
(2003) 05 GAU CK 0016
In the Gauhati High Court
Case No : Writ Petition (C) No. 7770 of 2002

Assam Urban Water Supply and Sewerage Board	APPELLANT
Vs	
Subhas Project and Marketing Ltd.	RESPONDENT

Date of Decision : 21-05-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(5), 16(6), 34
Constitution of India, 1950 — Article 226

Citation : AIR 2003 Guw 146 : (2003) 3 GLT 124 : (2004) 55 SCL 555

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : A.C. Borbora, M.K. Choudhury and B.K. Dutta, for the Appellant;
Markand, G.N. Sahewalla, A.K. Goswami and B. Bora, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—Heard Mr. M.K. Choudhury, learned counsel for the petitioner and Mr. Markand, learned Advocate for the respondents.

2. The matter relates to implementation and execution of Tezpur Water Supply Scheme. As per the administrative approval of the State Govt., the Assam Urban Water Supply and Sewerage Board, for short the Board" invited, bids in the year 1990 and the respondent M/s. Subhas Project and Marketing Ltd. were awarded the contract and a contract agreement was entered into on 20-3-1991. According to the Board a sum of Rs. 67,36,175/- was paid to the said company but nothing happened. Thereafter, Arbitration Nos. 5/2001 and 4/2002 was moved by the Govt. before the Hon"ble the Chief Justice, Gauhati High Court and vide the order dated 26-3-2002 Sri M.N. Bhagawati, respondent No. 2 was appointed as the sole Arbitrator. The case of the Board is that the Arbitrator was appointed without any notice to them. Petitioner Board thereafter challenged the appointment of the Arbitrator or) the ground that the agreement does not contain any arbitration clause by filing W.P.(C) No. 2873/02. The said writ petition along with the connected matters were disposed of by the Court with the

following observation :--

"A bare reading of Sections 13 and 16 of the Act, 1996 makes it crystal clear that the question with regard to jurisdiction of the Arbitrator or any objection with respect to the existence or validity of the arbitration agreement, independence and impartiality of the Arbitrator can be raised before the Arbitrator/Arbitral Tribunal who/which would decide the same".

3. Thereafter, the question of jurisdiction was challenged before the sole Arbitrator by filing the objections and the sole arbitrator vide the order dated 4-6-2002 rejected the contention raised by the Board and decided to proceed with the arbitration proceeding.

4. It may be mentioned here that the Board had also filed an application before the District Judge, Kamrup u/s 34 of the Arbitration and Conciliation Act, 1996, for short "the Act", but subsequently the said case was dismissed. The petitioner Board has filed the present writ petition stating, inter alia, that as the contract agreement between the Board and the company did not contain any clause regarding arbitration, the sole Arbitrator has got no jurisdiction to arbitrate the matter and the petitioner therefore prayed for quashing of the order dated 4-6-2002 and for setting aside the entire arbitration proceedings.

5. The respondent Govt. has raised a preliminary objection regarding the maintainability of the writ petition in the present case stating, inter alia, that in view of the specific provision contained in the Act itself, the Arbitrator has been given power to decide, about the jurisdiction and in case the Arbitrator decides that he got no jurisdiction, that is the end of the matter and the aggrieved party may, approach the competent forum. However, if the Arbitrator rejects the plea and hold that he has got jurisdiction, he may continue with the arbitral proceeding and make an arbitral award and the aggrieved party shall have the option to challenge the same u/s 34 of the Act only. Section 16 of the Act reads as follows :--

"Competence of arbitral tribunal to rule on its jurisdiction.-- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose.-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may; in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

6. There is no dispute at the Bar that this is a private arbitration in the sense that the Arbitrator has been appointed on the basis of the agreement/contract in between the parties and the respondent No. 2 is not the Instituted authority and this is not a case of statutory arbitration. Learned counsel for the petitioner has relied on the observation of the Apex Court in the case of Kerala Education Bill AIR 1958 SC 956 , wherein it was held that the power under Article 226 of the Constitution cannot be Curtailed by any legislation, short of amendment of the Constitution. Learned counsel has also referred to the observation of the Apex Court in paras 73 and 79 of L. Chandra Kumar Vs. Union of India and others,

"The jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution is a part of the basic structure of the Constitution (para 73). The power vested in the High Courts to exercise Judicial Superintendence over the decisions of all Courts and Tribunals within their respective jurisdiction is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided (para 79).

7. So far the remedy u/s 34 of the Act, as stated in Section 16 of the Act is concerned, we find that there is no dispute at the Bar that this remedy is available after the final award has been passed. Shri Choudhury, however, submits that where the sole arbitrator has no jurisdiction even to enter into the arbitral proceedings, the entire process will be a sheer abuse and wastage of time and money. At the first site the arguments; seems very attractive but the question that crops up is whether the Court should interfere in an arbitral proceedings at each and every stage and thereby delay the matter to defeat the very purpose of arbitration. As we know, arbitration is another form of alternative dispute resolution system and all over the world the recourse to arbitration has been taken so that disputes are settled expeditiously to save the time and money. If the Court is allowed to, interfere at each and every stage of arbitration proceeding to examine the correctness of the finding or decision, it will be a never ending business and it can safely be apprehended that the arbitration will be more time consuming process than the Court process, as there will be two

forums instead of one. The Constitutional vires of Section 16(5) was challenged before the High Court and the matter was taken before the Apex Court in case of Babar Ali Vs. Union of India (UOI) and Others, whereby the SLP was dismissed by stating as below :--

"We find that there is no question of the Arbitration and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India, as the High Court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. Only because the question of jurisdiction of the arbitrator is required to be considered after the award is passed and not at any penultimate stage by the appropriate Court, it cannot be a ground for submitting that such an order is not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by Parliament. The challenge to the vires of the Act was rightly rejected by the High Court. We fully endorse that view."

8. The question raised by the petitioner before us was also the subject matter of consideration before the Apex Court in the case of Kvaerner Cementation India Ltd. v. Bajranglal Agarwal 2001 (3) RAJ 414 (SC) and the Apex court observed :

"There cannot be any dispute that in the absence of any arbitration clause in the agreement no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question: A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed; within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."

9. The Hon'ble Kerala High Court referred to the various decisions and the English Courts took a similar view in the case of Hem v. D.F.O. 1988 (2) ALR 37 holding that no writ will lie to quash the award or to direct something to be done in relation to the arbitration award except as per the remedies available under the Act.

10. A Division Bench of the Punjab and Haryana High Court had also the occasion to consider the above aspect of the matter in the case of *Harike Rice Mills v. State of Punjab* 1998 (1) RAJ 223 and the Court held :--

"However, Sub-sections (4) and (5) of Section 13 of the Act make a distinct departure in this regard, inasmuch as, with a view to prevent dilatory tactics the Parliament has not allowed the unsuccessful party to challenge the appointment immediately to when its challenge had been unsuccessful before the arbitrator and requires such a party to wait and challenge the same only after the arbitral award has been made. When an unsuccessful party cannot challenge the order of the arbitrator rejecting the challenge to his appointment even before a civil Court before the award is made, how can a petition lie under Article 226 of the Constitution to challenge that Order when the award has yet to be made. Such a petition, in our view, is not maintainable even though one of the parties to the dispute may be an instrumentality of the State otherwise amenable to the writ jurisdiction of this, Court. Even if the appointment of the arbitrator was invalid, as contended by the petitioner the same will have to be decided by the Court before which the validity of the award would be challenged."

11. The matter raised in this writ petition was earlier contended before the, Bombay High Court in the case of *Basf Styrenics Pvt. Ltd. v. Offshore Industrial Construction Pvt. Ltd.* 2002 (2) RAJ 554 : (AIR 2002 Bom 289). The Division Bench of the Bombay High Court held :--

"In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in Sub-sections (5) and (6) of Section 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under Sub-section (2) of Section 37 of the Act."

12. In view of the provisions of Sub-sections (5) and (6) of Section 16 of the Act read with Section 13 and Section 37 of the Act, we are in respectful agreement with the view laid down by the Hon'ble Punjab and Haryana and the Bombay High Court and hold that the Arbitrator has the power to decide about its known jurisdiction and such decision is not amenable to writ jurisdiction and the aggrieved party may challenge the same as provided u/s 16(6) of the Act after the Arbitration proceeding is over and the award is made.

13. In view of what has been stated above, the present writ petition is not maintainable and the same is accordingly dismissed.