

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.14 Of 2010
(Through hybrid mode)**

***The New India Assurance Co. Ltd. Appellants
and others***

Mr. S.S. Rao, Advocate
Mr. S.K. Sarangi, Advocate

-versus-

***M/s. Soosree Plastic Industries Pvt. Respondent
Ltd.***

Mr. Milan Kanungo, Senior Advocate
Mr. Soumya Ranjan Mohanty, Advocate

CORAM: JUSTICE ARINDAM SINHA

**Order
No.**

**ORDER
26.04.2022**

44. 1. Mr. Rao, learned advocate appears on behalf of appellants and submits, by impugned judgment dated 27th February, 2010 his clients' challenge to the award was rejected. He refers to record of submissions in order dated 13th January, 2017, made by coordinate Bench. Three points were noted. Firstly, appointment of the arbitrator was itself illegal. Secondly, the claim was barred by limitation and thirdly, amount awarded is exorbitantly excessive. Court observes that challenge to the award may not be sustained on the third point, on exorbitance. That would be matter of merits and cannot be gone into under section 34, Arbitration and Conciliation Act, 1996.

2. On the first point Mr. Rao submits, condition no.13 in the contract was the arbitration agreement clause. Appointment of sole arbitrator was to be in writing by the parties, failing which the party invoking arbitration would appoint one arbitrator and the other party, the other. The two appointees were to appoint the third arbitrator/umpire. This was not done. Instead, the reference was on appointment of arbitrator, in the manner ruled by the arbitrator on his jurisdiction, saying that agreement of parties was recorded by the Consumer Forum, as a consequence of which the consumer complaint proceeding was dropped.

3. The arbitration clause in the insurance policy was extracted and supplied to Court in a note filed by appellants. The clause is reproduced below.

“If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitrator, comprising of the two arbitrators one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitrations shall be conducted under and in

accordance with the provisions of Arbitration and Conciliation Act, 1996.”

4. Mr. Rao reiterates, there was arbitration agreement between the parties regarding appointment of arbitrator. The arbitrator was not appointed in accordance therewith. Sub-clause (v) under clause (a) in sub-section (2) of section 34, Arbitration and Conciliation Act, 1996 provides for setting aside of the award on ground, inter alia, composition of the arbitral Tribunal was not in accordance with the agreement of the parties. He submits, respondent chose to go to the forum with its cause. On the respondent abandoning the same in the forum, the complaint was disposed of as dropped, on being withdrawn. Appointment of arbitrator through the forum was not the agreement of the parties. As such, the agreed procedure for appointment of arbitrator was not resorted to in the appointment of the sole arbitrator. On that ground alone the award should be set aside.

5. Without prejudice to his above submissions Mr. Rao submits, even if it is accepted that his client participated in the making of aforesaid consent order dated 29th April, 2003, the next step for respondent, to have appointment of arbitrator, ought to have been by writing executed both by it and his client. The agreed procedure required the same. Not having done so or if respondent had apprehension that even after aforesaid consent order, his client would

not join in appointment of the arbitrator, respondent ought to have moved the Chief Justice by request for appointment of arbitrator under sub-section (6) in section 11. The Consumer Forum did not have jurisdiction, authority or power to appoint arbitrator. In every way looked at, the appointment offends both agreed and statutory procedures provided for the purpose.

6. He relies on judgment of the Supreme Court in **Jagdish Chander v. Ramesh Chander** reported in (2007) 5 SCC 719, clause (iv) under paragraph-8, reproduced below.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration

agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.”

He submits, purported consent order of the forum can at best be said to be an agreement to abide by the agreed procedure.

7. He submits further, claims of respondent were also barred by agreement term under clause 6(ii) of the policy. The clause is reproduced below.

“In no case whatsoever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss of damage unless the claim is the subject of pending action of arbitration it being expressly agreed and declared that if the company shall disclaim the liability for any claim hereunder and such claim shall not within 12 calendar months from the date of disclaimer have been made the subject matter of a suit in a Court of law then the claim shall for all purpose be deemed

to have been abandoned and shall not thereafter be recoverable hereunder.”

His client, by letter dated 19th December, 2001 finally settled the claim and respondent, within 12 calendar months thereafter, did not make claim nor was arbitration reference commenced. The term, binding the parties in the situation, was that no claim whatsoever would be entertained after lapse of 12 calendar months. The arbitrator could not have gone beyond four corners of this condition, to award. As such the award is in conflict with mandate in section 28 and therefore against public policy and was liable to and should have been set aside under section 34.

8. Mr. Kanungo, learned senior advocate appears on behalf of respondent and draws attention to the consumer complaint to submit, it was made on deficiency of service, occasioned by appellants not having appointed arbitrator in terms of arbitration agreement in the policy. He refers to the prayers, reproduced below.

“In the light of the above facts and circumstances, the petitioner humbly prays that your Honour be graciously pleased to direct the opposite parties that.

(a) A sum of Rs.3,00,000/- be paid to the petitioner by opposite parties for deficiency in service as contemplated under (i), (ii), (iii) and (iv);

(b) The opposite parties be directed to pay

Rs.2,40,584/- to the petitioner which the petitioner is to accept UNDER PROTEST and WITHOUT PREJUDICE to its rights;

(c) The opposite-parties be directed to pay Rs.2,70,440/- to the petitioner-company alongwith interest @ 25% per annum;

(d) This Hon'ble Forum may direct the difference regarding quantum to be paid to petitioner under the insurance policy to Hon'ble Justice S.K. Mohanty for adjudication of the same;"

He submits, on 19th December, 2001 appellants had made purported offer of settling the claim at Rs.2,40,584/-. His client disputed the settlement and immediately by letter dated 26th December, 2001 nominated arbitrator for reference of the disputes. There was no response from appellants. In the circumstances, his client lodged Consumer Dispute Case no.28 of 2002 on additional claim of deficiency in service regarding appointment of arbitrator. He lays emphasis on the complaint, as directed at deficiency of service in that aspect, evidenced from prayers made therein. Before the forum, appellants indicated willingness to refer the disputes to arbitration. Their only assertion was there should be change of personnel, its suggested retired Judge, to be arbitrator. Accordingly, on 29th April, 2003 the consumer case was disposed of. Text of the order is reproduced below.

“Heard Mr. Kanungo and Mr. Parija. Both parties agreed that the matter may be decided by the Arbitrator Justice P.K. Mohanty, a Retired Judge of the Orissa High Court. Since the parties want to go in for arbitration, we have no reason to retain the case with us. Accordingly the matter is dropped as withdrawn.”

9. He submits, the arbitrator and thereafter the Court below relied on judgment of the Supreme Court in **B.S.N.L. v. Subash Chandra Kanchan** reported in (2006) 8 SCC 279. He relies on paragraphs 12 and 16 (Manupatra print). The paragraphs are reproduced below.

“12. The contract entered into by and between the parties was subject to the provisions contained in the 1996 Act.

Although in terms of the arbitration agreement contained in Clause 25 of the contract, ordinarily the arbitrator appointed by the Managing Director should act as arbitral tribunal in respect of the disputes and differences between the parties to the contract; in this case, the Appellants must be held to have waived their right as they consented to the appointment of Shri Bhattacharya as an arbitral tribunal. The High Court having appointed the arbitral tribunal on consent, it is, in our opinion, not open to the Appellants now to contend that no such concession was made.

“16. Furthermore, in terms of Order III, Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the Appellant in its written statement before the High Court the learned Advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.

He submits, there was clear waiver on part of appellants regarding agreed procedure of both parties joining in writing to appoint sole arbitrator.

10. On contention of his client’s claim having stood extinguished by the policy term, he reiterates his reliance on aforesaid sequence of events to show that the dispute arose on purported settlement made by appellants and his client had immediately sought reference, which culminated in appointment of the arbitrator on aforesaid concession order dated 29th April, 2003 of the forum.

11. Regarding the additional submission made on behalf of appellants Mr. Kanungo submits, this contention of agreed procedure having failed and therefore, appointment was to be made under subsection (6) in section 11 was never urged, neither before the arbitrator in the section 16 challenge nor before the Court below. It is for the first time in appeal, this contention. It is to be rejected. He submits further, the agreement by said consent order is an agreement, further to the agreed procedure and thereafter acted upon. The Consumer Forum did not itself appoint the arbitrator. It only recorded the parties' agreement.

12. The arbitration agreement between the parties required them to appoint sole arbitrator in writing. If they could not agree upon a single arbitrator within 30 days on any party invoking, there were to be two arbitrators, one to be appointed by each of the parties and thereafter the appointees to appoint third arbitrator, was agreed procedure. The sequence of events show that the claim was made as arising out of damage caused by super cyclone. On 19th December, 2001, appellants sought to settle the claim at Rs.2,40,584/-. This cannot be seen as a repudiation, to attract the extinguishing of claims clause. Nevertheless, soon after on 26th December, 2001, respondent nominated the retired Judge, in terms of the arbitration agreement. In the situation, appellants had option of either accepting respondent's

nominee as arbitrator, to enter into the disputes or appoint another person as its nominee arbitrator. Appellants did not respond to the nomination. Above omission on part of appellants was claimed by respondent to be deficiency in service, for approaching the forum. In the forum there was order dated 29th April, 2003, made on consent, text of which stands reproduced above.

13. Appellants' contention is that the claim before the forum stood withdrawn. For ascertaining scope of the complaint, reference to prayers made therein will show that a sum of Rs.3,00,000/- was claimed by respondent for deficiency of service. Further direction prayed for was for appellants to pay Rs.2,40,584/-, which respondent would accept under protest and still further direction regarding quantum to be paid under the insurance policy, to be referred to respondent's nominated arbitrator for adjudication. There was an yet further prayer for direction upon appellants to pay Rs.2,70,440/- on account of refund of premium paid for subsequent year, since respondent wanted to insure itself with some other insurance company. It appears from said consent order dated 29th April, 2003 that respondent gave up prayers (a), (b) and (c), to only take direction on prayer (d). Consideration for giving up the prayers appears to be appellants' consent to refer the disputes to another retired Judge, suggested by it.

14. From above analysis it is clear that the extinction clause cannot be made applicable to the facts and circumstances. As aforesaid there was no repudiation. On top of that there was omission on part of appellants to act in terms of agreed procedure in the agreement regarding adjudication of disputes by arbitration. Thirdly, in consideration of respondent forgoing prayers (a), (b) and (c), appellants imposed their nominee as sole arbitrator, for the disputes to be referred. In the premises, it cannot be said that agreed procedure was not followed in appointment of the tribunal.

15. Jagdish Chander (supra) is clearly not applicable inasmuch as policy clause 13 providing for arbitration between parties is not an agreement to agree to refer. It is a clear agreement regarding procedure for appointment of sole arbitrator or panel of arbitrators consisting of three members. The consent order must be seen as the writing of the parties, by which they appointed the sole arbitrator. Otherwise, **B.S.N.L.** (supra) clearly applies in fixing appellants of having waived their right to contend that appointment of sole arbitrator could only be by writing of both the parties. Appellants, as aforesaid, themselves did not adhere to the agreed procedure, specific enforcement of which is main plank of their challenge to the award. Not having indicated willingness to submit to the reference of the arbitrator nominated by respondent, appellants also did not

signify their dissent by appointing their own nominee. Appellants were in breach of the procedure for appointment. This stood remedied by appellants in conceding to said order dated 29th April, 2003, made by the forum, in the circumstances aforesaid.

16. The additional point taken by appellants, regarding authority of the forum to have appointed arbitrator, has been successfully met by respondent in contending that the forum simply recorded agreement between the parties to refer disputes to the arbitrator nominated by appellants. Disputes referred were, as aforesaid, described in prayer (d) made before the forum. So far as request under sub-section (6) of section 11 is concerned, keeping in mind respondent's submission that this is a belated contention, appellants may have not accepted the reference to arbitration by record in said consent order and instead of submitting to the reference, could have themselves made request under sub-section (6) of section 11 on contention that agreed procedure for appointment had failed. This appellants did not do. It, therefore, can be lawfully presumed that appellants consciously conceded to referring disputes to the person nominated by themselves as arbitrator. There is nothing in aforesaid consent order of the forum, which goes to show that the forum exercised either jurisdiction, authority or power to appoint the arbitrator.

17. Court finds that challenge of appellants to the award on the two grounds, firstly, on agreed procedure having been breached or not followed in appointment of arbitrator and secondly, the extinction clause having operated to extinguish claims of respondent, are grounds without merit. On the third ground of exorbitance, which Court has already indicated as would require entering upon merits of the claim, query was made and Mr. Kanungo submitted that aggregate cover was for Rs.2,55,00,000/-. Principal amount awarded was Rs.1,97,96,406/-. The principal amount awarded is well within the aggregate cover and there is nothing shocking or it does not shock the conscience of Court, considering that the claim was on account of damage caused by super cyclone and Mr. Kanungo's further submission that the stocks were earlier valued/assessed by appellants at Rs.1,03,00,000/-, machinery and accessories at Rs.96,00,000/- and building, ultimately at Rs.10,51,000/-.

18. For reasons aforesaid Court does not find merit in the appeal. Impugned judgment is confirmed.

19. The appeal is dismissed.

(Arindam Sinha)
Judge