Amongst other things, the said Section under the 'Heading 'Contract Data' provides that the arbitration procedure of the Orissa Arbitration Tribunal shall be followed. It further provides that the arbitration will take place in accordance with the Orissa Arbitration Tribunal Act, 1979. As a matter of fact, no such Act, namely, Orissa Arbitration Tribunal Act, 1979 exists. Further there is a set of Rules, namely, Orissa Arbitration Tribunal Rules, 1979. It appears that the said Rules were framed by the State of Orissa under the provisions of the Arbitration Act, 1940, and in accordance with the said Rules the Orissa Arbitration Tribunal was established.

5. Now it further appears from the counter affidavit filed on behalf of the opposite party that the opposite party was not satisfied with the decision of the Adjudicator. It is stated by the opposite party in the affidavit that on 19.8.2002 the opposite party referred the dispute to the Orissa Arbitration Tribunal for adjudication as the opposite party was aggrieved by the decision of the Adjudicator. It needs to be mentioned here that the petitioner was informed about the reference of the dispute between the parties arising out of the decision of the Adjudicator to the Orissa Arbitration Tribunal. Soon after that, the petitioner by its letter dated 2.9.2002 addressed to the Executive Engineer raised various questions and objections against the reference of the dispute to the Orissa Arbitration Tribunal and accordingly suggested various names for appointment of one of them as Arbitrator. The opposite party having not obliged the petitioner by appointing sole Arbitrator, the petitioner has filed this petition after expiry of one month since its letter dated 2.9.2002 was received by the opposite party on 5.9.2002 for appointment of a suitable Arbitrator and for a further declaration that the Orissa Arbitration Tribunal is incompetent to adjudicate the dispute between the parties on various legal grounds.

6. This is how the matter has come up/before this Court. The first question raised by the petitioner is that the arbitration clause contained in Para 25. 2 of Section 5 of the said Agreement clearly stipulates that if either of the parties is aggrieved by the decision of the Adjudicator, he may refer the dispute to 'an Arbitrator' within 28 days of the Adjudicator's written decision. Therefore, the dispute in question can be referred to the arbitration of sole Arbitrator only and it cannot be referred to an institution of more than one Arbitrator. The Orissa Arbitration Tribunal consists of three members. The expression 'an Arbitrator' occurring in Para 25. 2 relating to arbitration clause cannot include the Arbitration Tribunal as it consists of more than one Arbitrator. According to the learned counsel for the petitioner, for the aforesaid reasons reference of the dispute by the opposite party to the Arbitration Tribunal consisting of more than one member is invalid, and therefore, same should be quashed and this Court should appoint one Arbitrator and refer the dispute between the parties to the arbitration of the sole Arbitrator.

7. The second question agitated by the learned counsel for the petitioner is that no such Act, namely, Orissa Arbitration Tribunal Act, 1979 under which the said Tribunal purports to have been constituted exists. Therefore, such Tribunal cannot adjudicate the dispute between the parties. Apart from the aforesaid, it is also contended by the learned counsel for the petitioner that assuming that any such Orissa Arbitration Tribunal was constituted under the provisions of the old Act, same cannot decide the dispute between the parties as the dispute arose after the new Act came into force and hence, in the matter of such disputes which arose after the new Act came into force, the provisions of the [Arbitration and Conciliation Act, 1996](#) prescribing the necessary guidelines and the procedure should alone be followed and accordingly, the Arbitration Tribunal, if any constituted under the old Act, cannot decide a dispute where the arbitration proceeding commenced after the new Act came into force.

8. Learned counsel for the petitioner is indeed correct that no such law, namely, the Orissa Arbitration Tribunal Act, 1979 ever existed. In fact what has been printed is the Orissa Arbitration Tribunal Act, 1979 in the Agreement between the parties. This appears to have been a typographical error. The Orissa Arbitration Tribunal Rules, 1979 was framed by the State Government. Rule 4 of the said

Rules contemplates establishment of such Tribunal. In fact Rule 3(b) provides that the 'Tribunal' means the Arbitration Tribunal to be constituted by the State Government under the provisions of Rule 4. Sub-rule (1) of Rule 4 of the said Rules further provides that there shall be an Arbitration Tribunal consisting of three serving members of the State Government. Sub-rule (2) thereof also provides as to who could be inducted as members of the Tribunal. Sub-rule (3) thereof empowers the Government to effect any change in the composition and personnel of the Tribunal at any time. If there is an enabling provision of law, wrong citation of law cannot be a ground to strike down the action taken by the Government. The only question therefore is : Whether after the new Act came into force, the State Government can continue with the same set of Rules empowering it to constitute the Arbitration Tribunal and refer the dispute between the parties to the said Arbitration Tribunal or not? Section 85 of the new Act deals with repeal and savings of, inter alia, the old Act. Sub-section (1) of Section 85 provides that amongst others the Arbitration Act shall thereby stand repealed. Clause (b) of Sub-section (2) of Section 85 further provides that all rules made and notifications published, under the repealed enactment shall, to the extent to which they are not repugnant to the new Act, be deemed respectively to have been made or issued under the new Act.

9. Learned counsel for the petitioner never pointed out in course of his submission before the Court that the aforesaid Rules, namely, the Orissa Arbitration Tribunal Rules, 1979 and constitution of the Orissa Arbitration Tribunal consisting of three members were in any manner repugnant to the provisions of the new Act. Therefore, the provisions of the old Rules and the notifications issued or published thereunder to the extent they are not inconsistent with the provisions of the new Act shall be deemed to have been made or issued under the new Act. In that view of the matter, I am unable to accept the contention of the learned counsel for the petitioner that the constitution of the Arbitration Tribunal under the aforesaid Rules suffers from any legal infirmity whatsoever or on that ground it is incompetent for the Tribunal to adjudicate the dispute between the parties or the correctness of the decision of the Adjudicator merely because the proceeding commenced after the new Act came into force. The new Act by virtue of the provision contained in Clause (b) of Sub-section (2) of Section 85 of the said Act, has clearly saved the

provisions of the Orissa Arbitration Tribunal Rules, 1979 and the notifications said to have been issued thereunder or under the old Act to the extent they are not inconsistent with the provisions of the new Act. Therefore, on this ground alone, as contended by the learned counsel for the petitioner, I am unable to strike down the reference of the dispute and the correctness of the decision of the Adjudicator for arbitration to the Arbitration Tribunal constituted under the said Rules.

10. The citation of a non-existent law due to typographical or printing mistake cannot be a ground for striking down the reference of the dispute to the Arbitration Tribunal if it is found that enabling provision like Orissa Arbitration Tribunal Rules, 1979 existed when the reference was made to the Tribunal.

11. The arbitration clauses contained in Section 5 of the Agreement clearly contemplated in an unambiguous language that if either of the parties is aggrieved by the decision of the Adjudicator, it was open to him to refer the dispute to 'an Arbitrator'. It further contemplated that the procedure followed by the Orissa Arbitration Tribunal shall be followed in such a case. Orissa has only one Arbitration Tribunal constituted under the provisions of the said Rules. Orissa does not have any Arbitration Tribunal constituted under a non-existent law, like Orissa Arbitration tribunal Act, 1979. Therefore, the parties knew that in case of dispute between the parties and disagreement with the decision of the Adjudicator, it has to be referred to the Arbitration Tribunal and the procedure followed by the Arbitration Tribunal has to be followed in such arbitration proceedings. Knowing this provision contained in the Agreement signed by the parties, the petitioner had agreed to execute the work order issued in its favour. It cannot now take advantage of a typographical or printing error in the Agreement where-instead of typing 'Orissa Arbitration Tribunal Rules, 1979', it was wrongly printed as 'Orissa Arbitration Tribunal Act, 1979'. Therefore, I cannot assume lightly that it was not within the knowledge of the petitioner that no such Act existed and therefore, no such Tribunal constituted under such non-existing Act, could have existed when the petitioner signed the Agreement. Taking advantage of such feigned ignorance about the Rules and the Tribunal constituted thereunder, I cannot allow the petitioner to exploit the aforesaid printing error/mistake in the agreement.

12. When the aforesaid stipulations in the agreement clearly refers to Orissa Arbitration Tribunal and the procedure prescribed therefor to be followed in the matter in case dispute between the parties is referred to it. I am constrained to hold that the petitioner had full knowledge about the existence of the Tribunal consisting of three members as prescribed under the provisions of the said Rules. If the petitioner had any doubt, he should have obtained clarification from the opposite party in this regard before he signed the agreement or at least before dropping the tender. Having seen what is stipulated in Section 5 of the Agreement as regards the procedure for appointment of Arbitrator, I am unable to accept the case of the petitioner that he was ignorant about the existence of Rules merely because in Para 25. 3 of Section 5 of the agreement, it was wrongly typed or printed that Orissa Arbitration Tribunal Act, 1979 would be followed. Petitioner could have obtained clarification before signing the agreement from the opposite party that no such Act existed and whether it meant Orissa Arbitration Tribunal Rules, 1979. Without ascertaining these facts or without obtaining clarification from the opposite party or without raising any objection whatsoever in this regard, petitioner signed the agreement and executed the work order and thereafter has raised this dispute seeking appointment of sole arbitrator. There is nothing to show that Government constituted Orissa Arbitration Tribunal under any 1979 Act. At the time petitioner signed the agreement there existed only one Orissa Arbitration Tribunal constituted by the Government under the said Rules. When there is an enabling provision under the said Rules empowering the opposite party to refer the dispute for arbitration to the Orissa Arbitration Tribunal constituted by the Government under the said Rules, accidental printing mistake or error committed by the opposite party in wrongly mentioning Orissa Arbitration Tribunal Act, 1979 instead of mentioning Orissa Arbitration Tribunal Rules, 1979 in the relevant clause would not disentitle the opposite party from making a reference under that enabling provision to the Tribunal.

13. In this respect, another aspect must be mentioned here. The adjudicator gave his decision on the dispute on 22.7.2002. Petitioner was required under the said Para 25. 3 to refer the decision of the adjudicator to the arbitrator for arbitration within 28 days since such decision was given by the adjudicator. As already stated, the adjudicator gave his decision on 22.7.2002, petitioner did not issue its

letter dated 2.9.2002 requesting the opposite party to appoint an arbitrator within 28 days since such decision was rendered by the adjudicator. Hence when the petitioner made request for appointment of arbitrator far beyond the time stipulated in the relevant arbitration clause in the agreement, same is incompetent and in response thereto, no arbitrator can be appointed on the basis of the request letter of the petitioner. It needs to be further mentioned here that the aforesaid request letter dated 2.9.2002 was received by the Executive Engineer (opposite party) on 5.9.2002. Therefore, on this ground also, prayer of the petitioner for appointment of arbitrator cannot be entertained.

14. Clause (d) of Sub-section (1) of Section 2 of the new Act gives the meaning of Arbitral Tribunal. It provides that arbitral tribunal means a sole arbitrator or a panel of arbitrators. Therefore, an arbitration tribunal may consist of one arbitrator or more than one arbitrators. However, Sub-section (1) of Section 10 thereof further provides that parties are free to determine the number of arbitrators, provided that such number shall not be an even number. It is true that Para 25. 2 of Section 5 of the agreement stipulates that either party may refer a decision of the adjudicator to 'an Arbitrator' within 28 days of the adjudicator's written decision. From the expression 'an Arbitrator', learned counsel for the petitioner submitted that arbitrator contemplated thereunder cannot be more than one arbitrator and therefore, as the arbitration tribunal which consists of three members is incompetent to adjudicate the dispute between the parties or to examine the correctness of the decision of the adjudicator. But aforesaid words 'an Arbitrator' occurring in Clause 25.2 of the said agreement has to be read along with other provisions stipulated in the said agreement. This expression 'an Arbitrator' cannot be detached from the context in which it occurs and hence the same cannot be interpreted in the vacuum. An interpretation of the expression 'an Arbitrator' has to be made in the light of other provisions of the agreement. The very next clause, namely, Para 25.3 occurring in Section 5 of the said agreement clearly stipulates that the arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the Contract Data, of the same agreement. Contract Data of the agreement clearly stipulates in an unambiguous language that the procedure followed by the arbitration tribunal shall be followed. I cannot lightly presume that the petitioner was ignorant about the

existence of such arbitration tribunal or that it consisted of three members. This being the position, the expression 'an Arbitrator' must be held to include the arbitration tribunal also constituted by the Government under the provisions of the said Rules. If I accept this position, then I cannot allow the prayer of the petitioner to give a declaratory relief that such arbitration tribunal constituted under the said Rules consisting . of three members is incompetent to adjudicate the dispute between the parties merely because it consists of more than one member.

15. Despite the aforesaid position, learned counsel for the petitioner referred to a decision of Division Bench of Calcutta High Court in Teamco Private Ltd. v. T.M.S. Mani, AIR 1967 Calcutta 168, where it has been held that use of expression 'arbitrators' clearly expresses the intention that reference will not be to a single arbitrator and thus expresses a different intention ruling out the applicability of Rule 1 of First Schedule. However, the aforesaid decision of Calcutta High Court does not apply to the instant case, as here, I am required to interpret the expression 'an Arbitrator' occurring in the said agreement subject to other stipulations in the same agreement. In the context of the agreement before me, I am required to interpret the expression 'an Arbitrator' in accordance with or in the light of other stipulations in the same agreement. It must be understood also that where a word is expressed in singular form it also includes plural. (See : Section 13(2) of the [General Clauses Act, 1897](#)). That apart, a document has to be interpreted as a whole. No expression used in a document or instrument can be lifted from the context in which it occurs and the same cannot be interpreted in the vacuum without referring to other parts of the same instrument or document. The document has to be read as a whole and each expression has to be interpreted in accordance with the intention of the authors that can be gathered after reading the document/instrument as a whole. As has been referred to herein above, the words 'an Arbitrator' has to be interpreted in accordance with other terms and conditions stipulated in various paras of the same instrument. If I do not do so, it may so happen that the instrument will be rendered unworkable or some other stipulation of the agreement will be rendered unworkable or some other stipulation of the agreement will be rendered meaningless or devoid of any application. Under the Rules of interpretation of instruments/documents, it is one of the fundamental cannon of interpretation that the documents should be read harmoniously as a

whole, so that there is no repugnancy or inconsistency between different parts of the same document/ instrument. The intention of the authors of such instrument/documents has to be gathered after reading it as a whole and all efforts must be made that no part of the instrument/ document is made meaningless or devoid of any application. It is true that learned counsel for the petitioner cited number of decisions of the Supreme Court and High Court to buttress his aforesaid contentions. But after going through the same and in view of the aforesaid facts and circumstances of the case, I am of the view that none of the case laws cited on behalf of the petitioner is applicable to the instant case. For the sake of brevity, I do not like to refer the same in this judgment.

16. For the aforesaid reasons, I, therefore hold that the petitioner has failed to make out a case for declaratory relief that the arbitration tribunal constituted under the said Rules is incompetent to examine the correctness of the decision of the adjudicator or to adjudicate the dispute between the parties.

17. In the result, the petition is dismissed. The interim order, if any, stands vacated. No order as to cost.