
(2007) 10 GAU CK 0043
In the Gauhati High Court

B.K. Gupta

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12, 34

Citation : AIR 2008 Guw 60 : (2008) 1 ARBLR 337

Hon'ble Judges : Jasti Chelameswar, C.J

Bench : Single Bench

Final Decision : Allowed

Judgement

J. Chelameswar, C.J.—This is a petition filed u/s 11(5) of the Arbitration and Conciliation Act, 1996 with prayers as follows:

In the premises aforementioned, it is, therefore, prayed that Your Lordship may be graciously pleased to:

- (a) Admit this petition;
- (b) Call for the records of the case;
- (c) Issue notice calling upon the respondents to show cause as to why an arbitration tribunal will not be appointed under provisions of the appointment of arbitrators by the Chief Justice of the Gauhati High Court Scheme, 1996 read with Sub-section (5) of Section 11 of the Arbitration and Conciliation Act, 1996; and
- (d) On cause or causes being shown and after hearing the parties be pleased to pass the necessary orders appointing an arbitration tribunal as Your Lordship may deem fit and proper.

2. The respondent issued a tender notice inviting tenders for construction of certain works of the N.F. Railways on 20th May, 1992. On 18th November, 1992, the petitioner, who was a successful tenderer, eventually, entered into a contract

with the respondent for execution of the work. On 17.06.1996, the petitioner sought for appointment of an arbitrator for settlement of a dispute which arose during the execution of the above mentioned contract. The dispute was duly referred to the arbitrators by all the parties. The arbitrators published their award on 10th September, 2001.

3. Aggrieved by the award, the petitioner herein approached the competent civil court u/s 34 of the Arbitration and Conciliation Act, 1996, challenging the award. The arbitration award was set aside by the Additional District Judge (FTC) No. 4, Kamrup, Guwahati by the judgment dated 05.09.2006.

4. Subsequently, the petitioner called upon the respondent by his notice dated 05.02.2007 seeking reference of the dispute for arbitration once again. Admittedly, the notice was received by the respondent on 12.02.2007, but the respondent took no action on the notice. Hence, the present petition.

5. The respondent has been served and is represented by Mr. J. Singh, learned Standing Counsel for the Railways and Mr. S. Bhattacharjee, learned Counsel for the petitioner.

6. The learned Counsel for the petitioner submitted that the arbitration agreement subsists until the dispute is finally resolved and, in view of the fact that the award given by the arbitrators earlier is set aside by the competent civil court, the dispute still subsists and is required to be resolved as agreed between the parties, by arbitration.

7. On the other hand, the learned Counsel for the respondent submitted that the parties having availed the arbitration proceedings once cannot resort to the agreement repeatedly and, therefore, the petitioner is not entitled to any relief under the present position. The learned Counsel made a submission that arbitration proceedings having been availed once by the parties to the agreement, the authority stood exhausted and the agreement does not authorize a repeated resort to the arbitration agreement.

8. In response to the specific query by this court, the learned Counsel for the respondent submitted that there is no authority or precedent in support of the proposition advanced, nor could the learned Counsel for the petitioner bring to the notice of this court any precedent in support of his claim.

9. Therefore, this court is compelled to examine the issue on the basis of the first principles of law of contract and the provisions of the Arbitration and Conciliation Act, 1996.

9.1. As already noticed, both the parties agreed to have a dispute, if any, resolved through the process of arbitration. Admittedly, during the course of execution of the work under the contract dated 18.11.1992, certain dispute arose between the parties, details of which are not necessary for the present purpose. Both the parties referred the dispute for arbitration and the arbitrators passed an award which could not be sustained in law and had to be set aside by the civil

court. In the result, there is no resolution of the dispute between the parties. The award, which is set aside by the competent court, is "non est". In other words, there is no award in the eye of law. The object and purpose of the Arbitration and Conciliation Act, 1996 is to provide for a mechanism for settlement of the dispute between the parties and the parties agreed to have the dispute resolved by way of arbitration. Therefore, in our view, until the dispute is resolved the arbitration agreement subsists and the authority to refer the dispute to arbitration is not exhausted until the dispute is resolved. We, therefore, reject the submission made by the learned Counsel for the respondent.

9.2. Given under the scheme of the Arbitration and Conciliation Act, 1996, u/s 12, the appointment of an arbitrator can be challenged on anyone of the grounds indicated under Sub-section (3) when the requirements of Sub-section (3) are satisfied. The appointed arbitrator cannot continue if he falls within the clutches of anyone of the disqualifications indicated in Section 12. In such a situation, to hold that a fresh arbitrator cannot be appointed to resolve the dispute between the parties, the very scheme of the Arbitration and Conciliation Act, 1996 would be reduced to futility. For the same logic, we are of the opinion that even in the case where the arbitrator publishes an award which is eventually found to be illegal by the competent civil court, the authority to refer the matter to the fresh arbitration, in our view, must necessarily subsist.

10. The petition is, therefore, allowed. Shri Dinendra Biswas, a former judge of this court is appointed as the arbitrator to resolve the dispute between the parties to this petition which arose out of the agreement dated 18.11.1992.