State of Orissa and anr. Vs. Modern Construction Co.

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Court : Orissa

Decided On : Mar-27-1972

Reported in : AIR1972Ori219; 37(1971)CLT490

Judge : R.N. Misra, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 151; Arbitration Act, 1940 - Sections 11

Appeal No. : Civil Revn. Nos. 17 to 22 of 1972

Appellant : State of Orissa and anr.

Respondent : Modern Construction Co.

Advocate for Def. : S. Mohanty and ;N.R. Mohanty, Advs.

Advocate for Pet/Ap. : Adv. General and ;Addl. Govt. Adv.

Disposition : Petition allowed

Judgement :
ORDER

R.N. Misra, J.

1. These are six applications under Section 115, Civil P. C. at the instance of the State of Orissa and one of its employee engineers for removal of an appointed

arbitrator by quashing the order of the learned trial Judge.

2. The short facts relevant for the purposes of the revisions may be stated. The State Government of Orissa and the opposite party entered into contracts for execution of works. Such contracts had an arbitration Clause in the event of disputes arising in relation to the contracts. Disputes arose and the opposite party contractor wanted an arbitrator to be appointed for resolving such disputes. As no steps were taken in spite of demands of the contractor, the matter ultimately came before the court and the learned Subordinate Judge appointed Sri N.K. Misra, a retired Superintending Engineer, as the sole arbitrator. The State came before this court challenging such appointment mainly on the ground that Sri Misra was a retired employee of the State and the arbitration clause contemplated an engineer in the employment of the State. This Court did not entertain the objection of the State and Sri Misra's appointment stood affirmed.

Soon after an application was made in the trial Court for removal of Sri Misra from acting as arbitrator on the ground that Sri Misra had been convict' ed for an offence under the Essential Commodities Act read with Clause 15 (3) of the Iron and Steel Control Order, 1956 wherein he was sentenced to pay a fine of Rs. 2,000/- and in lieu thereof to undergo S. I. for six months. The matter was in appeal before this Court and is said to be still pending. It was further alleged that Sri Misra was also charged for an offence under the Prevention of Corruption Act and was undergoing trial before the Special Judge. Puri for having committed an offence punishable under Section 5(2) read with S. 5(1) of that Act.

It was contended on the aforesaid footing that Sri Misra was bound to have bias against the State of Orissa which was the real prosecutor in the two cases and as such it was not in the Interests of justice and fair play that such a person should be allowed to act as arbitrator. The learned trial Judge repelled the contention by saying that this was not one of the grounds available under Section 11 of the Arbitration Act-He also emphasised upon the fact that the conviction which is referred to above was prior to disposal of the revision which came before this Court -- the conviction is dated 11-1-1971 and the civil revision was disposed of on 8-3-1971 --the State of Orissa having not raised objection on that score before this

Court was not entitled to use that again as a ground for removal of Sri Misra from, functioning as the arbitrator. There are several contracts and as such there are several disputes. That situation has given rise to these six cases.

3. There is no dispute that Sri Misra has been convicted in the manner alleged and that there is a prosecution pending against him for the offence indicated above. There is also no dispute that the State of Orissa is the prosecutor. Where the arbitrator is litigating with, one of the parties to the arbitration proceeding, there would be no room for doubt that the arbitrator would have bias against his adversary whose dispute he has to arbitrate upon. In such situation the arbitrator cannot be allowed to function because he would have naturally some bias. The State, it is true, is not an individual and has not the feelings and reactions of an ordinary litigant. But such a situation does not really make much of difference because the arbitrator who is an individual is bound to react against his prosecutor and is likely to have a bias against it. It is not for the court, when moved for removal of an arbitrator on grounds of bias, to find out whether there has been actual bias already expressed in some overt act of the arbitrator. The possibility of bias must be taken as sufficient

There can be no doubt that disputes which are normally triable by courts are placed before arbitrators where by consent of parties a private forum is chosen for such adjudication. The arbitrator is a quasi-judicial tribunal and is bound to a great extent by the procedure applicable to the court. While it is true that many of the formalities prescribed for adjudication of disputes which apply to the court do not apply to the arbitrator, I have no doubts in my mind that the arbitrator in discharging his functions is to act judicially, is bound to hear parties and is to determine the dispute in an absolutely impartial way.

One of the well settled dicta of judicial procedure is that not only justice must be done, but justice must appear to be done. It is this principle and its corollary which has become a dictum of natural justice -- no Judge should hear a case if he has bias against the litigating party before him -- which is applied to proceedings before courts. I think the same standard is applicable also to the arbitrator. The arbitrator must be a man having no prejudice against the parties and all parties

must have confidence in the arbitrator and his proceeding and must look forward for a fair deal in his hands. If he is a person who is likely to begin with a bias certainly there would be no scope for confidence and the arbitration proceeding would really turn out to be a farce and ultimately no court is likely to sustain an award from such an arbitrator once it is indicated to the court that the arbitrator actually had or was very likely to have a biassed attitude against one of the parties. Bias certainly would vitiate the determination and it would be very difficult in many cases to have a concrete demonstration of the effect of bias on the conclusion reached in the proceeding. Bias or prejudice would remain in the background and in the hands of a clever arbitrator it would be difficult for the affected party to demonstrate the effect of prejudice and often be more difficult for the court to pick it up.

4. The next question for consideration is as to whether the court has any power to remove an arbitrator in such circumstances before the proceeding has concluded. Mr. Mohanty appearing for the opposite party refers to the provisions of Section 11 of the Arbitration Act and contends that the entire power of the court in the matter of removing an arbitrator is contained in that section, and as the allegations of the petitioners do not come within the purview of those provisions the arbitrator cannot be removed. Section 11 provides.

'(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself on the proceedings. x x x x x'

It is stated that there is no allegation of any misconduct of the arbitrator or of the proceeding, nor is it a case to which Sub-section (1) applies. Mr. Mohanty, therefore, contends that since Section 11 provides for the entire power of the court for removal of an arbitrator, the court has no power to remove the arbitrator in this case until there is evidence of his misconducting himself or the proceeding. The learned Additional Government Advocate relies upon the observations of a learned single Judge in AIR 1925 Pat 720, (Lachman Machhua y. Moghal Mianj wherein it

has been said,

'I am of opinion that although there Is no distinct provision in the chapter dealing with arbitration in the Civil P. C. of 1882 as well as in the second Schedule of the present Civil P. C. still the inherent power of a Court to make proper order for the ends of justice can always be invoked to prevent a miscarriage of justice'.

By 1924 when the aforesaid case was disposed of in the Patna High Court, the Arbitration Act of 1940 was not known to the statute book and as the learned Judge has said there was no clear provision like the present Section 11 in the matter of removal of the arbitrator. To meet the exigencies of circumstances the learned Judge came to hold that power inhered in the Court to avoid miscarriage of justice by exercising jurisdiction for removal of the arbitrator. The facts of the Patna case show that the arbitrator had demanded money from one side so that the award may be made in his favour. That certainly was a situation to which the present Section 11 would apply. But as by then power for removal was not there the question arose as to whether the Court had power to exercise in such a situation. The dictum laid by Kulwant Sahay, J. in this case has been approved by a Division Bench of the Patna High Court in AIR 1933 Pat 566, (Anand Das v. Rambhushan Das).

The learned Additional Government) Advocate also placed reliance on a Calcutta decision in AIR 1952 Cal 294, (Bhuwalka Bros. v. Fatehchand). Baner-jee. J, examined the question at a considerable length. The learned Judge quoted Russell on Arbitration where the chief grounds upon which leave to revoke could be granted were classified as follows:-- (a) error of law, or excess or refusal of jurisdiction by arbitrators (b) misconduct of arbitrator; (c) disqualification of arbitrator; (d) exceptional cases. In paragraph 99 of the judgment the learned Judge observed.

'It is not possible for me to say that the arbitrator will in fact be biassed and It is not necessary for me to say that. Here lies the difference between an application for leave to revoke the authority of an arbitrator or to stay an action under Section 34 and an application for setting aside an award on the ground of bias. In the first two applications, all that is necessary is to show that there is a probability of bias or a

reasonable prospect of bias or, as Simha, J., has put it in a very recent case, there is a reasonable apprehension of bias. This difference arises from, the very nature of the applications:

'A perfectly even and unbiassed mind is essential to the validity of every judicial proceeding. Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was entrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court. Whether in, fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist'.'

The last portion of the aforesaid observation seems to be based upon the remarks of Sir John Stuart, V.C. in Kemp v. Rose, (1858) 1 Giff 258.

5. I have already indicated that I am not in a position to rule out the apprehension in the minds of the State of Orissa and its officer that Shri Misra may have prejudice against them and is, therefore, likely not to conduct himself and the proceeding impartially. Once such a situation is found, is it necessary that the same arbitrator must be permitted to handle the proceeding until the aggrieved party is in a position to show-traces of such bias in the proceeding itself or in the conduct of the arbitrator? To my mind the answer seems to be clear and it is that the court must not plead helpless; on the other hand it must immediately meet the situation in exercise of its inherent powers which are vested for doing justice between litigants and to uphold fair play in judicial proceedings. Since Section 11 of the Arbitration Act does not meet the situation but the exigencies of the circumstances demand in the interests of justice exercise of powers, on the well settled principle indicated by their Lordships of the Supreme Court in several decisions including AIR 1962 SC 527, (Manohar Lal v. Hiralal) I must hold the court has inherent powers to exercise in the present setting. Courts exist mainly to do justice and in a situation like the present one, the court cannot abdicate its power and lie by as a silent spectator until the proceeding concludes, and when

dispute is raised against the award, to embark upon an enquiry by digging into the past to find traces of misconduct or prejudice. The legislature cannot be said to have intended that way and, therefore, I cannot uphold the contention of Mr. Mohanty for the opposite party that the applications of the petitioners before the learned Trial Judge were premature.

6. On the basis of what I have said above, the only conclusion which I can reach in this proceeding is that Sri Misra is not the proper person to continue as the arbitrator. The learned Trial Judge did not examine the matter from the proper perspective. The fact that there had been a conviction prior to the disposal of the revision in this Court was given undue consideration. The learned Trial Judge overlooked the fact that the State on account of its impersonal Character, its shape and size has a natural disadvantage which an individual litigant may not have and. therefore, it was quite possible that the fact that Sri Misra had already been convicted in one case and was undergoing trial in another was not known to the State's Law Officers when the earlier revision before this Court was disposed of. The view adopted regarding the powers of the court to meet such a situation does not seem to be in the interests of justice and the conclusion reached thus was vitiated by erroneous approach to the matter and by improper exercise of the jurisdiction vested in the court. I think the learned Trial Judge disposed of the proceeding on the basis that he had no jurisdiction to interfere in the matter while in my view he had. Thus he also failed to exercise a jurisdiction vested in him by law. I would allow each of the revision petitions and revoke the appointment of Sri N.K. Misra. retired Superintending Engineer, to, act as arbitrator, in these disputes between the parties. As a consequence of my order, there arises a vacancy which the court must now fill up in accordance with law.

7. The revision petitions succeed. But keeping the facts of the cases in view I direct both the parties to bear their own costs here.