

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.3990 of 2022
(Through Hybrid mode)

Birat Chandra Dagara

....

Petitioner

Mr. Banshidhar Baug, Advocate

-versus-

Biswajaya Dagara and another

....

Opposite Parties

Mr. S.Satyakam Swain, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
09.03.2022

Order No.

03. 1. Mr. Baug, learned advocate appears on behalf of petitioner and submits, the arbitrator was ineligible as per entries 4, 15 and 16 in the Seventh Schedule to Arbitration and Conciliation Act, 1996, to have been appointed. The arbitrator was earlier engaged by his client as evident from order dated 1st May, 2012 in CS no.33 of 2012 (Birat Chandra Dagara v. M/s. Taurian Exim Pvt. Ltd. and others), pending in Court of Civil Judge (Sr. Division), Rairangpur. Commencement of the reference was by opposite parties under letter dated 21st January, 2021. There was no express agreement of waiver regarding the ineligibility, as required by proviso under sub-section (5) in section 12. He relies on judgment of the Supreme Court in **Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5**

SCC 755, paragraph 20, for declaration of law to be that express waiver must be only if made subsequent to disputes having arisen between the parties. He submits further, the suit, in which the arbitrator was engaged, has as its subject matter, the mine. Disputes in the reference are also in respect of the mine.

2. Mr. Swain, learned advocate appears on behalf of opposite party no.1 and submits, in the meantime the arbitrator has recused himself. Therefore, there remains nothing to be decided in the writ petition. Mr. Baug responds, he is pressing for adjudication since according to his client, the arbitrator was ineligible and, therefore, the reference void ab initio, including the interim measure directed. It cannot be said that the arbitrator was duly appointed, acted and thereafter, recused.

3. In the circumstances, Mr. Swain submits, the applicable entry is entry 20 in the Fifth Schedule. The arbitrator had duly declared in order no.4 dated 27th February, 2021. The relevant declaration is reproduced below.

“3. In this case, there is no embargo on the arbitrator in so far as section 12 of the Act is concerned. No case or proceeding has been conducted or handled earlier by this arbitrator for and on behalf of the parties. No interest ever subsisted or is subsisting between this arbitrator and the parties.”

4. Entry 20 in the Fifth Schedule says as follows:-

“20. The arbitrator has within the past three years served as counsel for one of the parties or an

affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.”

Entries 4, 15 and 16 in the Seventh Schedule say as follows:-

“4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.”

5. There has been no demonstration that the arbitrator, being a lawyer, is in the same law firm, which is representing petitioner or the other party in the reference. In addition to indication by cause title of the suit, on query from Court it has been ascertained, subject matter of the suit was disputes between the management of the mine and another. Disputes in the reference are conflicting claims for management of the mine. There is no other in the reference apart from petitioner (father) and opposite party no.1 (son). On analysis of the facts it can be seen that entries 4, 15 and 16 in the Seventh Schedule are not applicable.

6. Entry 20 in the Fifth Schedule required the arbitrator to disclose that he previously advised or had been consulted by petitioner in an unrelated matter but the arbitrator and petitioner not having ongoing relationship. This the arbitrator omitted to declare. On further query from Court parties have not able to point out any remedy provided in the Act on such

omission by the arbitrator. Mr. Baug submits, in the situation, the arbitrator has to be deemed to have become de jure unable to perform his functions. Section 14(2) says, if a controversy remains concerning, inter alia, whether or not the arbitrator is de jure unable to perform his functions, a party may, unless otherwise agreed, apply to the Court to decide the termination of mandate. There is controversy since opposite party no.1 does not accept there was any omission by the arbitrator in making the declaration.

7. Remedy is provided under the Act for recourse to the Court under section 14, on termination of mandate. Petitioner can also seek fixation of the time of termination. It follows that there should not be interference in writ jurisdiction. In the premises, no order is to be made.

8. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS