

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA  
AT BHUBANESWAR.**

Present :

**Dr. D.P. Choudhury,**  
District Judge, Khurda  
at Bhubaneswar.

*Dated, Bhubaneswar the 11<sup>th</sup> July'14.*

**Arb. (P) No. 148 of 2014.**

(U/ss. 14 of the Arbitration and Conciliation Act, 1996)

Mahendra Swain, aged about 60 years, S/o. Late Baidhar Swain, residing At – Balashram, Khapuria, P.O./P.S. - Madhupatna, Town/Dist. - Cuttack.

... **Petitioner.**

***- V e r s u s -***

1. Union of India, Represented through General Manager, East Coast Railway, Rail Sadan, Chandrasekharpur, Bhubaneswar.
2. Chief Engineer (Con.), South Eastern Railway, at present East Coast Railway, Rail Sadan, Chandrasekharpur, Bhubaneswar.  
(No.2 deleted vide order dated 20.06.2014.)
3. Dy. Chief Engineer (Con.), East Coast Railway, Jajpur, Keonjhar Road, P.O. - Jajpur Road, Dist. - Jajpur.

... **Opposite Parties.**

**Counsel :**

For Petitioner	--	Shri J.K. Mohapatra & Associates.
For O.P. Nos.1 & 3	--	Shri D. Mohanty & Associates.

Date of argument : 25.06.2014.

Date of judgment : 11.07.2014.

## **J U D G M E N T**

This is an application under sections 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) filed by the petitioner praying to terminate the mandate of the arbitral tribunal.

2. Factual matrix leading to the case of the petitioner is that in pursuance of the tender call notice dated 30.12.1998 for execution of earth work, minor bridges and other allied works between Km. 142.70 and 145.00 of Tomka-Bansapani Rail Link Project, he submitted bid and it was accepted being the lowest one by the opposite parties. Accordingly, formal agreement was drawn bearing agreement No.10/CE(C)/BBS/SER/2000; but the work could not be completed during the said period of contract due to several hindrances caused by the opposite parties. To avoid their own lapses, the opposite parties imposed some illegal penalty and did not make payment of the final bill of the petitioner following which dispute arose between the parties.

3. It is further averred, inter alia, that the agreement was guided by the General Conditions of Contract (“GCC”, for short) executed between the petitioner and the opposite parties. As per Cl.64 of the contract, after taking nomination of the petitioner into consideration, arbitral tribunal comprising three members was constituted by the General Manager. They are : (1) Sri D.R. Shyamsundar, (2) Sri B.N. Mishra, & (3) Sri S.K. Pattanaik. It was constituted on 31.10.2006, but no proceeding was started till 2009. After elapse of two years and four months,

the General Manager unilaterally substituted Smt. Sumana Mohanty as co-Arbitrator in place of Sri S.K. Pattanaik and communicated vide office letter No. EcoR/GA/Arb/CE(Con) /MS/387/2194, dated 25.02.2009, which is also challenged by the petitioner. According to the petitioner, such substitution of Arbitrator being unilateral itself terminates the mandate of arbitral tribunal. It is further averred that the General Manager reconstituted the arbitral tribunal by substituting another person, namely, Sri M.K. Deouskar as co-Arbitrator in place of presiding Arbitrator Sri D.R. Shyamsundar and reappointed Sri B.N. Mishra as presiding Arbitrator. Accordingly, the petitioner was intimated by the General Manager vide his letter No. EcoR/CA/Arb/CE(Con) /MS/387/4984, dated 08.10.2012. On 17.04.2013, a letter was received from Sri B.N. Mishra, who claims to be the presiding Arbitrator, wherein the petitioner was requested to attend the first hearing of the case, which was scheduled to be held on 02.05.2013 at 3.30 P.M. A request was made by opposite party No.3 to postpone the date of hearing as he was unable to attend the same. But, the proceeding was conducted on that day in the absence of opposite party No.3 and the petitioner. Thus, the petitioner alleged that there is institutional bias and a total Railway mechanism has joined their hands to deprive him of his entitlement by fraudulent means. Not only this, but also the petitioner further alleged that he intimated the General Manager vide his letter No. MS/2013-14/35, dated 01.05.2013 that the reconstitution of the arbitral tribunal vide

letters dated 25.02.2009 & 08.10.2013 is not in accordance with the provisions of the contract, which also opposed to the mandate of law as provided under the Act. But, the General Manager replied vide his letter dated 24.05.2013 that no violation in constituting the subsequent arbitral tribunal has been made and informed the petitioner to participate in the hearing. In the meantime, the arbitral tribunal posted arbitration to 21.05.2013 and, on that day, the petitioner filed an application before the arbitral tribunal challenging its constitution; but, the arbitral tribunal, without considering the request of the petitioner, observed that the constitution of the tribunal is in conformity with law and proceeded with the arbitral proceeding. So, the petitioner knocks the door of the Court challenging the constitution of the arbitral tribunal and to terminate its mandate. Hence the petition.

4. The opposite parties filed counter, stating that the petitioner was awarded the contract; but some disputes were raised by him pertaining to the execution of the aforesaid works and, consequently, the dispute was referred to arbitration. It is further averred in the counter that the arbitral tribunal consisted of three members, namely, Sri D.R. Shyamasundar, Shri B.N. Mishra and Shri S.K. Pattanaik, who were appointed by the GM/ECOR vide Ecor/CAR/Arb/CE(Con)/MS/387/1309, dated 31.10.2006. The composition of the arbitral tribunal was due to Railway exigencies, which underwent changes on two occasions i.e. Shri S.K. Pattanaik was replaced by Smt. Sumana Mohanty

and Shri D.R. Shyamsundar was replaced by Shri M. Deouskar; but Shri B.N. Mishra, who is the nominee of the petitioner, remained unchanged and is made the Presiding Arbitrator. It is further averred that according to the terms between the parties, as per the contract and the position of law, the substitution of the Arbitrator by the appointing authority does not warrant interference by the Court, since as per the contract the Arbitrator nominated by the Railway can be replaced in case the Arbitrator resigns or vacates his office or is unwilling to work for any reason whatsoever or dies and the arbitration will proceed with the reference from the stage at which it was left by the previous Arbitrator. It is further averred that the petition of the petitioner does not disclose the circumstances on which the substitution of the Arbitrators has been challenged. In view of the facts and circumstances of the case, the petition deserves to be dismissed being devoid of merit.

5. Learned counsel appearing for the petitioner submitted that the General Manager of Railway while substituting the Arbitrators unilaterally, without giving any opportunity to the petitioner of being heard by choosing the nominee, has acted illegally. There is violation of section 14(1) (b) read with section 15(2) of the Act. He further submitted that Cl.64 of the GCC has not been followed by the General Manager for which constitution of the arbitral tribunal is not in accordance with law. Apart from this, while placing reliance on the decision reported in **AIR 2012 Orissa 9 (*Jarnail Singh Sandhu Vs.***

*National Projects Construction Corpn. Ltd. & Anr.*), learned counsel submitted that the mandate of the arbitral tribunal is required to be terminated as the agreement under Cl.64 is void *ab initio* as it is unconscionable. He, therefore, prayed to terminate the mandate of the arbitral tribunal under section 14 of the Act.

6. Learned counsel appearing for the opposite parties submitted that as per Cl.64(3)(c) of the GCC, the General Manager has acted by substituting the Arbitrators, who have been transferred and the arbitral tribunal should proceed with the reference from the stage at which it was left by the previous Arbitrators. He submitted that there being no change of nominee Arbitrator of the petitioner, there was no occasion for giving information of substitution prior to it. According to him, in the facts and circumstances of the case, the decision reported in **(2006) 6 Supreme Court Cases 204 (Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. and Another)** will apply and as per the provisions under section 15 of the Act, action has been taken by the opposite parties. Hence, he submitted to dismiss the petition.

7. The points for consideration in this case are :

(i) Whether the mandate of the arbitral tribunal presided by Shri B.N. Mishra is required to be terminated in view of the fact that there are frequent substitution of Arbitrators by the General Manager of the East Coast Railway; &

(ii) Whether the circumstances, as laid down in sections 13 & 14 of the Act, have been well proved to terminate the mandate of the arbitral tribunal ?

8. **Point No.(i) :** It is admitted fact that the petitioner was awarded with the work for execution of earth work, minor bridges and other allied works between Km. 142.70 and 145.00 of Tomka-Bansapani Rail Link Project; but, due to non-completion of the project on time, the payment was not made and the petitioner raised the dispute as to the payment of money for the aforesaid work and the said dispute was referred to arbitration. Since these contracts are governed by the GCC and the contract is for more than Rs.5,00,000/-, they are guided by Cl.64(3)(a)(ii) of the said GCC. According to the provisions of Cl.64(3)(a)(ii), two Arbitrators who shall be Gazetted Railway Officers will decide the claims subject to their engagement by the General Manager. Similarly, as per Cl.64(3)(b), the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway to the Contractor, who will be asked to suggest to the General Manager one name out of the list for appointment as the Contractor's nominee. The General Manager while so appointing the Contractor's nominee will also appoint second Arbitrator as Railway's nominee.

9. So, in the instant case, initially on 31.10.2006, there were three Arbitrators, namely, Shri D.R. Shyamsundar, Shri B.N. Mishra & Shri S.K. Pattanaik, all are Railway Officers. It is further admitted fact that Shri B.N. Mishra is the Arbitrator-nominee of the petitioner. It is also revealed from the petition and counter that Shri S.K. Pattanaik was replaced by one Smt.

Sumana Mohanty as the former resigned and joined as Director of Orissa Hydro Power Corporation Ltd. Similarly, it is revealed from the papers submitted by the petitioner that on 08.10.2012 Shri M.K. Deouskar was substituted in place of Shri D.R. Shyamsundar for the reasons best known to the opposite parties. Be that as it may, the nominee of the petitioner, Shri B.N. Mishra, remained intact and he is now the presiding Arbitrator in the arbitral tribunal. After the substitutes joined, the arbitral tribunal issued notice fixing 02.05.2013 for hearing; but there was resistance from the side of the petitioner on various grounds. The annexures to the petition show that the opposite parties have taken a plea that the petitioner did not cooperate by remaining absent from the proceeding. It appears that on 21.05.2013, the petitioner filed a representation before the arbitral tribunal, as there was failure of justice on account of delay and bias and for that the mandate of the tribunal is to be terminated. On 22.05.2013, the arbitral tribunal passed order that it has been properly constituted and adjourned the matter to the next date for hearing. In fact, on 28.03.2014, the arbitral tribunal decided that there is no bias or prejudice. Therefore, the dates have been adjourned from time to time for hearing on the matter. Cl.64(3)(c) of the GCC is depicted in the following manner :

“If the Sole Arbitrator appointed under sub-clause (a)(i) or one or both of the Arbitrators appointed under sub-clause (b) above resigns his appointment / resign their appointments or vacates his office / vacate their offices is / are unable or willing to act for any reason whatsoever or dies / die, the General Manager may appoint a new Arbitrator / Arbitrators to act in his / their place in accordance with the

provisions of Sub-clause (a)(i) or sub-clause (b) above as the case may be. Such Arbitrator / Arbitrators, as the case may be, shall be entitled to proceed with the reference from the stage at which it was left by the previous Arbitrator / Arbitrators.”

10. The aforesaid clause of the agreement squarely shows that the General Manager can substitute the Arbitrators in case of resignation or vacating the office or unwilling to act for any reason or dies. In the instant case, Shri S.K. Pattanaik resigned being appointed in another job and Shri D.R. Shyamsundar was substituted either for his unwilling to act or for his transfer. But, the fact remains that they have been substituted by the opposite parties. In such circumstances, I find that as per the above clause, the Arbitrators shall be entitled to proceed with the reference from the stage at which it was left by the previous Arbitrators.

11. In the case of *Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. and Another* (supra), Their Lordships have observed at para-4 that :

“Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term “rules” in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration”.

With due respect to the said decision, I find that the rules in this case relate to the aforesaid clause of the GCC. So, under the provisions of the Act, the substitution of the Arbitrators shall be made. In the instant case, the same thing has happened,

but keeping intact the nominee Arbitrator of the petitioner i.e. Shri B.N. Mishra.

12. By adverting to the facts of the case, as narrated above, I do not find any reason to hold that the petitioner is required to give further choice of Arbitrators. Since the arbitral proceeding is going on, it is not proved by the petitioner that the mandate of the arbitral tribunal is required to be terminated. Point No.(i) is decided accordingly.

13. **Point No.(ii)**: In the case at hand, the petitioner has not proved any circumstances by which the Arbitrators have withdrawn from their office or they become *de jure* or *de facto* unable to perform their functions. It is only alleged institutional bias by the Arbitrators, but the arbitral tribunal has disposed of this matter by virtue of its order dated 28.03.2014, as annexed to the petition. Since the contract has been made as per the agreement between the parties they have reached and the arbitral proceeding is going on, any clause of sections 13 & 14 of the Act are not proved. But, learned counsel for the petitioner gave emphasis relying upon the decision in the case of ***Jarnail Singh Sandhu Vs. National Projects Construction Corpn. Ltd. & Anr.*** (supra), wherein His Lordship has observed in the following manner :

“Delay for an unreasonable period by the Arbitrator appointed by the opposite party, in conducting the proceedings amounted to withdrawing himself from conducting the proceedings. Added to that, he retired from service in the meantime and imposed certain terms and conditions to conduct the proceedings, which was not acceptable to the petitioner, itself is a ground to uphold the termination

of mandate of Arbitrator”.

14. With due respect to the said decision, I find that if there is delay for an unusual period on the part of sole Arbitrator, it is a ground to uphold the termination of the mandate of the Arbitrator. But, the aforesaid case relates to the appointment of sole Arbitrator. Here is a case which relates to multiple Arbitrators to constitute the arbitral tribunal. Even if there is delay, nevertheless the matter has already been taken up and is going ahead. Therefore, the question of institutional bias because of delay is not well proved by the petitioner. On the other hand, the petitioner has failed to prove the grounds for termination of the mandate of the arbitral tribunal being presided by Shri B.N. Mishra. Hence ordered :

### **O R D E R**

The petition under section 14 of the Arbitration and Conciliation Act, 1996 being devoid of merit stands dismissed, but in the circumstances without cost. The arbitral tribunal would do well to pass the award expeditiously and both parties are directed to cooperate for early disposal of the matter.

**District Judge, Khurda  
at Bhubaneswar.**

11.07.2014.

Dictated, corrected by me and pronounced in the open Court this day the 11<sup>th</sup> July, 2014.

**District Judge, Khurda  
at Bhubaneswar.**

11.07.2014.



