

2003

AIR 2003 SUPREME COURT 4207

(From : Orissa)*

N. SANTOSH HEGDE AND B. P. SINGH,
JJ.C. A. No. 5313 of 2003 with C. A. No. 5314
of 2003, D/- 30-7-2003.State of Orissa and others, Appellants v.
Gokulananda Jena, Respondent.

(A) Arbitration and Conciliation Act
(26 of 1996), Ss. 11(6), 16 — Order of des-
ignated Judge appointing arbitrator — Is
amenable to writ jurisdiction — But on
limited grounds — Powers under Art. 226
cannot be equated with power under Art.
136.

Constitution of India, Arts. 226, 136.

An order made by the Designated Judge
under S. 11(6) is amenable to writ jurisdic-
tion. An administrative order is amenable
to the writ jurisdiction under Art. 226 of the
Constitution of India. An order made by the
Designated Judge under S. 11(6) of the Act
is not an exception to this rule. The power
of the High Court under Art. 226 to enter-
tain a writ petition cannot be equated with
the power of the Supreme Court to enter-
tain an appeal under Art. 136 of the Consti-
tution of India. The power of the High Court
to entertain a writ petition is an original
power while power of this Court while en-
tertaining an appeal under Art. 136 of the
Constitution is an appellate power.

(Paras 5, 6, 7)

However in view of Ss. 16, 12, 13 it is
clear that there is hardly any area of dis-
pute which cannot be decided by the Arbi-
trator appointed by the Designated Judge.
If that be so, since an alternative efficacious
remedy is available before the Arbitrator, writ
Court normally would not entertain a chal-
lenge to an order of the Designated Judge
made under S. 11(6) of the Act which in-
cludes considering the question of jurisdic-
tion of the Arbitrator himself. Therefore, even
though a writ petition under Art. 226 of the
Constitution is available to an aggrieved
party ground available for challenge in such
a petition is limited because of the alterna-
tive remedy available under the Act itself.

(Para 8)

* O. J. C. No. 1483 of 2002, D/- 8-4-2002.
(Orissa).

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(B) Arbitration and Conciliation Act
(26 of 1996), S. 11(6) — Constitution of
India, Art. 226 — Appointment of arbi-
trator by Designated Judge — Writ peti-
tion against — Tenability — Appointment
challenged on grounds that Act does not
apply, dispute is stale and agreement con-
templated adjudication by company arbi-
trator alone — Such grounds could also
be raised before the arbitrator — Writ
petition is not tenable.

(Paras 10, 10A)

Cases Referred : Chronological Paras

M/s. Konkan Railways Corpn. Ltd. v. M/s.
Rani Construction Pvt. Ltd., AIR 2002 SC
778 : 2002 AIR SCW 426 : 2002 CLC 478 :
(2002)2 SCC 388 4, 7, 8

Jana Kalyan Das, for Appellants; Manoj
Kumar Das, Sibbo Sankar Mishra, Ms.
Praveena Gautam, Mrs. Ginny Jetly and
Dharmendra Rautray, Advocates, for Re-
spondent.

SANTOSH HEGDE, J. :— Leave granted.

2. Heard learned counsel for the par-
ties.

3. State of Orissa in this appeal has chal-
lenged the order of the High Court of Orissa
at Cuttack dated 8-4-2002 made in O. J. C.
No. 1483 of 2002. In the said with petition,
the State of Orissa had challenged the va-
lidity of an order made by the Judge desig-
nated by the Chief Justice of the said Court
for appointing an Arbitrator under S. 11(6)
of the Arbitration and Conciliation Act, 1996
(the 'Act').

4. The High Court after refer-
ring to a judgment of this Court
delivered by a Constitution
Bench in the case of M/s. Konkan
Railways Corporation Ltd. & Anr.
v. M/s. Rani Construction Pvt.
Ltd. (2002 (2) SCC 388) came to
the conclusion that a writ peti-
tion under Article 226 of the Con-
stitution of India questioning the
correctness of an order made by
the Designated Judge under S.
11(6) of the Act is not maintain-
able because the said order is an
administrative order and this
Court in the case of M/s. Konkan
Railway (supra) has held that
such an order cannot be chal-
lenged before this Court under

(AIR 2002
SC 778 :
2002 AIR
SCW 426 :
2002 CLC
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Article 136 of the Constitution of India. Drawing an analogy from the said judgment, the High Court came to the conclusion that even a writ petition under Article 226 of the Constitution of India will not be maintainable.

5. We think this view of the High Court as to the non-maintainability of a writ petition against an order made by the Designated Judge under S. 11(6) of the Act cannot be sustained.

6. It is to be noted that an administrative order is amenable to the writ jurisdiction under Article 226 of the Constitution of India and we find such an order made by the Designated Judge under S. 11(6) of the Act is not an exception to this rule. The power of the High Court under Article 226 to entertain a writ petition cannot be equated with the power of the Supreme Court to entertain an appeal under Article 136 of the Constitution of India. The power of the High Court to entertain a writ petition is an original power while power of this Court while entertaining an appeal under Article 136 of the Constitution is an appellate power.

7. The Constitution Bench in the case of *M/s. Konkan Railway* (supra) itself has held that an order which is the subject of the petition for special leave to appeal under Article 136 must be an adjudicatory order, that is, an order which has adjudicated upon the rival contentions of the parties. In that context, this Court in *M/s. Konkan Railway* case has held that an order made by the Designated Judge under S. 11(6) of the Act is not an order in which the Designated Judge adjudicates parties rights, hence, it is in the nature of an administrative order against which an appeal under Article 136 does not lie. This Court in that judgment has not stated that an order being an administrative order, same cannot also be challenged under Article 226 of the Constitution for good and valid reasons. Therefore, in our opinion, the High Court was wrong in coming to the conclusion that an order made by the Designated Judge under S. 11(6) of the Act is not amenable to the writ jurisdiction of the High Court.

8. However, we must notice that in view of S. 16 read with Ss. 12 and 13 of the Act as interpreted by the Constitution Bench of this Court in the *M/s. Konkan Railway* (supra) almost all disputes which could be presently contemplated can be raised and

agitated before the Arbitrator appointed by the Designated Judge under S. 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the Arbitrator, writ Court normally would not entertain a challenge to an order of the Designated Judge made under S. 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself.

9. Having come to the conclusion that a writ petition under Article 226 is maintainable as against the order made by the Designated Judge under S. 11(6) of the Act on limited grounds, we will now consider whether such grounds are available to the petitioner to challenge the order of the designated Court in the case in hand. For this purpose, we have noticed the grounds raised in the said writ petition, a copy of which has been enclosed with this petition.

10. The challenge of the appellant in the writ petition against the order of the Designated Judge is based on the following facts:

(i) The contract between the parties was executed before the Act came into force, hence, the act does not apply.

(ii) Dispute is a stale one having arisen nearly 20 years ago;

(iii) Clause 23 of the agreement contemplates the adjudication of a dispute by a company arbitrator.

(iv) No person other than an arbitrator nominated in Clause 23 of the argument has any jurisdiction to entertain the disputes.

10A. All these grounds of attack, in our opinion, can very well be raised before the Arbitrator appointed by the Designated Judge, hence, on the facts of the case, we find the writ petition of the appellant was liable to be dismissed by the High Court. For this reason, we do not think it appropriate to remand the matter back to the High Court. Therefore, we dismiss this appeal permitting the appellant to raise all its contentions before the arbitrator appointed by the Designated Judge.

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C.A. No. 5314/2003 (arising out of SLP (C) No. 592/2003).

11. Leave granted.
12. Heard learned counsel for the parties.
13. The issues involved in this appeal both on facts and in law being identical with the issues involved in the C. A. No. 5313/2003 @ SLP (C) No. 478/2003, this appeal is also liable to be dismissed for the reasons mentioned in the said civil appeal. The appeal is dismissed. No costs.

Order accordingly.

AIR 2003 SUPREME COURT 4209

(From :— Allahabad)*

**DORAISWAMY RAJU AND
ARIJIT PASAYAT, JJ.**

C. A. No. 5207 of 2003, D/- 25-7-2003.

State of U. P. and others, Appellants v. Smt. Gulaichi, Respondent.

(A) Constitution of India, Arts. 16, 309 — Correction of date of birth — Application for — Not to be dealt with keeping in view only the concerned public servant — Court or Tribunal should not issue direction or make declaration on basis of materials which make such claim only plausible — Unless prima facie evidence of unimpeachable character is produced by public servant, no interim relief or continuation in service should be granted.

An application for correction of the date of birth should not be dealt with by the Courts, Tribunal or the High Court keeping in view only the public servant concerned. Any direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment

keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the Court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of Supreme Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The Court or the Tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior.

The Secy. and Commr., Home Dept. v. R. Kirubakaran, AIR 1993 SCC 2647 : 1993 AIR SCW 3333, Foll.

(Para 9)

* S. A. No. 314 of 2002, D/- 14-5-2002 (All).

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