

State Of Orissa vs Niranjan Swain on 10 August, 1989

Equivalent citations: 1990 AIR 685, 1989 SCR (3) 821, AIR 1990 SUPREME COURT 685, 1989 (4) SCC 269, (1989) 3 JT 366 (SC), (1990) 1 ARBILR 306, (1990) 2 CIVLJ 200, (1990) 69 CUT LT 756, (1990) BANKJ 411

Author: Jagdish Saran Verma

Bench: Jagdish Saran Verma, L.M. Sharma

PETITIONER:
STATE OF ORISSA

Vs.

RESPONDENT:
NIRANJAN SWAIN

DATE OF JUDGMENT 10/08/1989

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
SHARMA, L.M. (J)

CITATION:
1990 AIR 685 1989 SCR (3) 821
1989 SCC (4) 269 JT 1989 (3) 366
1989 SCALE (2) 345
CITATOR INFO :
D 1990 SC1128 (5,6)

ACT:

Arbitration Act, 1940: Award--Absence of reasons--Whether affects validity--Valid and invalid part--Severability and effect of-Arbitrator--A competent witness--Court to exercise power of calling him as witness cautiously.

Interest Act, 1978: Arbitration--Reference before the commencement of Act--Arbitrator--Whether empowered to grant interest upto the date of submission or pendente lite upto the date of award.

HEADNOTE:

The respondent was awarded a contract for construction of Earth Dam by the appellant-State of Orissa. His dispute relating to the remaining Claim for payment was referred to

an arbitrator for adjudication. Before the arbitrator the respondent claimed (i) the balance amount due to him; (ii) his security deposit with the appellant; and (iii) interest, on the balance amount due and security deposit, upto the date of award. On 2.12.1980 the arbitrator gave a lump-sum award in favour of the respondent inclusive of interest upto the date of award.

The Trial Court made the award a rule of the Court and accordingly passed a decree in favour of the respondent for the amount awarded together with interest at the rate of six per cent from the date of decree. The appeal filed by the State was dismissed by the High Court.

In this appeal it was contended on behalf of the State that the award was invalid because; (i) the arbitrator gave no reasons; (ii) no interest could be awarded by the arbitrator upto the date of award, and the award being inclusive of interest was not severable. it was also contended that the High Court was wrong in assuming that the Trial Court was correct in refusing to call the arbitrator for being examined.

Allowing the appeal partly,

HELD: 1. The absence of reasons in the award does not by itself result in its invalidity except where the giving of reasons by the

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arbitrator for the award is the requirement of the arbitration agreement or the deed of submission or an order made by the Court or statute governing the arbitration. [823G-H]

Raipur Development Authority & Ors. v. M/s Chokhamal Contractors and Ors., [1989] 2 S.C.C. 721, applied.

2. Even though an arbitrator is a competent witness, the Court must exercise the power of calling him as a witness cautiously and sparingly and not in a routine manner. When the Court is requested to call the arbitrator for examination as a witness it must be shown that there is some cogent ground for his examination within the permissible limits. [826D]

In the instant case, nothing has been shown to indicate that it was at all necessary to call the arbitrator as a witness to depose on any matter which could legitimately be examined by the Court in the proceedings. The High Court was, therefore, justified in refusing to call the arbitrator for examination. [826E]

State of Orissa v. D.C. Routray, A.I.R. 1983 Orissa 163, approved.

3. In cases wherein the reference to arbitrator was made prior to the commencement of the Interest Act, 1978, on August 19, 1981 the arbitrator is not empowered to grant interest for the period either before the commencement of the proceedings or during the pendency of the arbitration.

In the instant case, the reference to arbitrator was made and even the award was given prior to the commencement of the Interest Act, 1978. Therefore, the arbitrator had no

jurisdiction to grant any amount as interest for any period either upto the date of submission of the claim before him or pendente lite upto the date of the award. [827F-G]

Executive Engineer (Irrigation), Balimela & Ors. v. Abhaduta Jena & Ors., [1988] 1 SCC 418, applied.

Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr., [1989] 1 SCC 532, held inapplicable.

4. In the instant case, the inclusion of the amount of interest in the lumpsam award by the arbitrator does not render the whole award

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invalid since it is possible to sever the invalid part relating to interest. The balance amount of award remaining after deduction of interest would not be tainted with any invalidity, and it would be just and proper to sustain the award to this extent only. The decree is, therefore, modified to this extent. [828E-F; 829C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3297 of 1981.

From the Judgment and Order dated 17.8.1981 of the Orissa High Court in Misc. Appeal No. 145 of 1981. R.K. Mehta for the Appellant.

A.K. Sen, Arun Madan, R.K. Sahoo and J.D.B. Raju for the Respondent.

The Judgment of the Court was delivered by VERMA, J. This appeal by special leave under Article 136 of the Constitution challenges the judgment dated 17.8.1981 of the High Court of Orissa dismissing Misc. Appeal No. 145 of 1981 against the judgment dated February 28, 1981 passed by the Subordinate Judge, Baripada, District Mayurbhanj in Title Suit No. 106 of 1980 by which the arbitrator's award for a sum of Rs.21,11,835.00 in favour of the plaintiff- respondent, Niranjan Swain, was made a rule of the court and a decree was passed for that amount together with interest at the rate of six per cent per annum from the date of the decree.

The main ground taken in this appeal was that the arbitrator's award was per se invalid since it gave no reasons. Some other points were raised to which we shall advert later. The question of invalidity of an arbitrator's award merely on the ground that it gave no reasons was involved for decision in a large number of matters pending in this Court and in view of the importance of this common question the bunch of cases was heard and decided by the Constitution Bench in Raipur Development Authority and others v. M/s Chokhamal Contractors and others, [1989] 2 SCC 72 1. The Constitution Bench has held that the absence of reasons in the award does not by itself result in its invalidity except where the giving of reasons by the arbitrator for the award is the requirement of the arbitration agreement or the deed of submission or an order made by the Court or statute governing the arbitration. Accordingly, this contention raised in the present appeal and all other

similar matters was rejected by the Constitution Bench with a direction that all such cases should go back to the Division Bench for disposal in accordance with law on the remaining points surviving therein for decision. This is how the present appeal has come before us. The conclusion reached by the Constitution Bench in the above case and the direction given therein is as under:

"Having given our careful and anxious consideration to the contentions urged by the parties we feel that law should be allowed to remain as it is until the competent legislature amends the law. In the result we hold that an award passed under the Arbitration Act is not liable to be remitted or set aside merely on the ground that no reasons have been given in its support except where the arbitration agreement or the deed of submission or an order made by the court such as the one under Section 20 or Section 21 or Section 34 of the Act or the statute governing the arbitration requires that the arbitrator or the umpire should give reasons for the award. These cases will now go back to the Division Bench for disposal in accordance with law and the view expressed by us in this decision."

The only points now urged by Shri G.L. Sanghi, learned counsel for the appellant, are two, namely, (1) no interest could be awarded by the arbitrator in the present case upto the date of the award but the same is obviously included in the lumpsum award of Rs.21, 11,835.00; and the invalid part of the award not being severable from the rest, the entire award must be set aside; and (2) the High Court in its cryptic order has wrongly assumed as correct the trial court's refusal to call the arbitrator for being examined in the court. The learned counsel contended that any one of these defects was sufficient to set aside the entire award. In reply Shri Arun Madan, learned counsel for the respondent, primarily contended that the arbitrator was empowered to award interest upto the date of award. In the alternative, learned counsel for the respondent contended that the invalid part of the award relating to grant of interest upto the date of the award was severable and, therefore, only that part should be set aside instead of setting aside the whole award. He also contended that the High Court did not make any wrong assumption and refusal to call the arbitrator for examination was justified. It was also urged that in the present case there was nothing to indicate that calling the arbitrator for examination in the court was at all necessary. Before proceeding to consider the surviving points now urged on behalf of the appellant we may refer briefly to the few facts which alone are relevant at this stage. The contract for the work "Construction of Earth Dam (balance work) of Sansiali Nai M.I. Project" in Division Mayurbhanj, Baripada, was given by the appellant, State of Orissa, to respondent, Niranjan Swain and the agreement between the parties contained an arbitration clause for adjudication of disputes arising out of the contract. Consequently, the dispute relating to the remaining claim for payment made by the respondent was referred for adjudication to the arbitrator in terms of the arbitration clause contained in the agreement. The respondent's claim before the arbitrator was for the amount of Rs. 19,04,689.00 as the balance amount due to him and for return of the security deposit of Rs.28,000.00 or in all the total of Rs. 19,32,689.00 as the principal amount. The respondent also claimed interest on the sum of Rs. 19,04,689.00 at the rate of 18 per cent per annum from 15.4.1977 to 15.5.1978, namely, the date of submission of the statement of claim before the arbitrator amounting to Rs. 3,71,414.00 and interest on the security deposit of Rs. 28,000.00 at the same rate from 15.9.1977 to 15.5.1978 amounting to Rs.3,360.00. The respondent further claimed interest at the rate of 18% per annum

from 16.5. 1978 till payment of the amount to the respondent by the appellant. In the statement of claim the total amount claimed was mentioned at Rs.23,07,463.00 together with interest @ 18% per annum on Rs. 19,32,689.00 from 16.5.1978 to the date of the award. The appellant denied the respondent's claim including the claim for payment of interest.

The arbitrator gave the award dated 2.12.1980 as under:

"AWARD After perusal of the claim statements and counter statements, the counter claim of the respondent, the rejoinder of the claimant, the documentary and oral evidence and on a careful consideration of the submissions and arguments of the parties and the IR advocate, I have come to the conclusion that the claimant is entitled to get a sum of Rs.21,11,835.00 (Rupees twenty-one lakhs eleven thousand eight hundred thirty-five only) in full and final satisfac-

tion of his claims till the date of the award from the respondent. The respondent is not entitled to get any amount towards his counter claim from the claimant.

sd/-

B.S. Patnaik Arbitrator 2/1980"

(emphasis supplied) It is on the basis of the contents of this award that the above contentions have to be considered and decided. We may dispose of the second point urged by learned counsel for the appellant straightaway since it does not merit any elaborate consideration. The argument of the learned counsel for the appellant relating to calling the arbitrator for examination as a witness in the court was based on the decision of the Orissa High Court in *State of Orissa v. D.C. Routray*, AIR 1983 Orissa 163. That decision itself says that even though an arbitrator is a competent witness, the court must exercise the power of calling him as a witness cautiously and sparingly and not in a routine manner. It is obvious that when the court is requested to call the arbitrator for examination as a witness it must be shown that there is some cogent ground for his examination within the permissible limits. Nothing has been shown in the present case to indicate that it was at all necessary to call the arbitrator as a witness to depose on any matter which could legitimately be examined by the court in the proceedings. This alone is sufficient to justify the view taken by the High Court. This contention of learned counsel for the appellant is, therefore, rejected.

The only point surviving for consideration now relates to the grant of interest by the arbitrator and its effect on the validity of the award. It is obvious from the contents of the award and the details of the respondent's claim before the arbitrator that a lumpsum amount of Rs.21,11,835.00 awarded in the respondent's favour by the arbitrator was in full and final satisfaction of all the respondent's claims before the arbitrator till the date of the award. As mentioned earlier, the respondent's claim before the arbitrator mentioned the sum of Rs.19,04,689.00 plus the security deposit of Rs.28,000.00 or in all Rs. 19,32,689.00 only as the total principal amount of the claim and the sum claimed in excess thereof was on account of interest. The grant of a lumpsum amount of Rs.21,11,835.00 in the award in full and final satisfaction of all the claims till the date of the award

must, therefore, obviously include interest also. It is equally plain that the claim for the entire principal amount was not accepted by the arbitrator. The effect on the question of validity of the award has to be decided on this basis.

It is settled by the decision of this Court in *Executive Engineer (Irrigation), Balimela and others v. Abhaduta Jena and others*, [1988] 1 SCC 4 18 that in cases wherein the reference to arbitration was made prior to the commencement of the Interest Act, 1978, on August 19, 1981, the arbitrator is not empowered to grant interest for the period either before the commencement of the proceedings or during the pendency of the arbitration. This is clear from the position summarized in *Abhaduta Jena's case* (supra), as under:

"In the remaining cases which arose before the commencement of the Interest Act, 1978, the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1939, does not apply to their cases and there is no agreement to pay interest or any usage or trade having the force of law or any other provision of law under which the claimants were entitled to recover interest. They are not entitled to claim *pendente lite* interest as the arbitrator is not a court nor were the reference to arbitration made in suits."

The learned counsel for the respondent placed reliance on the decision of this Court in *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.* and another, [1989] 1 SCC 532 in support of his primary contention that the arbitrator was empowered to grant interest upto the date of award. We are unable to construe this judgment in the manner suggested by learned counsel for the respondent. The decision clearly refers to *Abhaduta Jena's case* (supra) and also follows it. The primary contention of the learned counsel for the respondent that the award does not suffer from any infirmity by grant of interest therein upto the date of award is, therefore, rejected. It cannot, therefore, be disputed that in the present case wherein the reference to arbitration was made and even the award was given prior to the commencement of the Interest Act, 1978, on August 19, 1981, the arbitrator had no jurisdiction to grant any amount as interest for any period either upto the date of submission of the claim before him or *pendente lite* upto the date of the award.

From the above, it follows that inclusion of the amount of interest in the lumpsum award of Rs.21,11,835.00 by the arbitrator does render that part of the award invalid. The question now is of the consequence of this invalidity on the entire award. The learned counsel for the appellant contended that the invalid part of the award not being severable from the rest the entire award must be set aside. On the other hand, the learned counsel for the respondent urged that there is no difficulty in separating the invalid part from the rest and this could easily be done by deducting from the total sum of Rs.21,11,835.00 granted in the award, the maximum interest calculated at the rate of 18% per annum which was claimed by the respondent before the arbitrator upto the date of the award (2.12.1980). He urged that such a view cannot, in any manner, prejudice the appellant and if at all it can work only to the detriment of the respondent who make this suggestion.

In our opinion it is possible in the present case to sever the invalid part relating to interest in order to sustain the valid part of award. Accordingly, we requested both sides to calculate the total amount of interest and give to us the agreed figure. The agreed figure of Rs. 12,65,871.97 has been given by them as the maximum amount of interest which could be included in the award of Rs.21, 11,835.00, in accordance with the respondent's claim before the arbitrator. It is common ground that the invalid part of the award on the basis of grant of interest by the arbitrator cannot exceed the amount of Rs. 12,65,871.97 out of the total Sum of Rs.21, 11,835.00. It is also not disputed that the balance amount remaining after deduction of Rs. 12,65,871.97 cannot be tainted with any invalidity. The learned counsel for the respondent has confined the respondent's claim in the alternative to upholding of the award only in respect of this balance amount and no more. We do not see any reason why the award should not be modified and sustained to this extent only. We are conscious of the fact that the interest amount of Rs. 12,65,871.97 so calculated for deduction from the total amount of Rs.21, 11,835.00 granted in the award is in excess of the interest calculated on the remaining balance treated as principal amount at this stage on the above suggestion. However, in the peculiar circumstances of this case and in view of the alternative contention on behalf of the respondent, we see no reason for rejecting, in the present case, this alternative contention also. Viewed in this manner, the balance amount of the award would not be tainted with any invalidity and, therefore, it would also be just and proper to sustain the award to this extent only. We, therefore, reject the contention of learned counsel for the appellant that the entire award should be set aside and instead accept the alternative contention of learned counsel for the respondent.

In view of the above, the agreed amount of interest upto the date of the award (2.12.1980), that is, Rs. 12,65,871.97 is deducted from the amount of Rs.21,11,835.00 leaving the balance amount of Rs.8,45,963.03 say Rs.8,45,963.00. This amount of Rs.8,45,963.00 survives as the valid part of the award and, therefore, the decree of the courts below is modified to this extent so that the decree in favour of the respondent now remains for the sum of Rs.8,45,963.00 only together with interest thereon at the rate of 6% per annum from the date of the decree passed by the trial court until payment. In view of the partial success of both sides, the parties shall bear their own costs throughout. The appeal is partly allowed in this manner.

We are informed that the respondent has withdrawn a certain amount against the decree during the pendency of this appeal. We direct that the amount due to the respondent shall be calculated on the basis of this modified decree. In case, the amount obtained by the respondent is less than the amount to which the respondent is found entitled as a result of this modified decree, the remaining amount shall be paid to the respondent with interest @ 12% per annum from 8.12. 1981 in terms of the interim order of that date passed in this appeal; and in case, the amount obtained by the respondent is in excess of that to which he is found entitled, the excess amount shall be refunded by the respondent to the appellant similarly with interest at the same rate of 12% per annum from 8.12. 1981 upto the date of its refund.

T.N.A.

Appeal allowed partly.