
(2004) 06 CAL CK 0062
In the Calcutta High Court
Case No : F.A.T. No. 001 of 2004

Union of India (UOI)

APPELLANT

Vs

Surendranath Kanungo and Another

RESPONDENT

Date of Decision : 21-06-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 34

Citation : (2005) 2 ARBLR 106 : (2005) 1 CALLT 457

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Samjay Bhasin and Arul Prasanth, for the Appellant; Hemraj Bhadur, for the Respondent

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—This appeal is directed against the judgment and order dated 9th March, 2004 passed by the learned District

Judge while disposing of the application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred in short as the said Act). By the

judgment and order impugned the learned Judge rejected the application of the appellant and upheld the award passed by the learned Arbitrator.

2. The facts of this case needs to be briefly stated as hereunder :

The first respondent by a written contract was entrusted by the appellant to execute a portion of the civil works of extension of runway of the Air

Port at Port Blair. The portion of the work given the first respondent essentially involved excavation of earth for a total cost of Rs. 14, 72,36,603/-

. The said contract was entered into factually by and between the first respondent and the Executive Engineer, APWD on 29th December 1995.

The said written agreement contained an arbitration clause being Clause 25 of

the condition of contract which will be referred to little later.

3. Undisputedly, the first respondent completed a portion of the aforesaid works covered by first to sixteenth running account bills and admittedly

the payment in respect of the aforesaid bills has been made, of course with the intervention of the Court, as the disputes related thereto were

referred to the arbitration followed by the award and affirmation of the same by the Court. Thereafter, the first respondent is said to have

completed, the works of the running account bills numbering 75th and 148th were prepared in connection therewith for payment. The first

respondent to recover price of the works done covered by the bills as above, had filed writ petition. The said writ petition was disposed of by the

Hon"ble Mr. Justice P.C. Ghose on 17th January 2002. Justice Ghose was pleased to direct the Chief Engineer, APWD to appoint an Arbitrator

to decide the market rate for the works done by the respondent No. 1. In terms of the aforesaid order the Chief Engineer of the APWD appointed

the Additional Director General (SLP), CPWD one Shri Jagmohan Lal, Ministry of Urban Development, New Delhi as the sole Arbitrator, the

second respondent, and he accepted this office of arbitration. The Arbitrator, second respondent thereafter entered upon reference on 16th August

2002 and gave direction upon the respective parties to file statement of claim counter statement and rejoinder in terms of order of Justice Ghose.

The respondent thereafter, in his official capacity was due to and indeed retired on 30th September 2002. Even after retirement the learned

Arbitrator proceeded with the arbitration and passed award upon ex parte hearing. It is stated in the petition that the consent was given for

continuation with the arbitration proceedings even after his retirement, however, subsequently the second respondent was replaced by fresh

appoint of personnel, on 24th December, 2002 instead of re-appointment in favour of the second respondent, as it was assured to be made

previously. One Shri O.P. Gandhyan, Ministry of Urban Development and P.A., Calcutta was appointed sole Arbitrator in place of the second

respondent. Such appointment was made in terms of the arbitration agreement which enables Chief Engineer to do so on vacation of office of

substantive post by the Arbitrator initially appointed.

4. The second respondent ignoring the fact of his replacement completed the

hearing ex parte on 28th December 2002 and without giving opportunity of further hearing or adducing any evidence made and published award on 3rd January 2003.

5. The learned counsel appearing for the appellant, Mr. Sanjay Bhasin contends that the learned Court below erroneously and wrongly rejected

contention of the appellant that award is nullity, as the respondent No. 2 had become functus officio on account of his retirement from the

services. He had no jurisdiction to proceed further with the arbitration for any Officer appointed as Arbitrator by the Chief Engineer can act as

such till he remains in the same office at the place where he was appointed. He had vacated the office of his retirement, therefore, he ought not to

have proceeded with this arbitration proceeding.

6. It is true at one point of time before his retirement the consent was given for extension of time to make and publish the award till time beyond

date of his retirement. Even his clients also participated at the time of the site inspection made by second respondent, and according to him by

reason of giving consent for acting upon the learned Arbitrator cannot be said to have been clothed with the Jurisdiction. The position is clear from

fair reading of the arbitration agreement.

7. It will be apparent further from the language of the arbitration clause that any person who has vacated office either on account of transfer or

retirement or otherwise the Chief Engineer had no jurisdiction even to reappoint him nor any of the officials of the petitioner can give consent to

such reappointment. He submits further that question of acquiescence or estoppel do not apply in a case of this nature and in support of his

contention he has drawn our attention to a decision of the Supreme Court reported in Union of India and others Vs. M/s. Prabhat Kumar and

Bros. and another, and Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., respectively.

8. He further contends that the learned Arbitrator has passed the award upon hearing the matter exparte on 28th of December, 2002 though his

client's officials admittedly prayed for adjournment and the communication of refusal of such adjournment and of fixing date of hearing of the

arbitration proceedings on 28th December, 2002 itself was not communicated, as such the appellant was prevented from appearing before him

subsequently. Therefore, the respondent No. 2 has committed breach of principles of natural justice while making and publishing the impugned award.

9. On merit according to the learned counsel for the petitioner there was no evidence so to say to accept the market rate for payment of the price for works done for passing the impugned award. No documentary evidence was produced before him and in fact had the appellant been given opportunity for hearing unimpeachable documents could have been produced to rebut evidence and further claim of the first respondent.

10. Mr. Hemraj Bahadur learned counsel for the respondent No. 1 submits that the award passed by the learned Arbitrator does not suffer from any infirmity or illegality on any count. The appropriate official of the petitioner duly gave consent to the extension of the making and publishing of the award by the respondent No. 2 when his tenure in his substantive post did not cease. His contention is that both the parties consciously participated in the arbitration proceedings even after retirement of the respondent No. 2 therefore, by act and conduct the appellant has waived their objection as to the question of jurisdiction of the learned Arbitrator. In any event the learned Arbitrator in his award has decided this question.

u/s 16 of the said Act he is competent to decide the same. He has relied on the following decisions of the Supreme Court in support of this portion of his submission.

(1998)2 SCC 82 (Construction India v. Secretary Works Department, Government of Orissa and Ors.)

2001(3) Arb LR 142 SC (State of Punjab v. Amar Nath Agarwal Construction and Ors.)

Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others,

Himalayan Construction Co. Vs. Executive Engineer, Irrigation Division and Another, and

(2000) 10 SCC 41

11. His next contention about passing ex parte award is that in spite of the peremptory notice of hearing being given by the learned Arbitrator the appellant deliberately did not appear. Therefore, there is no illegality in hearing the matter ex parte. In support of this submission he has referred to the decision of the Supreme Court reported in Narayan Prasad Lohia Vs. Nikunj

Kumar Lohia and Others, .

12. As far as the challenge on the merit of the award is concerned, the contends, that under provision of Section 34 of the said Act this challenge is

not sustainable and in fact Court has no jurisdiction to scrutinise nor examine reason of the learned Arbitrator, nor re-appreciate either. The Court

cannot entertain any objection as regard correctness of the awards on merit. He has referred to the decision of the Supreme Court reported in Puri

Construction Pvt. Ltd. Vs. Union of India (UOI), .

13. After having heard the respective submissions of the learned counsels and examined the materials placed it appears to us in this matter that

there are three points involved to examine whether the learned Court below has decided the matter legally and properly (i) Whether the learned

Arbitrator had become functus officio at the time of passing of the award, (ii) Whether the learned Arbitrator committed misconduct in passing ex

parte award in this matter, (iii) Whether the objections raised on merit of award can be scrutinised u/s 34 of the said Act.

14. The learned Court below on the first question has held that by act and conduct and by necessary implication the appellant has waived the

objection as to jurisdiction of the learned Arbitrator as he found that the appellant having consented to extension beyond his retirement date the

learned Arbitrator was allowed to continue with the arbitral Tribunal. He held upon interpretation of the arbitration clause that the reference was

made not to the office of the learned Arbitrator but to him in his personal capacity. On the question of ex parte hearing the learned Court below

found that in spite of repeated opportunity being given by serving notice and consequent upon prayer for adjournment being rejected did not turn

up, as such there was no wrong on part of the second respondent to hear ex parte and to make and publish ex parte award.

15. On merit the learned Court below did not find any infirmity or illegality.

16. While deciding the question of jurisdiction in the context of the question raised by the appellant it is necessary to examine the scope and

content of arbitration agreement itself in as much as, the authority of the Arbitrator emanates from the agreement itself as it is settled position of

law. Unlike, statutory arbitration, Arbitrator is the creature of agreement between the parties. It is also settled position of law agreement once

concluded and arrived at cannot be allowed to be breached by any of the parties as the same is binding of course subsequently the parties are free

to amend, alter or abrogate the agreement altogether- Therefore, the agreement being Clause 25 of the contract is reproduced hereunder.

Clause 25 - Except where otherwise provided in the contract, all question and disputes relating to the meaning of the specification, designs,

drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other

questions, claim, right matter of thing whatsoever in any way arising out of or relating to the contract, designs, drawing, specifications, estimate,

instructions orders or these condition or otherwise concerning the works of the execution of failure to execute the same whether arising during the

progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief

Engineer, CPWD in charge of the work at the time of dispute or if there be charge of the work at the time of dispute or if there be no Chief

Engineer, the administrative head of the said CPWD at the time of such appointment it will be objection to any such appointment that the Arbitrator

so appointed is Government Servant that he has to deal with the matters to which the contract relates and that in the course of his duties as

Government servant he has expressed views on all or any of the matters to which the contract relates and that in the course of his duties as

Government servant he has expressed views on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally

referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or administrative head as aforesaid at the

time of such transfer vacation of office or inability to act shall appoint another person to act as Arbitrator in accordance with the terms of the

contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of

this contract that no persons other than a person appointed by such Chief Engineer or administrative head of the CPWD as aforesaid should act as

Arbitrator and if for any reason that is not possible the matter is not to be referred to the arbitration at all. In all cases where the total amount of all

the claim in dispute is Rs. 75,000/-and above the Arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act 1940, or any statutory modification or reenactment thereof and the rules made

thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause

together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90

days of receiving the intimation from the Government that the final bill is ready for payment, the claim of the contractor(s) will be deemed to have

been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these

claims.

The Arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

The decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rate or substandard

work which may be decided to be accepted will be final and would not be open to arbitration.

17. On careful reading of the aforesaid clause we think that the parties have agreed to the choice with regard to appointment of Arbitrator, of the

Chief Engineer, CPWD in charge of the work at the time of dispute or if there be no Chief Engineer, the administrative head of the CPWD at the

time of such appointment. Here the Chief Engineer was available. In this case, the second respondent was chosen by the then Chief Engineer. It is

made clear from the aforesaid clause that the Arbitrator so chosen or to be chosen by the Chief Engineer will remain in the office of the arbitral

Tribunal till he remains as the incumbent of such office of substantive post, and this is clear from the words, ""the Arbitrator to whom the matter is

originally referred, being transferred to vacate his office or being unable to act for any reason, such Chief Engineer or Administrative Head as

aforesaid at the time of such transfer vacation of office or inability to act shall appoint person to act as Arbitrator in accordance with the terms of

contract.

18. It is further clear from the aforesaid clause that a person initially appointed cannot continue in the office of the Arbitral Tribunal after cessation

of holding of his office for any reason whatsoever. This is clear from the words and sentences employed in the clause itself as follows :

It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the CPWD as

aforesaid should act as Arbitrator, and if for any reason that is not possible, the matter is not to be referred to arbitration at all.

19. Above wording in no uncertain terms, according to us suggest unmistakably that only the Chief Engineer can alone appoint Arbitrator and on

vacating office under any circumstances by the personnel he alone can supply the vacancy by choosing another person. It is not open for the

claimant respondent nor for the Government to supply the person by appointing another person or reappointing the same person.

20. In our considered view appointment of a particular office as an Arbitrator by the Chief Engineer is coterminous with his tenure in that particular

office held by him at the time of appointment. In other words once he ceases to hold particular office for the reason of his being transferred,

resignation and retirement of his incapacity on any account he cannot continue with office in the arbitral Tribunal.

21. It is settled position of law that point of jurisdiction and authority of a judicial or quasi judicial functionaries are the fundamental one and need to

be examined and in our view the same can be done undoubtedly under the provision of Section 34 of the Arbitration and Conciliation Act, 1996.

22. In this case admittedly, the original appointee viz. the second respondent had retired from his services before the arbitration could be

concluded. From the records we find both the parties had extended time to make and publish award till such time beyond his date of retirement.

We also find both the parties by the act and conduct no doubt accepted the authority of the second respondent even after the retirement. Because

of this act and conduct of the appellant the first respondent has raised question of waiver and acquiescence so also accepted by the learned Court

below. The question of waiver under provision of Section 4 of the said Act 1996 assumes tremendous significance.

23. We are of the view that the question of waiver as to the objection to the authority of the second respondent is wholly misplaced here. The

expression "waiver" postulates as noted in Black's Law Dictionary VIth Edition at page 1580, intentional or voluntary relinquishment of a known

right, or such conduct as warrants an inference of the relinquishment of such right. None of the contracting parties in terms of the arbitration

agreement had any authority to give consent expressly or impliedly to continue with incompetent Arbitrator in arbitration without abrogating

arbitration agreement and/or the reference. The extension granted during subsistence of the valid reference and before the retirement date of the

second respondent cannot travel beyond the date of retirement, and this extension shall be meaningfully interpreted and construed to have been

granted till the date of his retirement, as any act and conduct or action of the second respondent qua holder of the substantive office cannot be said

to be valid after retirement, as his appointment was attached to his office and it was his part of his job while holding office.

24. The learned Arbitrator ought to have understood his limited tenure. In our view the second respondent on the face of the said arbitration

Clause 25 ought not to have proceeded with.

25. It is nobody's case the Chief Engineer has ever granted extension. On the contrary from the records we find that the official of the appellant

had requested the learned Arbitrator to hold his hand till the Chief Engineer made valid re-appointment, In our view none of the parties agreed to

authorize Chief Engineer to reappoint the same person who has vacated office of his substantive post held at the time of his appointment. In

absence of further agreement to this effect even the Chief Engineer could not reappoint. Factually the Chief Engineer ultimately did not make re-

appointment. So, we conclude that the act and conduct of the parties particularly the appellant while accepting and/or acquiescing in continuation

of the second respondent in the office of the arbitration are of no consequence under law.

26. To our mind the learned Arbitrator, second respondent inherently lacked jurisdiction as his continuation under no circumstances in this case

was possible. We also find from the records that the learned Arbitrator himself observed that he should continue the arbitration proceedings

subject to formal re-appointment. This decision in our view can be termed to be interim award u/s 16 Sub-section 4 of the said Act, he himself

should have acted pursuant thereto. We are constrained to hold the second respondent's conduct was any thing but fair or proper as in spite of

being communicated by the Chief Engineer that new person had been appointed in his place on 24th December, 2002, he proceeded further with

the arbitration proceedings and heard the same ex parte on 28th December, 2002 and ultimately pursuant to such hearing he made and published

the award. When he was communicated with the decision of the Chief Engineer that he had been replaced, then and there he ought to have realised

that this services as an Arbitrator was no longer required and his act and function would be of no effect and rather it would be a futile exercise. He

had undertaken such unwarranted tasks, notwithstanding.

27. We, thus unable to accept the contention of Mr. Bahadur that the second respondent was appointed as a person not as being holder of the

substantive post and his appointment as an Arbitrator is not co-terminus" with his holding of substantive post. The learned Court below therefore,

in our view, was completely in error for he misread scope and purview of the aforesaid arbitration agreement. We think also even on casual

reading of the aforesaid clause no person having ordinary prudence could come to conclusion that the mechanism of the arbitration agreement

anyway suggest any appointment to a particular person rather than the holder of the office. Such irrational and absurd finding are not sustainable

and accordingly, we cannot accept the same of the learned Court below. We are not oblivious to our limitation under the provision of Section 34

of the said Act that does not permit to substitute interpretation of Superior Court in place of that of learned first Court or learned Arbitrator. But

we feel this proposition is not inflexible. Irrationality or absurdity be it in administrative or quasi-judicial or judicial action has no place anywhere.

This must be eliminated both in public law and private law field. The decisions of the Supreme Court cited by Mr. Bahadur on the question of

waiver and acquiescence are absolutely misplaced here.

28. The decision of the Supreme Court reported in case of Construction Works Department, Government of Orissa and Ors. (1998) 2 SCC

1989 relied on by Mr. Bahadur is not an appropriate authority In this case, rather it helps some extent to uphold the contention of the appellant. In

paragraph 6 of this judgment Their Lordships clearly observed that:

When the Arbitrator is employed, 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 hold a particular office, a mere reference to the office held by the Arbitrator will disqualify him, forming an

Arbitrator after he ceases to hold that office.

29. The machinery of the arbitration agreement in the case on hand clearly indicates that the appointee will cease to hold the office of Arbitrator so

long he/she will hold substantive office.

30. The decision of the Supreme Court rendered in case of State of Punjab v. Amaranth Agarwala Construction and Ors. 2001(3) Arb LR 142

cited by Mr. Bahadur is factually distinguishable and in this case the learned Arbitrator though vacated his office by the order of punishment of

compulsory retirement but subsequently he was reinstated. Moreover, factually both the parties participated in the hearing of the arbitration. In this

case on hand except site visit of the Arbitrator the appellant did not participate in the hearing nor did it turn up.

31. The decision of the Supreme Court rendered in case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, the Supreme Court

followed the principle of waiver and acquiescence in different context and fact. In that case it appears that the parties themselves under the

arbitration agreement were competent to appoint and further to supply the vacancy of the Arbitrator. In this case the appointing authority was a

third party and the parties denuded themselves from right of choosing the Arbitrator. So question of estoppel and acquiescence cannot arise

applying this decision. Likewise the decision of Supreme Court in case of Himalaya Construction Company v. Executive Engineer Irrigation

Division [(2001) 359] is also not helpful to accept the contention of Mr. Bahadur as the machinery of the arbitration in that case was absolutely

different from the present one. In that case it appears from the arbitration agreement itself the parties had free choice to appoint Arbitrator.

Moreover, arbitration clause in that case did not reflect any intention of the parties unlike present one that on retirement and/or vacation of office of

the Arbitrator in his substantive office authority of the Arbitrator would cease.

32. The Hindustan Vegetable Oil Corporation case decided by the Apex Court reported in (2000) 10 SCC 41 is similarly distinguishable on fact

as there was no indication in that case as to the nature of the arbitration clause. As such abstract proposition of law laid down without having clear identity of the fact will not be applicable.

33. Rather we find that the decision of the Supreme Court cited by Mr. Bhasin, learned counsel for the appellant rendered in case of Union of

India and others Vs. M/s. Prabhat Kumar and Bros. and another, we find that the continuation of an Arbitrator after retirement in his substantive

post is invalid. In paragraph 5 of the said judgment it has been observed by the Three Bench decision of the said Court that the Arbitrator who had

been appointed by the Government cease to be the Arbitrator on the retirement from Government service on 17th September, 1990. In terms of

condition 70 the Union of India is competent to appoint a new Arbitrator.

34. In this case also this has exactly happened what had happened in the case cited above. Another person viz. O.P. Gaddhyan, Ministry of UD &

PA has been appointed in place and stead of the second respondent and such decision was communicated on 24th December, 2002.

35. As far as the question of ex parte final hearing of the matter as well as the passing the Award is concerned, we are of the considered view that

the learned Arbitrator, namely, the second respondent without giving sufficient notice of hearing to the appellant, heard the matter ex parte and

passed the impugned award. On 23rd December, 2002, the learned Arbitrator held proceeding and decided that the matter to be heard on 28th

December, 2002 and on that date, the respondent duly prayed for adjournment and such adjournment is said to have been refused by the learned

Arbitrator. But we do not find any material from the records that such decision of refusal of such prayer has been communicated to the appellant.

36. Moreover, another significant fact is that before the matter could be heard on 28th December 2002, the Chief Engineer took decision for

appointing a new Arbitrator in place and stead of the second respondent and such decision was communicated to and received by the learned

Arbitrator on 24th December, 2002. On receipt of this communication, the learned Arbitrator in our view, would not have proceeded with this

matter without giving another chance to the appellant to take further course of action. We fail to understand what prompted the learned Arbitrator

to proceed in such hasty manner when there was a dispute and controversy

regarding the functioning of the learned Arbitrator. On 17th November, 2002 in his sitting of Arbitration had taken note of his retirement that he would continue with arbitration pending issue of letter of reappointment by the Chief Engineer. It is quite natural that the appellant having been informed about the change of Arbitrator would not appear before the second respondent. This should have been understood by the learned Arbitrator himself as well as the learned Court below. Therefore, we hold that the impugned award has been passed in flagrant violation of the principles of natural justice. On that ground also the impugned award is not sustainable.

37. There are many a facets of principles of natural justice and one them is to give reasonable opportunity of being heard. In this case, we are

constrained to observe that reasonable opportunity was not given to the appellant for hearing and making final submission on merit of the case.

38. As far as the contention of Mr. Bhasin, learned counsel appearing for the appellant on the merit of the award is concerned. We are not

impressed with the submission of the learned counsel. The learned Arbitrator even assuming he was competent to decide the matter, has

considered the evidence and appreciated the same, when upon appreciation he has come to his own finding on merit the Court cannot upset unless

there is apparent perversity. It is not the case of no evidence or unacceptable evidence but question of adequacy and inadequacy of the evidence.

This Court as rightly submitted by Mr. Bahadur for that matter the Court contemplated u/s 34 of the said Act, is not competent to re-appraise or re-

appreciate the evidence adduced by the parties before the arbitral Tribunal.

39. The arbitral Tribunal is the last authority on the question of appreciation and appraisal of the evidence adduced. It is settled position of law that

while examining an award u/s 34 of the said Act, the Court is clothed with the power to examine the same within four corners of the aforesaid

statute, nothing more or nothing less.

40. Upon perusal of the said section, we think that power of reappraisal or re-appreciation of evidence has not been conferred upon the Court.

Therefore, we uphold the findings of the learned Court below to this extent that the Court cannot re-appreciate the evidence.

41. We of course hasten to add that this observation and finding are. subject to

our findings and decision regarding the competence of the learned Arbitrator being the second respondent herein.

42. In the result, we uphold the argument of Mr. Bhasin and set aside the impugned award. Naturally, we also set aside the judgment and order of the learned Court below.

43. As the Chief Engineer has already appointed another person in place and stead of second respondent, so we direct that the newly appointed

Arbitrator shall proceed with this matter in terms of the arbitration agreement namely, from the stage as it has been left by the second respondent

on or immediately before his retirement. We clarify it that the learned Arbitrator shall take note of the action of the second respondent till his date

of retirement and he will proceed from that stage. We record that this arbitration shall be concluded within a period of two months from the date of

communication of this order.

Thus the appeal succeeds. No order as to costs.

P.K. Chattopadhyay, J.

44. I agree.