

(2022) 08 GAU CK 0019
In the Gauhati High Court
Case No : Arbitration Appeal No. 7 Of 2018

M/S S.R. Engineering Construction	Vs	APPELLANT
Commander Works Engineer		RESPONDENT

Date of Decision : 11-08-2022

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 29A, 34, 34(2)(a)(iii), 34(2)(b)(ii), 37

Citation : (2022) 08 GAU CK 0019

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : G. D. Dhiman, M. Bhattacharjee

Final Decision : Disposed Of

Judgement

1. Heard Mr. Ghanshyam Das Dhiman, the petitioner-in-person and Ms. M. Bhattacharjee, the learned counsel appearing on behalf of the respondent.

2. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the Act of 1996) challenging the order dated 20.05.2016

passed in Misc. Arbitration Case No.44/2013 whereby the application under Section 34 of the Act of 1996 was dismissed.

3. The brief facts of the instant case are that certain disputes and differences arose between the parties in respect to a contract agreement

No.CWE/TEZ/39 of 1989-90 which was in relation to construction of Pump House with allied services in remote area of Arunachal Pradesh under

GE 859 EWS. Initially, one Shri Praveen Kumar, SE was appointed as Sole Arbitrator who resigned on 25.08.2010. Thereupon, one Sant Ram, SE

was appointed as the Sole Arbitrator.

4. The appellant herein submitted the statement of claim on 14.04.2011. The

respondent filed its statement of defence on 21.04.2011. Thereupon, the arbitration proceedings commenced. The respondent herein before the Arbitrator raised locus-standi of the appellant stating inter-alia that Mr. G. D. Dhiman was authorized to file the claim proceedings on behalf of the appellant. It is relevant, however, to take note of that the petitioner-in-person Mr. Ghanshyam Das Dhiman had submitted two Power of Attorneys, one dated 15.09.2011 and the other dated 9.08.2011. Thereupon, it appears from the perusal of the arbitration award that there was a proceeding initiated before this Court on the ground that there was a delay in disposal of the arbitration proceedings and this Court had directed the Arbitrator to complete the arbitration proceedings by 31st of January, 2013 subject to the appellant furnishing the required documents by 31st of July, 2012. It further appears from the arbitration award that the issue as regard the locus-standi of the appellant continued to be pivotal on the ground that there was no document produced that the person(s) authorizing Mr. Ghanshyam Das Dhiman to file arbitration proceedings vide the two Power of Attorneys had the power on behalf of the appellant in question. It further appears that the appellant herein had on various occasions requested the Arbitrator to grant opportunity. From the arbitral award it though appears some opportunities were being granted but it is the case of the appellant herein that the said opportunities were nothing but an eye wash in as much as the opportunity so granted was inadequate. It further appears that the arbitration proceedings were decided only by Narinder Singh and Sons vs. Union of India through Divisional Superintendent hearing the respondent in the said arbitration proceedings and the claimant, i.e., the appellant herein were not heard. It further appears on record from the arbitration award that the Arbitrator did not take into consideration the claims so raised in the claim proceedings but rather accepted the stand of the respondent therein that the claimant had no locus-standi for filing and getting any claim on behalf of M/s S. R. Engineering Construction. It is on the basis thereof, the Arbitrator passed a NIL award. It is also pertinent herein to mention that though the respondent herein sought for imposition of cost of Rs.40,000/- being the cost involved in the arbitration proceedings, but the Arbitrator in the facts of the case directed both the parties to bear their own costs. The said award was published on 15.01.2013.

5. Being aggrieved and dissatisfied, the appellant herein preferred a proceeding under Section 34 of the Act of 1996 before the Court of District

Judge, Sonitpur at Tezpur for setting aside the said award dated 15.01.2013. The said case was registered and numbered as Misc. Arbitration Case

No.44/2013.

6. The Court of the District Judge, Sonitpur at Tezpur vide the order dated 20.05.2016 dismissed the said application on the ground that the objections

so raised to the award in question do not come within the ambit of Section 34 of the Act of 1996.

7. Feeling aggrieved and dissatisfied, the present appeal has been preferred under Section 37 of the Act of 1996.

8. The petitioner-in-person referring to the judgment of the Supreme Court rendered in the case of Enginer-II, Northern railway, Ferozepur Division,

Ferozepur, reported in (2021) SCC Online SC 1082 has submitted that Section 18 of the Act of 1996 mandates that both the parties shall be treated

with equality and each party shall be given full opportunity to present his case. The petitioner-in-person, therefore, submits that from a perusal of the

arbitration award itself would show that the adequate opportunity was not given to the appellant despite various requests being made so and as such

the same on the face of it was in violation of Section 18 of the Act of 1996 which fell within the ambit of clause (iii) to Section 34 (2) (a) as well as

clause (ii) of Section 34 (2) (b) of the Act of 1996. In that regard the petitioner-in-person referred to the judgment of the Supreme Court in the case of

Narinder Singh and Sons (supra), and more particularly, the paragraph No.7 of the said judgment which for the sake of convenience is quoted herein

below:-

â??7. Section 19 of the Act states that while the arbitral tribunal is not bound by the Civil Procedure Code, 1908 or the Indian Evidence

Act, 1872, in the absence of any agreement between the parties as to the procedure to be followed, the arbitral tribunal may conduct the

proceedings in the manner it considers appropriate. Section 18 mandates that both parties shall be treated with equality and each party

shall be given a full opportunity to present his case. Reference can also be made to Sections 24 and 25 and newly enacted Section 29A of

the Act, which though not applicable to this case, emphasise on quick and

prompt adjudications. Idioms carping â??delayâ?? and â??hurryâ?? in adjudication highlight the importance of both speedy disposal and reasonable opportunity, as both are essential for an even-handed and correct decision. Neither should be sacrificed nor inflated, as to prolong or trample a just and fair adjudication. A pragmatic and common-sense approach would invariably check any discord between the desire for expeditious disposal and adequacy of opportunity to establish one's case. In the context of the present case, we agree with the High Court that there was unnecessary haste and hurry by the arbitrator, especially when the respondent had filed the affidavit by way of evidence on 21 October 2010. Earlier, the respondent had filed written statement shortly after the appellant had filed the claim statement. The respondent was also deprived of reasonable and fair opportunity to cross-examine Paramdeep Singh (PW-1). The respondent had also moved an application for waiver of costs, which was rejected on 21 October 2010, albeit the arbitrator decided to continue the arbitration to proceed ex parte and adjourned the matter to 9 November 2010 for final arguments. As the evidence of the respondent by the way of affidavit was not taken on record, their contentions and evidence were not considered and thus debilitated the respondent from stating their case. Given the aforesaid factual position, there was violation of principles of natural justice and lack of full opportunity as envisaged by Section 18 of the Act, thereby, impeding a fair and just decision. Consequently, the award suffers and is liable to be set aside in terms of clause (iii) to Section 34(2)(a) as well as clause (ii) to Section 34(2)(b) of the Act.â??

9. On the other hand, Ms. M. Bhattacharjee, the learned counsel appearing on behalf of the respondent submits that the appellant herein was given all adequate opportunities by the Arbitrator in question. The learned counsel for the respondent submits that it was because of the appellant a time-frame was fixed by this Court for disposal of the said arbitration proceedings by 31st of January, 2013 and the appellant, knowing it fully well, was delaying the disposal of the said arbitration proceedings as would be apparently seen from the arbitration award itself. The learned counsel for the respondents further drew the attention of this Court to the communication dated 09.06.2011

issued by the Arbitrator to the appellant whereby notice was given to both the parties that the case would be taken up for hearing on 21st of June, 2021 at 10:30 AM in the Office of CWE Dinjan and the hearing shall be continued on subsequent days if considered necessary. It was further directed that the parties should ensure that all relevant documents were handed/taken over during the hearing and the case of both the parties shall be presented to the Arbitrator. Further to that, it was also mentioned that no further extension of time would be granted in view of the time constraint. It was also clearly mandated in the said communication that in case a party failed to attend the hearing, the Arbitrator shall proceed with the reference ex-parte based on the available records held with him. The learned counsel for the respondents submitted that it was known to the appellant that if the appellant had not appeared, the proceedings would continue ex-parte. In spite thereof, the Arbitrator had considered 2/3 requests of the petitioner-in-person and had fixed the hearing on 05.12.2012 and under such circumstances, the question of the Arbitrator having not given the appellant any opportunity does not arise in the facts of the instant appeal. The learned counsel for the respondent further submitted that this aspect of the matter was duly taken into consideration by the learned Court of the District Judge, Sonitpur at Tezpur while deciding the Section 34 application and had therefore, rightly exercised the jurisdiction in dismissing the application under Section 34 of the Act of 1996.

10. I have heard the learned counsel for the parties and perused the materials on record. A perusal of Section 18 of the Act of 1996 clearly shows that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. The Supreme Court in the case of Narinder Singh and Sons (supra) observed that Idioms carping ‘‘delay’’ and ‘‘hurry’’ in adjudication highlight the importance of both speedy disposal and reasonable opportunity, as both are essential for an even-handed and correct decision as such neither should be sacrificed nor inflated, as to prolong or trample a just and fair adjudication. It was further observed that a pragmatic and common-sense approach would invariably check any discord between the desire for expeditious disposal and adequacy of opportunity to establish one's case. In the said case, it was further observed that not taking on record the affidavit of the respondent therein had resulted in non-

consideration of the contentions and evidence which was in violation to the principle of natural justice and lack of full opportunity as envisaged under Section 18 of the Act of 1996 thereby impeding a fair and just decision.

11. In the instant case, if this Court looks into the materials on record, it would be seen that the Arbitrator did not decide the claims on merit. The

Arbitrator decided the entire claim proceedings on the question of locus-standi of Mr. Ghanshyam Das Dhiman, the petitioner-in-person to represent

M/s S. R. Engineering, the appellant although both the Power of Attorneys in question were on record. If it was only the question of locus-standi, the

Arbitrator ought to have permitted the claimant to produce necessary documents in support thereof and the said opportunity was being sought for by

the claimant before the Arbitrator but it is seen that the Arbitrator was more in a hurry to dispose of the Arbitration proceedings in view of the

direction passed by this Court to dispose of the arbitration proceedings by 31st of January, 2013. It is, however, relevant to take note of that a party

not been able to prove his case on the basis of producing documents to substantiate a claim is different from a party being non-suited on the ground of

locus-standi and this very aspect of the matter touches on Section 18 of the Act of 1996. It, however, appears that the Court of the District Judge,

Sonitpur at Tezpur did not take into consideration the said aspect of the matter, and consequently, dismissed the said application.

12. In view of the above and taking into consideration that there was an infraction of the rights of the claimant/appellant herein under Section 18 of the

Act of 1996, the arbitral award dated 15.01.2013 passed in respect to contract agreement No.CWE/TEZ/39 of 1989-90 :: construction of Pump House

with allied services in remote area or Arunachal Pradesh under GE 859 EWS stands set aside and quashed.

13. The parties, if so advised, may take appropriate steps for settling the dispute in accordance with law.

14. In view of the above, the instant appeal stands disposed of.