

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

Present :

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

*Dated, Bhubaneswar the 31st Jan.,
2015.*

Arb. (P) No.221 of 2011.

(Under Section 34(2) read with sections 12, 13, 14 & 15
of the Arbitration and Conciliation Act, 1996)

Sri Dhanurdhar Champatiray, aged about 50 years, Son of
Late Brajasundar Champatiray, Contractor, LIG-30, Brit
Colony, Nayapalli, Unit-VIII, Bhubaneswar - 751 012,
Dist. - Khurda.

... **Petitioner.**

-V e r s u s-

1. Bharat Sanchar Nigam Limited, a Government of India Enterprises, represented through its Executive Engineer, Civil Division, Door Sanchar Bhawan, 3rd Floor, Unit-IX, Bhubaneswar - 751 022.
2. Chief Engineer (C), Bharat Sanchar Nigam Limited, Civil Orissa Zone, Door Sanchar Bhawan, 3rd Floor, Unit-IX, Bhubaneswar - 751 022.
3. Shri Rabinarayan Mishra, Retired Superintending Engineer (Civil), PHD, Government of Orissa, Plot No.140-A, Mahavir Nagar, Stage-V, Jharpada, Bhubaneswar - 751 006, Dist. - Khurda.

... **Opp. Parties.**

Counsel :

For Petitioner -- Shri S.K. Sangneria & Associates.
For O.P. No.1 -- Shri S.K. Pattanaik & Associates.
For O.P. No.2 -- None (Set Ex parte).
For O.P. No.3 -- Shri B.K. Panda.

Date of conclusion of arguments : 02.01.2015.

Date of judgment : 31.01.2015.

J U D G M E N T

This is an application under section 34(2) of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the Act') read with sections 12, 13, 14 and 15 of the said Act for setting aside the award of opposite party No.3.

2. The factual matrix leading to the case of the petitioner is that the petitioner being a contractor entered into an agreement with opposite party No.1 for construction of "V/e to 8 nos. Type-II & 6 nos. Type-IV Telecom Staff Quarters at CITC Compound, Vani Vihar, Bhubaneswar (i/c internal w/s & s/i)" vide contract Agreement No.558/TCDB of 1990-91 for contract value of Rs.20,94,847.50 paise with the date of commencement from 27.02.1992. It is alleged, inter alia, that during execution, there was deviation in respect of the execution of the work and as per order and direction of opposite party No.1, the petitioner executed extra items of work within the periphery of the agreement and arising out of and in relation

to the contract agreement. Due to failure to provide lay out in time, decision relating to the drawing and supply of departmental materials, non-payment of the running account bills in terms of the Agreement and execution of additional and extra items of work, opposite party No.1 failed in their contractual obligation although the work was completed by the petitioner in all respects within the extended period. Since there was no final settlement of account by opposite party No.1, the petitioner invoked arbitration clause and approached opposite party No.2 for appointment of an Arbitrator for adjudication and settlement of the disputes. Since opposite party No.2 failed to appoint Arbitrator within time, the petitioner approached Hon'ble the Chief Justice of Orissa High Court in an application under section 11 of the Act and Hon'ble the Chief Justice appointed Hon'ble Smt. Justice A.K. Padhi, former Judge of Orissa High Court, as the sole Arbitrator in ARBP No.28 of 2005. The appointment of Hon'ble Smt. Justice A.K. Padhi was challenged by opposite party Nos.1 & 2 before the Hon'ble Supreme Court and after hearing, the Hon'ble Apex Court remanded the matter to Hon'ble the Chief Justice of Orissa High Court for appointment of a fresh Arbitrator. In pursuance of the order of the Hon'ble Supreme Court, Hon'ble the Chief Justice of Orissa High Court appointed opposite party No.3

from the list submitted by opposite party No.1 as the sole Arbitrator to adjudicate the claims and disputes between the parties.

3. Opposite party No.3, after receipt of certified copy of the order of appointment from the petitioner, sent notice to both parties to appear before him for preliminary hearing on 05.01.2011. On 05.01.2011, the petitioner was present through his Advocate and opposite party No.1 was also present. On that day, Advocate for the petitioner sought for time for filing the statement of claim and the learned Arbitrator fixed to have discussions on some points of arbitration on the next day to be held on 26.02.2011. On 26.02.2011, the petitioner sought for time to file detailed statement of claims and on that day no procedure was settled; but the venue of arbitration was decided to be held at the residence of opposite party No.3. On 05.04.2011, the petitioner filed his statement of claims and documents and opposite party No.1 sought for time before opposite party No.3. The learned Arbitrator on that day without any settlement of procedure for proceeding and hearing, suo motu directed both parties to submit the analysis on which tender was decided, which is totally irrelevant and unnecessary as per the petitioner. On the next date i.e. on 10.05.2011, opposite party No.1 filed their reply to the claim statement of

the claimant and the petitioner was permitted to file reply to the reply of opposite party No.1 on 31.05.2011. The learned Arbitrator suo motu changed the programme of field visit to different dates i.e. 21.05.2011, 01.06.2011, 02.06.2011 & 03.06.2011. On 21.05.2011, the petitioner attended the inspection site at Bhubaneswar; but the learned Arbitrator sent letter dated 27.05.2011 to the petitioner regarding programme of hearing though the pleadings were not completed by then. On 31.05.2011, the petitioner filed four petitions vide Annexures 7, 8, 9 & 10. In one petition, the petitioner requested the learned Arbitrator to cancel the inspection of site fixed to 01.06.2011 & 02.06.2011, since the claimant had gone to Calcutta to attend his daughter and son-in-law. In the second petition, the petitioner prayed to settle the procedure under section 19 of the Act before hearing. In the third petition, the petitioner requested the learned Arbitrator to frame and settle the issues. In the fourth petition, requested was made by the petitioner to the learned Arbitrator to direct opposite party No.1 to produce the relevant documents, which were in possession of the opposite parties. The learned Arbitrator, without passing any order on those four petitions, proceeded for inspection of site at Bhanjanagar & Aska on 01.06.2011 & 02.06.2011 respectively. The petitioner alleged that in his absence, the learned

Arbitrator inspected the site and accepted the hospitality of opposite party No.1 and his subordinate officials. It is also alleged that on 16.07.2011, the petitioner filed an application stating that he has no faith on the Arbitrator when the learned Arbitrator proceeded to the inspection site in his absence and did not pass any order on his petitions. Finally, the petitioner filed the petition raising various grounds; but the learned Arbitrator passed the order on 03.08.2011, which is a peculiar one. The dates were arbitrarily changed by the learned Arbitrator. On 16.08.2011, the petitioner intimated the learned Arbitrator that he has no faith on him. Thereafter, the learned Arbitrator went ahead with the hearing of the case in spite of time being sought for by the petitioner and finally on 27.08.2011, the learned Arbitrator dismissed the petition and gave the nil award and also subsequently disposed of four other claims of the petitioner. It is the case of the petitioner that the learned Arbitrator has not given him reasonable opportunity to present his case by not settling the procedure under section 19 of the Act, nor gave equal opportunity to him under section 18 of the Act, nor framed the issues. The learned Arbitrator without following any sort of procedure has exposed his mind of biasness and finally passed the nil award to the petitioner. So, the petitioner challenged the award of the learned Arbitrator on

various grounds praying to set aside the award and appoint fresh Arbitrator.

4. Opposite party No.2 is set ex parte. Opposite party No.1 filed objection refuting the allegations made in the petition. As per the programme of the learned Arbitrator, both parties attended the spot visit. There was no arrangement made by opposite party No.1 for the hospitality of opposite party No.3 and the learned Arbitrator (opposite party No.3) fixed up the case from time to time, but the claimant did not submit rejoinder and went on praying for time frequently. According to this opposite party, opposite party No.3 has proceeded as per rule and there is no reason to think that he is biased against the claimant. On the other hand, due to non-cooperation of the petitioner, the sole Arbitrator having no option dismissed the claim and passed the nil award. There is no ground for setting aside the award as per section 34(2) of the Act. A petition under sections 12 & 13 of the Act was filed by the petitioner, but the arbitral tribunal rejected the same and continued to pass the arbitral award. So, the present petition filed by the petitioner bears no merit and the same should be rejected.

5. Opposite party No.3 filed counter almost on similar footing with that of opposite party No.1 and refuted all the allegations made against him. It is his case that due to non-

cooperation of the petitioner, opposite party No.3 had no other alternative than to pass the award. On the other hand, he prayed to direct the petitioner to pay the amount towards his fees, which is pending payment against the petitioner.

6. Basing on the pleadings of both parties, the following points emerge for determination :

- i) Whether opposite party No.3 has shown biasness against the petitioner and passed the nil award ?
- ii) Whether the arbitral award is otherwise bad in law to be aside ?

Point No.(i) :

7. Perused the LCR and the impugned order. On going through the LCR, it appears that Arbitration Case No.11, which relates to the present case, was taken up by the learned Arbitrator on 05.01.2011. On that day, both parties were present and there was some discussion; but the present petitioner submitted before him that they have filed petition before the Hon'ble High Court for change of Arbitrator. But, the matter was adjourned to 26.02.2011 for finalization of all points in his letter dated 29.12.2010. On 26.02.2011, in presence of both parties, place of hearing and fees of Arbitrator were settled. Time was granted to 05.04.2011 for submission of detailed claim by the present petitioner. On 05.04.2011, the

present petitioner submitted detailed claims; but the respondent took time to submit reply. Respondent was allowed to submit reply on 10.05.2011 and field visit was fixed to 14.05.2011 & 15.05.2011 and it was instructed to the respondent to arrange the field visit. On 10.05.2011, in presence of both parties, field visit programme was fixed as hereunder :

Bhubaneswar	:	21.05.2011.
Bhanjanagar	:	01.06.2011.
Aska	:	02.06.2011.
Jankia	:	03.06.2011.

8. On 21.05.2011, site at Vani Vihar was inspected by the learned Arbitrator in presence of both parties. On 31.05.2011, a sitting was held by the learned Arbitrator. On that day, the claimant, who is the present petitioner, filed a petition under section 19 of the Act to settle the procedure for arbitration and to call for the documents from the respondents. There was discussion about payment of fees of Arbitrator on that day. The matter was adjourned to 16.07.2011 for further hearing. On 01.06.2011, field visit was made by the learned Arbitrator. But, on that day, neither the petitioner nor his Advocate was present. Nothing is mentioned in the order-sheet to indicate how the learned Arbitrator proceeded to visit the sites without giving information to learned counsel for the

petitioner inasmuch as although the learned Arbitrator should maintain all propriety, but that does not mean that leaving aside one party he will go to the other party for field visit. On 02.06.2011, field visit was made in the absence of the claimant or his Advocate, but the contractor was present. On 03.06.2011, field visit was done and on that day, the petitioner himself and the concerned officer of the respondent were present. Discussion was made about the site and construction made thereon, but the matter was adjourned to 19.07.2011. On 19.07.2011, the matter was again adjourned to 25.07.2011 for hearing in presence of both parties. On 25.07.2011, the claimant-petitioner filed another application and the respondent took time. The matter was adjourned to 28.07.2011 and on that day, the learned Arbitrator heard arguments for withdrawal of Arbitrator from the case; but no order was passed and the matter was adjourned to 03.08.2011 for delivery of orders. On 03.08.2011, the learned Arbitrator observed that the petitioner being the Special Class Contractor even if did not remain present at the time of field visit, but he could have been represented by a technical person on 01.06.2011 & 02.06.2011. It appears from the order-sheet that on 31.05.2011, Advocate for the claimant had informed not to conduct the field visit on 01.06.2011 & 02.06.2011, but due to short notice, field visit was

not deferred. When the arbitral proceeding was conducted by the arbitral tribunal, it was for the arbitral tribunal to ensure the presence of both parties and short notice for deferring field visit cannot be a ground to go ahead with field visit. From the order-sheet, it appears that on 03.08.2011 the ground of accepting the hospitality from the respondent on 01.06.2011 & 02.06.2011 by the learned Arbitrator was denied and rather the learned Arbitrator has observed that the allegation is outrightly a contempt. On the same day, he took Arbitration Petition No.11 for consideration and rejected the allegations made against him by the petitioner having arrayed the same as baseless, lie, false and motivated. On that day, request of the claimant, who is the petitioner, to the learned Arbitrator to resign or relinquish was rejected. The matter was adjourned to 16.08.2011 for further orders. On 16.08.2011, claimant's Advocate submitted an application stating that they have filed a case in the Court of District Judge where orders are awaited. The matter was adjourned to 17.08.2011. But, on 17.08.2011, claimant's Advocate did not appear and the matter was adjourned to 18.08.2011 for hearing. On 18.08.2011, ARBP No.11 was dismissed with nil award. On 23.08.2011, ARBP No.12 was rejected. On 26.08.2011, ARBP No.18 was dismissed with nil award. On the same day, ARBP No.28 was posted to

27.08.2011 for hearing. On 27.08.2011, the claimant was absent on the ground of illness. The Advocate representing the claimant filed a time petition to allow adjournment for ten days, but the request for adjournment was refused by the learned Arbitrator with the only reason that the claimant being a Special Class Contractor was supposed to keep technical staff to proceed with the case. On the same day, he heard the respondent with the records; but again observed in para-3 that in the absence of material proof produced by the claimant the claim is liable to be rejected with nil award. There is no discussion basing on which materials or reasons, conclusion is arrived at to pass the nil award.

9. Their Lordships in the case of *M/s. Anand Brothers P. Ltd. Vs. Union of India and others* reported in **AIR 2015 S.C. 125** have been pleased to observe at para-14 that :

“It is trite that a finding can be both a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the Arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a “finding” no matter the conclusion or the reasons in support of the same may themselves be erroneous

on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties.....”.

10. Their Lordships in the said decision have also been pleased to observe at para-9 that :

“Reference may also be made to The Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act of 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of Courts in arbitration proceedings. Section 31(3) of the said Act obliges the arbitral tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties.....”.

11. With due respect to the above decision, I find that in the instant case, no reasons whatsoever has been assigned by opposite party No.3, which prompted him to reach a conclusion of rejecting the claim with nil award. So, the award passed by the learned Arbitrator cannot be said to be awarded in the eye of law.

12. It appears from the above proceeding that the learned Arbitrator has not disposed of the petition filed by the petitioner under section 19 of the Act to find out the procedure

or modalities for the arbitral proceeding. Further, it appears that the learned Arbitrator has made field visit in the absence of the claimant in spite of request to defer the same just on the previous evening of field visit. Since it is an arbitral proceeding, the learned Arbitrator ought to have taken both parties into confidence. Not only this, but also when there is petition filed by the petitioner disclosing the fact that they have already moved the Hon'ble High Court for appointment of Arbitrator, the learned Arbitrator should not have hastily gone ahead to dispose of the matter by threatening the petitioner that the allegation is contemptuous. When there is allegation made against the learned Arbitrator, it is the Arbitrator who is required to recuse himself from the proceeding. When he did not do that and passed nil award on 27.08.2011 without any sort of discussion on the merit of the case, the biasness is palpably available on the face of the materials on record. The manner in which the learned Arbitrator proceeded is perhaps with some sort of rivalry with the petitioner because of the petition filed challenging the conduct of the learned Arbitrator. An Arbitrator is not supposed to take the proceeding to personify inasmuch as he is also a Judge to decide the claims and it must be only done with the consent of both parties. So, the petitioner has proved the biasness of the learned Arbitrator in this case.

13. Their Lordships in the case of *State of Arunachal Pradesh Vs. Subhash Projects & Marketing Ltd. and Anr.* reported in **2007(1) Arb. LR 564 (Gauhati) (DB)** have been pleased to observe that :

“.....Independence and impartiality of an arbitrator being inseverable attributes to vest him with the legal authority to adjudicate the difference between the parties in an arbitration exercise, he would be *de jure* disqualified from discharging his functions once he renounces the above qualities. This according to court is the mandate of Sections 12, 13, 14 which form a complete scheme with the underlying objective of securing the sanctity and probity of an arbitration proceeding”.

14. With due respect to the said decision, I find that in the instant case, impartiality and independence of the learned Arbitrator has not been attributed from the conduct of the proceeding.

15. The learned Arbitrator has attended the Court being party to this proceeding. It appears that he vehemently opposed the submission of the petitioner and only relied on his order-sheet filed before this Court. On the other hand, learned counsel appearing for opposite party No.1 simply submitted that the learned Arbitrator has done his job whereas the petitioner has not cooperated. But, he could show nothing from the LCR about non-cooperation of the petitioner before submission of objection on the point of settlement.

16. In view of the aforesaid analysis, I find that the circumstances, as proved by the petitioner, have given rise to justifiable doubts as to the independence or impartiality of the learned Arbitrator. On the other hand, the petitioner has proved that there is lack of impartiality and independence with the learned Arbitrator to adjudicate the difference between the parties in an arbitration exercise. Point No.(i) is answered accordingly.

Point No.(ii) :

17. When point No.(i) is answered to the effect that there is biasness on the part of the learned Arbitrator towards the petitioner, that is a ground to challenge the appointment of the learned Arbitrator under section 12 of the Act and that petition has been rejected under section 12(3) of the said Act. It is revealed that appointment of Arbitrator can be challenged on the ground of provisions under section 12(3) of the Act, but in spite of that the learned Arbitrator can go ahead to pass the award and decide the challenge. Sub-section (5) of section 13 of the Act also enshrines that where an arbitral award has been passed in spite of challenge, that can be a ground also to challenge the award under section 34 of the Act. In the instant case, appointment of fresh Arbitrator questioning impartiality and independence of opposite party No.3 has been raised and

cannot interfere with the merit of the award, but can interfere with the procedure adopted by the learned Arbitrator. In the case at hand, due legal procedure has been neither followed nor decided by the learned Arbitrator inasmuch as there is lack of impartiality and independence on his part and without assigning any reason required under the law has passed nil award and, as such, the award passed by him is irrational and illegal. Therefore, the award being not passed in consonance with the provisions of law should be set aside.

19. While the award is to be set aside as per section 34 read with section 13(5) of the Act, under section 13(6) the Court may decide as to whether the Arbitrator, who is challenged, is entitled to any fees or not. It appears from the proceeding of the learned Arbitrator that parties have agreed to the terms and conditions of the fees of Arbitrator, as decided on 26.02.2011, and from the LCR it appears that the learned Arbitrator is entitled to fees towards share of the petitioner. Hence ordered :

O R D E R

The arbitration petition is allowed on contest and the impugned award dated 27.08.2011 passed by the learned sole Arbitrator is hereby set aside under section 34(2) of the Arbitration and Conciliation Act, 1996 read with section 13(5)

of the said Act. In terms of section 13(6) of the Act, the petitioner is directed to pay fees of the learned Arbitrator towards his share as requested by the learned Arbitrator. In order to settle their claims, both parties are at liberty to approach the Hon'ble High Court under the Act for appointment of a new Arbitrator, if so advised. No cost.

**District Judge, Khurda
at Bhubaneswar.**

31.01.2015.

Dictated, corrected by me and pronounced in the open Court this day the 31st January, 2015.

**District Judge, Khurda
at Bhubaneswar.**

31.01.2015.