

(2015) 02 AHC CK 0115

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 30711 of 2003

Union of India and Others

APPELLANT

Vs

Additional District Judge, Meerut and Others

RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 14, 16, 16 (2), 30, 4
Constitution of India, 1950 — Article 226

Citation : (2015) 3 ADJ 67 : (2015) 110 ALR 146 : (2015) 2 AWC 1700

Hon'ble Judges : V.K. Birla, J

Bench : Single Bench

Advocate : Ajit Kumar Singh, for the Appellant; P.K. Jain and Vikrant Rana, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vivek Kumar Birla, J.—Heard learned counsel for the petitioners and Shri Vikrant Rana appearing for the contesting respondents. The facts of the case in brief are that a contract was entered into between the Union of India and the respondent No. 3 (M/s. P.A.B.(India) Private Ltd., Paitapur (hereinafter referred to as the "Firm") on 22.2.1990 for construction of Air Conditioning Accommodation for data entry system at Ordinance Factory, Muradnagar. Subsequently, the time for completion of work was extended till 30.9.1991. Thereafter, certain disputes arose between the parties and as per clause 70 of the agreement, the matter was referred to sole Arbitrator. The Chief Engineer Bareilly Zone, Bareilly appointed Shri Ashok Kumar, Additional Chief Engineer (Planning), CEBZ Bareilly as Arbitrator by letter dated 15.12.1992. The Arbitrator gave its award on 21.1.1994 awarding certain amount in favor of the Firm. The Firm also filed an application under Section 14 of the Arbitration Act for making the award, Rule of the Court. The petitioners filed objection under Section 30 of the Arbitration Act before the Court below. By order dated 26.10.1996, the IVth Additional Civil Judge (Senior Division), Meerut rejected the objections of the petitioners and allowed the case of the Firm. This order dated 26.10.1996 was further challenged

by the Union of India before the IVth Additional District Judge, Meerut by filing Misc. Appeal No. 414 of 1996. On 18.11.1997, the appeal was allowed and the order dated 26.10.1996 passed by the Civil Judge (Senior Division) Meerut making the award, Rule of the Court was set aside and the matter was remanded back to the sole Arbitrator, Shri Ashok Kumar, Additional Chief Engineer for decision afresh. Certain findings were recorded by the Lower Appellate Court to the effect that the Arbitrator has not accepted the claim of the Firm, insofar as, claim Nos. 2, 3, 4, 6, 7 and 9 are concerned but while deciding item No. 8 interest was awarded, which was a gross illegality and therefore, the same could not have been awarded. The Appellate Court remanded back the matter by judgment and order dated 18.11.1997 to Shri Ashok Kumar, Additional Chief Engineer and it is not in dispute that Shri Ashok Kumar had retired on 31st August, 1995 i.e. much prior to the date of decision of the Appellate Court given on 18.11.1997. This judgment was not challenged by Union of India before any higher Court and thus attained finality.

2. Shri Ashok Kumar proceeded with the arbitration proceedings and no objection was taken by the Union of India before him that after retirement he was no longer competent to proceed with the arbitration proceedings. Ultimately, a fresh award was passed on 15.6.1998 (which may be referred to as the "last award"). The Firm filed an application to make the (last) award, Rule of the Court. Against the last award, an objection was also filed by the Union of India under Section 30 of the Arbitration Act before the concerned Court. By judgment and order dated 15.9.1999, the Vth Additional Civil Judge (Senior Division), Meerut rejected the objection of the petitioners and directed that the Award dated 15.6.1998 be made, Rule of the Court. Against the aforesaid judgment of the Additional Civil Judge dated 15.9.1999, two miscellaneous appeals came to be filed by the Union of India being Misc. Appeal No. 54 of 1999 and Misc. Appeal No. 80 of 2000. Both the appeals were dismissed by the Lower Appellate Court on 31.3.2003.

3. In nutshell, the objection of the Union of India was dismissed and application of the Firm was allowed to the effect that the award be made, Rule of the Court.

4. The present petition has been filed primarily challenging the aforesaid decisions on the ground that the Arbitrator had no jurisdiction to proceed with the Arbitration Proceedings as he had retired from service and was not competent to proceed with the arbitration proceedings.

5. The counsel for the petitioners has also weakly attempted to show that the Firm specifically gave an undertaking that for the unfinished work done during the extended period the Firm shall not claim any escalation of cost. He submits that the Arbitrator has illegally granted the same for the work done in extended time and that the same is wholly without jurisdiction and contrary to the terms agreed between the parties.

6. Per contra, Shri Vikrant Rana, Advocate appearing for the Firm had submitted that the objections, which are now being taken regarding competence of the

Arbitrator, were never taken by the petitioners before the Arbitrator. He submits that it was well within the knowledge of the petitioners that the arbitrator had already retired from service during the pendency of the appeal whereby first award was challenged by the Union of India, and subsequent thereto no objection was raised before the Arbitrator regarding his competence to proceed with the arbitration proceedings. He, therefore, submits that it is no longer open to the petitioners to claim that Shri Ashok Kumar had no jurisdiction to proceed with the arbitration after his retirement. He further pointed out that the judgment and order dated 18.11.1997 passed by the Lower Appellate Court in Appeal No. 414 of 1996 was never challenged by the petitioners and thus, became final and the petitioners also submitted before the Arbitrator and completed their arguments without raising any such objection. He further submits that insofar as, claim of payment of escalated cost against work done during extended period, the same was never challenged before the Arbitrator as well as by filing objections under Section 30 of the Arbitration Act while challenging the judgment and order dated 15.9.1999 passed by the Vth Additional Civil Judge (Senior Division), Meerut in appeal, hence now the same is not open to challenge as it will be deemed that the Union of India, by its conduct has waived the terms of agreement. In support of his arguments, Shri Rana has relied upon several judgments of Hon''ble Apex Court to contend that once the petitioners failed to raise any objection with regard to competence of the Arbitrator that he cannot proceed with the arbitration proceedings after his retirement, it is no longer open to the petitioners to challenge the same and the present petition deserves to be dismissed as the order passed by Lower Appellate Court are perfectly just and legal.

7. I have considered the rival submissions and perused the record. A perusal of record demonstrates that the objections filed by the Union of India under Section 30 of the Arbitration Act against the last award are too vague in nature and except one line objection that the Arbitrator after retirement was not competent to give award, there is no specific challenge to the last award. Further, there is nothing on record to show that any attempt was made by the petitioners before the lower appellate Court, before or at the time of passing of the judgment dated 18.11.1997 in Misc. Appeal No. 414 of 196 when matter was remanded back to Shri Ashok Kumar, to intimate the Court that he had already retired and therefore was not competent to proceed with arbitration. Undisputedly, after remand the petitioners pursued their case before Shri Ashok Kumar.

8. Insofar as the competence of the Arbitrator after his retirement is concerned, it is very much clear from the operative portion of the judgment of the Lower Appellate Court dated 18.11.1997 that Shri Ashok Kumar, Additional Chief Engineer was directed to pass the fresh award within three months. This judgement and order dated 18.11.1997 was never challenged by Union of India by filing writ petition or by availing any other remedy available in law. Not only this, Union of India appeared before the Arbitrator, Shri Ashok Kumar, who had already retired during the pendency of the appeal before the Court below with

full knowledge. It is also clear from the record that arguments were also advanced before the Arbitrator only on merits and his competence to proceed with the arbitration proceedings was never raised before him.

9. In *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, AIR 1988 SC 205 : (1987) 2 ARBLR 196 : (1987) 3 JT 160 : (1987) 2 SCALE 125 : (1987) 4 SCC 217 : (1987) 3 SCR 569 : (1987) 2 UJ 445 , the Hon''ble Apex Court held that the principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from the contending that the proceedings were without jurisdiction. Paragraphs 6, 7 and 8 of the said judgment are quoted herein under:

"6. Mr. Kacker submitted that this principle could be invoked only in a situation where the challenge is made only after the making of an award, and not before. We are unable to accept this differentiation. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction.

7. Russel on Arbitration, 18th Edition page 105 explains the position as follows:

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

8. The Judicial Committee in decision in *Chowdhri Murtaza Hossein vs. Mussumat Bibi Bechunnissa*(1876) L.R. 3 I.A. 209 (Privy Council) , observed at p. 220:

"On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceedings to make their awards, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself; and that is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

Relying on the aforesaid observations this Court in *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, AIR 1975 SC 230 : AIR 1974 SC 230 : (1975) 1 SCC 289 : (1975) 2 SCR 811 : (1975) 7 UJ 2 acted upon the principle that acquiescence defeated the right of the applicant at a latter stage. In that case the facts were similar. It was held by conduct there was acquiescence. Even in a case where initial order was not passed by consent of the parties a party by participation and acquiescence can preclude future challenges."

10. In the case of *Durga Charan Rautray Vs. State of Orissa and Another*, (2011) 12 JT 275 : (2011) 2 SCALE 316 : (2012) AIRSCW 87 : (2011) 7 Supreme 495

the Hon''ble Apex Court held that once the disputes raised by appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable.

11. In *Construction India Vs. Secretary, Works Department, Government of Orissa and Others*, AIR 1998 SC 717 : (1998) 1 ARBLR 127 : (1998) 86 CLT 142 : (1998) 1 CTC 119 : (1997) 10 JT 220 : (1997) 7 SCALE 693 : (1998) 2 SCC 89 : (1997) 6 SCR 371 Supp : (1998) 1 UJ 360 : (1998) AIRSCW 415 : (1997) 10 Supreme 565 , the Hon''ble Apex Court held that a conscious acquiescence on the part of the respondents in the continued jurisdiction of the arbitrator, it is no longer open to them to challenge the same on the ground of jurisdiction. In this case also (as in the case in hand) the appointment of arbitrator was by name and he continued even after he was no longer Chairman of Orissa Arbitration Tribunal. The decision of the Hon''ble Apex Court in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, AIR 1988 SC 205 : (1987) 2 ARBLR 196 : (1987) 3 JT 160 : (1987) 2 SCALE 125 : (1987) 4 SCC 217 : (1987) 3 SCR 569 : (1987) 2 UJ 445 , is also cited with approval in paragraph 13 of this decision. Paragraph 6 of the said judgment is quoted herein under:

"6. The order of appointment clearly shows that the appointment of Shri G.S. Patnaik, Chairman of the Orissa Arbitration Tribunal, is of a named arbitrator. The order of appointment does not qualify this appointment either by prescribing that he can act as an arbitrator so long as he continues as Chairman of the Orissa Arbitration Tribunal; nor is there any implication to this effect in the Sub-Court's order. The reference to arbitration is also not to the Orissa Arbitration Tribunal. This would require three members constituting the Tribunal to sit together. Therefore, it is difficult to hold that the arbitrator who was named was to act as an arbitrator only so long as he held the office of the Chairman of the Orissa Arbitration Tribunal. The parties may choose an arbitrator for various reasons. They may rely on his expertise or his special skills at the time when they choose the arbitrator. According to the respondents they agreed to the name because there were departmental instructions to refer disputes to the arbitration of any member of the Orissa Arbitration Tribunal. But when the arbitrator is named, unless there is a clear intention spelt out in the agreement of reference to indicate that he would continue to be an arbitrator only so long as he holds a particular office, a mere reference to the office held by the arbitrator will not disqualify him from being an arbitrator after he ceases to hold that office. The arbitrator, therefore, had jurisdiction to give the awards."

12. Recently again while considering the competence/jurisdiction of the Arbitrator, the Hon''ble Apex Court in *Union of India (UOI) Vs. M/s. Pam Development Pvt. Ltd.*, (2014) AIRSCW 1408 : (2014) 2 SCALE 573 , clearly held that since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned Arbitrator, the

same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996. Relevant paragraphs No. 16, 17, 18 and 19 are quoted hereunder:

16. As noticed above, the appellant has not only filed the statement of defence but also raised a counterclaim against the respondent, since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned Arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.

17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16 clearly recognises the principle of kompetenz-kompetenz. Section 16 (2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *BSNL v. Motorola India (P.) Ltd.* Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

"39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

19. In our opinion, the obligations are fully applicable to the facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of jurisdiction of the Arbitral Tribunal."

13. Thus, in the facts and circumstances of the case and in view of the various decisions of Hon'ble Apex Court, it is no longer open to the petitioners, Union of India to challenge that the award was without jurisdiction as Shri Ashok Kumar, the Sole Arbitrator had no jurisdiction to proceed with the matter after his

retirement.

14. In my opinion, except the aforesaid ground, no other ground to challenge the award and the judgments passed by the Court below can be now raised. This Court cannot sit in appeal over the decision of the Arbitrator by examining and re-examining the material and evidence before him. Further, no challenge to the finding of facts was made in the objections filed by the Union of India before the Courts below. Even otherwise apparently on the basis of arguments findings have been recorded by both the Courts below against the petitioners, which in my opinion are not open to challenge and cannot be re-appreciated under Article 226 of the Constitution of India.

15. No other point is pressed by the counsel for the petitioners. In view of the aforesaid, the petition lacks merit and is accordingly, dismissed.