

PETITIONER:
M/S. CONSTRUCTION INDIA ETC.

Vs.

RESPONDENT:
SECRETARY, WORKS DEPARTMENT, GOVERNMENT OF ORISSA & ORS.

DATE OF JUDGMENT: 10/12/1997

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:
THE 10TH DAY OF DECEMBER, 1997

Present:

Hon'ble Mrs. Justice Sujata V. Manohar
Hon'ble Mr. Justice D.P. Wadhwa

Vinoo Bhagat, Adv. for the appellant
Jayant Das, Sr. Adv., R.K. Mehta and P.N.. Misra, Advs. with
him for the Respondents.

J U D G M E N T

The following Judgment of the Court was delivered:
With C.A.No. 716/91 and CA No 8829/97 (Arising out of SLP
(C)No.9060/91

Mrs. Sujata V. Manohar, J.

Leave granted in S.L.P. (C) No. 9060 of 1991.

The appellant in these three appeals had entered into three separate agreements with the respondents relating to a works contract. The arbitration clauses under these three contracts were similar and required a reference being made to the Superintending Engineer of the respondents unconnected with the work. However, as the respondents unconnected with the work. however, as the respondents did not refer the disputes to arbitration, an application was made by the appellant under Section 8 of the Arbitration Act of 1940. The Court passed the following order dated 15.9.1981 on the application by consent of parties from the panel of names given by both parties. Both the panels contained the name of Shri G.S. Patnaik. The order was as follows:

"Both the parties have filed panel of names for appointment of Arbitrator. Heard. Shri G.S. Patnaik, Chairman, Arbitration Tribunal, Orissa, is appointed as sole Arbitrator, send the reference to him."

Accordingly, arbitration proceedings were commenced by the Arbitrator. The appellant filed separate statements of case in each of the three cases. The respondents filed their counter claim and/or replies. The parties were heard and the impugned Awards were pronounced by the Arbitrator on 17th of March, 1982.

The respondents challenged these Awards on the ground that while the arbitration proceedings were going on, the Arbitrator, on 19th of February, 1982 ceased to be the Chairman of the Orissa Arbitration Tribunal. On 3rd of March, 1982 the respondents filed a petition before the Arbitrator to the effect that since the Arbitrator had ceased to be the Chairman of the Orissa Arbitration Tribunal, he had no jurisdiction to continue with arbitration. The appellant filed his objections to this application. On 9th of March, 1982, the Arbitrator made the following record:

"Claimant and his Advocate present.
A.G.P. Bhubaneswar present on behalf of respondent. heard on the petition of A.G.P. filed earlier and objections of claimant. I have been appointed by name as sole Arbitrator. A.G.P. also does not press his petition any further. hence, petition is rejected as not pressed. hearing of the arbitration case stands closed. Orders reserved for pronouncing award. Claimant to file stamp paper."

Thereafter, the Arbitrator pronounced his Award on 17th of March, 1982.

It is contended by the respondents that the appointment of the Arbitrator Shri G.S. Patnaik was an appointment by designation and hence he ceased to have jurisdiction when he demitted the office of the Chairman, Orissa Arbitration Tribunal. While the appellant contends that the Arbitrator is a named Arbitrator, who is appointed by consent of parties and that he continues to have jurisdiction, although he may have demitted his office as the Chairman of the Orissa Arbitration Tribunal. The appellant also relies upon the proceedings before the Arbitrator of 9th of March, 1982 when the objection as to the jurisdiction of the Arbitrator on his demitting office was not pressed by the respondents. According to the appellant this will amount to acquiescence by the respondents to the continuation of the arbitration before the named Arbitrator. Since they have so acquiesced, they cannot object to his arbitration.

The order of appointment clearly shows that the appointment of Shri G.S. Patnaik, Chairman of the Orissa Arbitration Tribunal, is of a named Arbitrator. The order of appointment does not qualify this appointment either by prescribing that he can act as an Arbitrator so long as he continues as Chairman of the Orissa Arbitration Tribunal; nor is there any implication to this effect in the sub-Court's order. The reference to arbitration is also not to the Orissa Arbitration Tribunal. This would require three members constituting the Tribunal to sit together. Therefore, it is difficult to hold that the Arbitrator who was named was to act as an Arbitrator only so long as he held the office of the Chairman of the Orissa Arbitration Tribunal. The parties may choose an Arbitrator for various reasons. They may rely on his expertise or his special skills at the time when they choose the Arbitrator. According to the respondents they agreed to the name because there were departmental instructions to refer disputes to the arbitration of any member of the Orissa Arbitration Tribunal. But when the Arbitrator is named, unless there is a clear intention spelt out in the agreement of reference to indicate that he would continue to be an Arbitrator only so

long as he holds a particular office, a mere reference to the office held by the Arbitrator will not disqualify him from being an Arbitrator after he ceases to hold that office. the arbitrator, therefore, had jurisdiction to give the awards.

Our attention was drawn to a decision of the Calcutta High Court in the case of Smt. Pratima Sarkar v. Corporation of Calcutta & ors., (AIR 1973 Calcutta 434 at 437). The parties agreed to settle their dispute on the basis of a report which was to be submitted by Respondent No.3. The order in this connection, which was passed, records, "Owing to the technical nature of the dispute involved in this case, it would be better to have all the questions in dispute between the parties decided by the Commissioner of the Corporation of Calcutta, who is Respondent No.3...." The High Court pointed out that while Respondent No.2 was the Commissioner of the Corporation of Calcutta, Respondent No.3 was the same person who was impleaded in his personal capacity.

Therefore, although the Arbitrator was named and described by his designation, this was a case where Respondent No.3 was personally selected by the parties on account of his technical qualifications. he does not cease to have jurisdiction on his ceasing to be the Commissioner of the Corporation of Calcutta.

There were two other judgments cited, one of the Orissa High Court in the case of Union of India v. Ch. Radhanath Nanda & Anr. (AIR 1961 Orissa 143) and the other of the Delhi High Court in the case of Mrs. Sushila Seth & Ors. v. The State of Madhya Pradesh (AIR 1980 Delhi 244). In both the cases, in the arbitration agreement, the Arbitrator was described with reference to the office he was holding. The name of the Arbitrator was not mentioned. In the case before the Orissa High Court, the High Court said that the identity of the Arbitrator had to be determined with reference to the point of time when a reference was made to arbitration. Whoever was holding that office on the date of the reference was the arbitrator. what is more, although he is not named as such, he can dispose of the reference even though he may be transferred elsewhere prior to giving his decision.

In the case before the Delhi High Court, the words in the Arbitration clause, "the Chief Engineer of the circle for the time being" were held to refer, in the context of that case, to the Chief Engineer at the time when the dispute arose. The court observed that the relevant time will depend upon "the context of the facts and the object of the Arbitration". Neither of these two cases are of any direct assistance in the present case when there is no dispute about the identity of the Arbitrator who has been expressly named in the order of reference.

The respondents relied upon a decision of this Court in Hari Dutt Bhardwaj v. Haryana State Agriculture Marketing Board, Punchkula & Anr, (AIR 1989 SC 1670). In this case the Arbitrator was a Superintending Engineer on deputation to the Marketing Board. While he was conducting arbitration proceedings he was reverted to his parent department. But by a subsequent order he was redeputed as Superintending Engineer of the Marketing Board. He then completed the arbitration proceedings and gave his Award. The Court said that he had jurisdiction to complete the arbitration proceedings and gave his Award It was contended that this decision is to the effect that once the Arbitrator ceased to be on deputation to the Marketing Board, he would not have jurisdiction to continue as an Arbitrator. But this question was not required to be dealt with at all, not has

this Court given any finding on this question because the person concerned was redeputed to the same post. There was, therefore, no difficulty in holding that he had jurisdiction. This case, therefore, does not assist the respondents.

The respondents also relied upon a decision of this Court in the case of Union of India & Ors. v. Prabhat Kumar and Brors. & Anr. (1995 Supp. [4 SCC 525). Under the arbitration clause, all disputes between the parties to the contract were to be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents. The clause further provided that if the Arbitrator so resigns his appointment or (inter alia) vacates his office, the authority appointing him may appoint a new Arbitrator to act in his place. The Arbitrator who was so appointed conducted the proceedings until he voluntarily retired from Government service. This Court held that looking to the Arbitration clause, the Arbitrator ceased to be an Arbitrator on his retirement. In terms of the Arbitration clause, the Union of India was competent to appoint a new Arbitrator. This decision turns entirely on the Arbitration clause where it is expressly provided that in the case, inter alia, of the Arbitrator ceasing to hold office, a new Arbitrator has to be appointed. This case also does not help the respondents as the present Arbitration reference does not contain any such provision.

The jurisdiction which is conferred on an Arbitrator is on account of the consent of the parties to the arbitration agreement. Before the Arbitrator, the objection as to jurisdiction of the Arbitrator was withdrawn by the respondents. It shows acquiescence on the part of the respondents in the continued jurisdiction of the Arbitrator to decide the dispute. The minutes recorded show that after raising the objection, the respondents have withdrawn the same. This would indicate a conscious acquiescence on the part of the respondents in the continued jurisdiction of the Arbitrator. In the case of N. Chellappan v. Secretary, Kerala State Electricity Board & Anr. (1975 [2] SCR 811 at 817), this Court on similar grounds held that the State Electricity Board was precluded from challenging the jurisdiction of the umpire. A passage from Russell on Arbitration, 17th Edition at page 215 was relied upon. It is to the following effect:

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

It has also relied upon a decision of Privy Council in the case of Chowdhari Murtaza Hossein v. Mussumat Bibi Bechunnissa (III I.A. 209).

The same passages have been quoted by this Court in a later judgment in the case of Prasun Roy v. Calcutta Metropolitan Development Authority & Anr. (1987 [3] SCR 569 at 574), where this Court said that long participation and acquiescence in the arbitration proceedings preclude a party from contending that the proceedings were without

jurisdiction. Therefore, on this ground also the appellant is entitled to succeed.

In Civil Appeal No.858/97 one additional point was examined by the High Court. The Arbitrator had maintained three sets of minutes relating to the three proceedings before him although they were heard together. In the minutes of 27th of February, 1982, which relate to the set of 30 claims which are the subject matter of Civil Appeal No.858/1987, one of the sentences is as follows:

"Put up on 2.3.82 at 9 A.M. for hearing on the law points and claim items 31 to 37....."

Minutes of the same date viz. 27.2.82 pertaining to the set of claims in Civil Appeal No.716/1991, contains the following sentence:

"Put up on 27.2.82 at 9 A.M. for filing counter claim and objection thereon."

In the same minute book for the earlier date i.e. 20.2.82 it is stated, inter alia:

"Heard claimants on claim items 31 to 37."

Clearly the reference to hearing claimants on claim items 31 to 37 has a reference to the claims which are the subject matter of Civil Appeal No.716/1991. The reference to claims 31 to 37 in the minutes relating to claims in Civil Appeal No.858/1987 appears to be a mistake. The High Court, however, has, on its own, considered this as a case of non-application of mind by the Arbitrator to the disputes before him. This issue was not raised by the respondents at any time and even in the grounds of appeal filed in the High Court. In our view. This inadvertent reference to claim items 31 to 37 pertaining to the claims in other disputes before the Arbitrator between the same parties, cannot be construed as non-application of mind by the Arbitrator. All the three disputes were being heard simultaneously by the Arbitrator and the dates in the minute books are a clear indication of this fact. A mistake in recording the minutes of one date cannot be the ground for setting aside the arbitration Award.

The appeals are, therefore, allowed. the impugned judgment of the High Court is set aside. The orders of the Subordinate Judge upholding the Awards and granting decrees in terms of the Awards are upheld.