

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.8 Of 2009
(Through hybrid mode)**

M/S Nalina Kumar Ray

....

Appellant

Ms. Deepali Mohapatra, Advocate

-versus-

***M/S Steel Authority of India
Limited, Rourkela and another***

....

Respondents

Mr. Niroj Kumar Sahu, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
12.04.2022**

Order No.

19.

1. Ms. Mohapatra, learned advocate appears on behalf of applicant and submits, her client was claimant in the reference. Upon adjudication on merits of the claims made, there was award dated 7th February, 2004. It will appear from the award, paragraph 23 that by additional note on argument dated 10th December, 2003 filed on behalf of respondents, in the reference and herein, there was allegation that the arbitrator was related to her client. The arbitrator rejected the allegation. Respondents carried the award in challenge made to the Court below. By order dated 17th January, 2009 said Court, after finding in favour of her client on the merits, set aside the award on erroneous appreciation of compliance of procedural safeguards

provided by section 12 in Arbitration and Conciliation Act, 1996 (before amendment). She submits, her client is not related to the arbitrator. Her client filed an affidavit to that effect before the tribunal.

2. Mr. Sahu, learned advocate appears on behalf of respondents and submits, on his client becoming aware from a reliable source that there was relation between the arbitrator and claimant, it was brought to notice of the tribunal. There was no disclosure made by the arbitrator as mandated by section 12. On the information conveyed to the tribunal, it purported to act on the affidavit filed by claimant and rejected the contention out of hand. It was a clear case of violating the procedural safeguards, which are mandatory for purpose of fair adjudication by chosen forum. Impugned order bears these reasons. As such, the award was liable to be and correctly set aside by the Court below. There should not be interference.

3. He relies on several judgments.

i) **Nihal Chand vs. Shanti Lal** reported in **AIR 1935 Oudh 349**, wherein a Division Bench took the view that a party on becoming aware of the relationship, though did not refuse to have the arbitration carried out, the objection could not be seen as waiver on his part. He submits, his client is better placed inasmuch as the relationship was

discovered after closure of arguments and conveyed to the tribunal by the additional note on argument filed by his client.

ii) **Satyendra Kumar Vs. Hind Constructions Ltd.** reported in **AIR 1952 Bombay 227**, paragraph 4, wherein a Division Bench took the view that position of arbitrator is different from that of a Judge. If a party goes to a Court, he has got to submit to decision of the judge. He has no choice in the appointment of the Judge. But when parties go to a domestic forum and want their matters to be determined by arbitration, they have every choice as to the person whom they should select as their arbitrator and, therefore, it is clear that highest faith should be shown by the arbitrator. It also follows that the arbitrator must disclose to the parties all facts, which are likely or calculated to bias him in any way in favour of one or the other party.

iii) **Union of India Vs. Tolani Bulk Carriers Limited** available at **(2001) SCC On Line Bom 1027**, wherein a learned single Judge quoted paragraphs 11 to 14 from judgment of the Supreme Court in **Ranjit Thakur Vs. Union of India**, reported in **(1987) 4 SCC 611**.

4. Mr. Sahu submits, the Supreme Court declared that procedural safeguards require mandatory compliance. Section 12, before amendment, also required mandatory compliance of the procedural

requirement provision. He submits further, though his client has not filed cross objection, the award on the claims is otherwise against public policy and thereby also liable to be set aside.

5. Court ascertained that the allegation of relationship was asserted by respondents on additional note on argument dated 10th December, 2003. The arbitrator, in the award (paragraph 23) said that on the complaint found to be vague, as not disclosing identity of the source/sources nor when the information was obtained, required a hearing and directed respondents to appear on 21st December, 2003, to clarify and substantiate the point raised. This was directed by order dated 16th December, 2003, duly served on respondents' learned advocate. Respondents were not represented by the learned advocate on 21st December, 2003. On these facts there is no dispute raised in this Court.

6. Perusal of paragraph 23 in the award makes two things clear. They will appear from last two sentences of said paragraph.

“The allegation about my relationship with claimant is a blatant lie. The claimant has filed an affidavit to show that he is not in any way related to me. I reject this allegation as baseless.”

First is that the arbitrator says that the allegation of relationship is a

blatant lie. Second is claimant had filed affidavit to show that he is not in any way related to the arbitrator. The allegation being relationship between the arbitrator and claimant, by those two sentences in paragraph 23 of the award, both parties to the alleged relationship, denied it. This, in backdrop of respondents' omission to give particulars regarding, at least the source, to establish the relationship, if from paternal or maternal side as could not be gone into by the tribunal for there being some light thrown on the aspect in the award.

7. So far as procedural safeguards requiring mandatory compliance is concerned, section 12 stood before amendment as reproduced below.

“12. Grounds for challenge—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by

the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made”.

8. As aforesaid, it does appear that the allegation was made without any particulars about the relationship nor of the reliable source. Court cannot speculate as to whether the reliable source was a common relative or why identity of the reliable source, respondents chose not to disclose. That brings us to a situation where Court cannot say that there were circumstances, based on the alleged relationship (non existent), to give rise to justifiable doubts as to independence or impartiality of the arbitrator. There were no circumstances nor anything for the arbitrator to disclose.

9. The learned judge, also by paragraph 23 in impugned order, found fault with the arbitrator in not having disclosed by writing immediately before commencement of the arbitral proceeding, the circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Said Court omitted to thereafter point out what were the circumstances likely to give rise to justifiable doubts, existing either at the commencement of the arbitral proceeding, during it or when the award was made. Impugned order

does not say on the allegation of relationship, whether was one that could be relied upon.

10. It can be gainsaid that **Nihal Chand** (supra) was precursor view of provisions in section 12 and amendments thereto. So also can be said about view expressed in **Satyendra Kumar** (supra). Regarding mandatory compliance of procedural safeguards, following the declaration of law in **Ranjit Thakur** (supra), same have been applied in this appeal and views expressed as above.

11. Regarding submissions of Mr. Sahu on claims awarded, Court is not inclined to go into them as no cross-objection was filed.

12. Impugned order is set aside in appeal. The award is restored.

13. The appeal is disposed of.

(*Arindam Sinha*)
Judge

Prasant