
(2019) 08 GAU CK 0055

Gauhati High Court

Case No: Arbitration Appeal No. 7 Of 2006

Union Of India

APPELLANT

Vs

J P Rateria And Co

RESPONDENT

Date of Decision: Aug. 22, 2019

Acts Referred:

- Arbitration Act, 1940 - Section 3, 20, 31, 33, 119
- Code Of Civil Procedure, 1908 - Section 151
- Limitation Act, 1963 - Section 5
- Limitation Act, 1963 - Article 119, 137

Hon'ble Judges: Achintya Malla Bujor Barua, J

Bench: Single Bench

Advocate: B Sarma, G Sutradhar

Final Decision: Disposed Off

Judgement

1. Heard Mr. B. Sarma, learned counsel for the appellant as well as Mr. R. Hussain, learned counsel appearing for the respondents.

2. The respondent who is a registered contractor with the appellant Railway authorities, entered into a contract dated 20.10.1984 for certain works

where the value of each work did not exceed Rs. 50,000/- and the period of the contract was for 12 (twelve) months from 01.10.1984 to 30.09.1985.

The contract of agreement entered by the parties contained a clause that the Standard General Conditions of Contract (in short SGCC) of the

appellant Railway authorities would be applicable where Clause 62 of the SGCC provides that all disputes and differences of any kind whatsoever

arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the

determination of the contract, shall be referred by the Contractor to the Railways and the Railways shall within a reasonable time after their

presentation, make and notify their decisions in writing.

Clause 63 provides that in the event the Railways fails to make the decision within a reasonable time or in the event of there being any dispute or

difference between the parties as to the construction or operation of the contract or if the Railways withhold any certificate to which the Contractor

may claim, the dispute or difference be referred to arbitration.

Clause 63(3)(a) of the Standard General Conditions of Contract provides as under :

“(i) A sole Arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question

is below Rs. 3,00,000/- and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole

judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two Arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in sub-clause (3)(b) for

all claims of Rs. 3,00,000/- and above and for all claims irrespective of the amount or value of such claims if the issues involved are of a

complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the

event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the

matter laid down in clause (3)(b) for his decision.

(iii) The Arbitrator/Arbitrators/Umpire so appointed as the case may be shall give the award on all matters referred to arbitration indicating

therein break-up of the sums awarded separately on each individual items of disputes.

3. A bare reading of Clause 63(3)(a) makes it discernible that the dispute or difference is to be arbitrated on being referred for decision to a sole

Arbitrator who shall be a General Manager or a person nominated by him where the claim in question is below Rs. 3,00,000/-and where the issues

involved are not of a complicated nature. On the other hand, for claims above Rs. 3,00,000/- and above, two Arbitrators who shall be Gazetted

Railway Officers of equal status be appointed as Arbitrators and in the event the two Arbitrators are divided in their opinion, the disputes be referred

to an Umpire to be appointed for the purpose.

4. Upon a dispute and difference having arisen between the appellant and the respondents, an application under Section 20 of the Arbitration Act,

1940, was preferred by the present respondents, which was registered as T.S. (Arbitration) No. 156/1990 in the Court of Assistant District Judge No.

1, Guwahati. By judgment dated 08.12.1993, the learned Assistant District Judge No. 1, Guwahati, had issued a direction that the defendants therein,

i.e. the appellant Railway authorities, shall appoint a sole Arbitrator and refer the dispute set forth in the petition to the Arbitrator who is to be

appointed within 60 (sixty) days thereof. Being aggrieved by the judgment dated 08.12.1993, the appellant Railway authorities preferred the Civil

Revision Case No. 144/1994 before this Court. By the judgment and order dated 10.11.1998, it was provided that the revision application stood

dismissed and that the matter be referred to the Arbitrator within a period of 2 (two) months thereof.

The direction of this Court in Civil Revision Case No. 144/1994 would have to be understood that the revision preferred by the appellant Railway

Authorities stood dismissed and the direction of the Assistant District Judge No.-1, Guwahati, for referring the matter to the Arbitrator be complied

with within 2 (two) months thereof.

Now, when we look at the direction of the Assistant District Judge No.-1, Guwahati, in his judgment dated 08.12.1993, it is discernable that the

direction was to the appellant Railway Authorities to appoint a sole Arbitrator.

5. In the aforesaid background, by the communication dated 19.03.1999, the appellant Railway Authorities had suggested the names of 4 (four)

persons to be the Arbitrator and requested the respondents to choose 2 (two) amongst them. Subsequent thereto, by the communication dated

26.03.1999, the respondents had chosen 2 (two) such persons namely, Shri Pramod Kumar, CE/CON-I/MLG and Shri P.K. Sharma, CE/CON-

V/MLG. Thereupon, the Deputy CE/P&D of the appellant Railway authorities by a communication dated 31.05.1999, informed the respondents that

the following persons were appointed as Arbitrators :

(A) As Joint Arbitrators :

1. Shri Parmod Kumar, CE/Con-I/Maligaon, N.F. Railway, Contractor's Nominee.

2. Shri Rabin Deka,

Dy. CAO (T),

N.F. Railway,

As Accounts Representative.

(B) As the 3rd Member :

3. Shri C. Bakshi,

CTE/N.F. Railway, Maligaon.

6. The respondents vide communication dated 15.06.1999, accepted the appointment of the aforesaid persons as Arbitrators. But subsequently vide

another communication dated 07.10.1999, they resiled from their earlier acceptance and in turn, suggested the name of Shri Vishnu Dutta Gautam

who is an empanelled Arbitrator under the Indian Council of Arbitration. It is stated that the said communication of the respondents resiling from their

earlier acceptance of the three Arbitrators and suggesting another person from the list of Arbitrators was neither rejected nor accepted by the

respondent authorities but nevertheless, the arbitration proceeding continued with the aforesaid persons as Arbitrators.

7. In course of the proceeding, the 3rd Arbitrator, Sri. C. Bakshi, expressed his inability to continue and in the resultant situation by the communication dated 16.12.2001, the respondents requested the appellant Railway Authorities to appoint another person as the 3rd member. It is given to understand that a 3rd member was accordingly appointed and the arbitration proceeding continued resulting in the award dated 12.03.2003. The award dated 12.03.2003 was assailed by the respondents before the learned Civil Judge (Senior Division) No. -2, Guwahati, which was registered as Misc. (J) Case No. 33/2004. The application of the respondents assailing the award of the Arbitrators was purportedly made under Section 33 read with Section 3 of the Arbitration Act, 1940 and Section 151 of the CPC.

Without going into the question as to under which provision of the Arbitration Act, 1940 the respondents had made their application for assailing the award of the Arbitrator, we take note of that the award of the Arbitrators was assailed primarily on two grounds. The first ground was that the learned Assistant District Judge No. 1, Guwahati, in its judgment dated 08.12.1993 in T.S. (ARB) No. 156/1990, had directed the appointment of a sole Arbitrator and, therefore, the process undertaken by the appellant Railway Authorities in appointing three Arbitrators for the purpose was unsustainable and beyond the direction of the learned Assistant District Judge No. 1, Guwahati. It is more so as the said direction of the learned Assistant District Judge No. 1, Guwahati, in its judgment dated 08.12.1993, was also subjected to a revision by this Court in Civil Revision Case No. 144/1994, which stood dismissed by the judgment dated 10.11.1998, where also a direction was issued that the matter be referred to the Arbitrator as directed by the Assistant District Judge No. 1, Guwahati. In other words, the judgment dated 10.11.1998 of this Court, also required that the matter be proceeded by appointing the Arbitrator as directed by the learned Assistant District Judge No. 1, Guwahati i.e. by appointing a sole Arbitrator.

The petition of the respondents assailing the award dated 08.12.1993 had been objected by the appellant Railway authorities on the ground that under

the terms and conditions of agreement, as provided in the SGCC, the Railway authorities have a discretion to appoint three Arbitrators and therefore,

the respondents having bound itself by the SGCC, ã, cannot raise the objection as regards the appointment of three Arbitrators. The petition was also

objected on the ground that there was considerable delay in filing it and no such application is on record for condoning the delay. The learned Civil

Judge (Senior Division) No. 2, Guwahati by the order dated 20.06.2005, rejected both the objections raised by the appellant Railway authorities and

allowed the petition of the respondent by setting aside the arbitration award dated 08.12.1993 as invalid, null and void.

8. The order dated 20.06.2005 of the learned Civil Judge (Senior Division) No. 2, Guwahati, is assailed in this appeal. In the appeal, the appellant

Railway authorities urges upon their ground that the issue of delay in preferring the application by the respondents had incorrectly been dealt with by

the learned Civil Judge (Senior Division) No. 2, Guwahati, in as much as Article 119 of the Limitation Act would be the relevant provision and not

Article 137 as taken into consideration by the learned Court.

9. Article 119 of the Limitation Act, 1963, provides for setting aside an award or getting an award remitted for reconsideration which was passed

under the Arbitration Act, 1940 and the limitation for preferring such application is 30 (thirty) days. On the other hand, Article 137 of the Limitation

Act, 1963 pertains to any other application for which no period of limitation is provided elsewhere where the period of limitation prescribed is 3 (three)

years.

10. Mr. R. Hussain, learned counsel for the respondents has raised a contention that the respondents had preferred the application under Section 33

read with Section 3 of the Arbitration Act, 1940, and hence, it is an application where no limitation is otherwise prescribed and therefore, Article 137

will be applicable. To a query put that as the petition filed by the respondents is essentially for the purpose of setting aside the award of the Arbitrator

under the Arbitration Act, 1940 and therefor Article 119 of the Limitation Act, 1963 would be applicable, Mr. R. Hussain, learned counsel for the

respondents seeks to differentiate between setting aside of award and declaring the award to be null and void and by insisting upon such distinction,

contends that Article 119 will not be applicable.

11. We are unable to accept the said contention of the respondents in as much as we do not find any sustainable and intelligible differentia between an

award being set aside and an award being declared to be null and void. Further, the jurisdiction to file an application for setting aside an award can be

invoked under Section 30 and section 31 of the Arbitration Act, 1940, and therefore, we cannot accept the contention that such application would not

be covered under Section 119 of the Arbitration Act, 1940.

12. The ground on which the respondents seek to assail the award is that the appellant authorities had acted beyond the provision of the order dated

08.12.1993 of the learned Assistant District Judge No. 1, Guwahati, which in other words, can be construed that the award is being assailed on the

ground of it having been improperly procured or is otherwise invalid. It being so, from the ground taken in the petition by the respondents it appears

that the petition is essentially a petition under Section 30 of the Arbitration Act, 1940. But, however, the contention raised by Mr. R. Hussain,

learned counsel for the respondents, that the respondents were of the view that the petition was preferred under Section 33 of the Arbitration Act,

1940 cannot be said to be wholly preposterous.

13. Section 33 provides that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or an

award shall apply to the Court and the Court shall decide that question on affidavits. A cursory look at Section 33 may give an impression that in order

to challenge an award of Arbitrator the application would be under Section 33. But on a closer reading, it has to be understood that such view would

be incorrect. Section 33 is merely an enabling provision that for the purpose of challenging an award the party shall apply to the Court and the Court

shall decide the question on affidavits. Section 33 is not the power for invoking the jurisdiction of the Court to challenge an award. On the other hand,

it is merely a provision that such challenge may be decided on affidavits. But, however, as the appellant was under a wrong impression and reading of

law, thinking that Section 33 is a provision invoking the jurisdiction, we are of the view that such wrong understanding of the law by the respondents

resulting in a delay in filing the petition for setting aside the award may be a ground for condoning the delay. But, however, as the respondent had not

filed any application under Section 5 of the Limitation Act praying for such condonation, we are of the view that they deserve an opportunity to raise

such issue before the learned Civil Judge (Senior Division) No. 2, Guwahati, by filing appropriate application for condoning the delay. Upon such

application being filed, the learned Court shall consider the same as per law. The observation that a wrong understanding of the law may be a ground,

shall not be binding on the learned Court and it is for the learned Civil Judge (Senior Division) No. 2, Guwahati, to decide the issue on its own merit as

per law.

14. As regards the other ground raised by the appellant Railway Authorities, that the SGCC provides for appointment of 3 (three) Arbitrators and

therefore, the appellant was not incorrect in so appointing, we have some reservation in accepting the said contention.

15. The direction of the learned Assistant District Judge No. 1, Guwahati, in its judgment dated 08.12.1993 in T.S. (ARB) No. 156/1999 was passed

exercising its power under Section 20 of the Arbitration Act. 1940. Section 20 of the Arbitration Act, 1940 is as follows :

“Application to file in Court arbitration agreement.-(1) Where any persons have entered into an arbitration agreement before the

institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the

agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to

which the agreement relates, that the agreement be filed in the Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or

claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all

the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the

applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the

Arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an Arbitrator, to an

Arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can

be made applicable.

16. Section 20, inter-alia, provides that the Court before whom such application is filed shall order a reference to be made to the Arbitrator appointed

by the parties, and if the parties cannot agree the Arbitrator be appointed by the Court. The very fact that the learned Assistant District Judge No. 1,

Guwahati, had not appointed the Arbitrators as per the SGCC goes to show that the alternative power to appoint an Arbitrator dehors the agreement

or to appoint an Arbitrator on its own discretion was exercised by the learned Court. Further even in the revision against the order dated 08.12.1993,

no grievance was made by the appellant Railway Authorities against the appointment of a sole Arbitrator and it being so, provisions of, res adjudicata

will now be applicable against the appellant Railway Authorities to raise the issue that the appointment of a sole Arbitrator would be contrary to the

provisions of Clause 63 of the SGCC, more so when the parties to the dispute are one and the same. Further even otherwise, we find that Clause 63

of the SGCC provides for appointment of 2 (two) Arbitrators and in the event of their being a difference of opinion between 2 (two)

Arbitrators, the procedure provides for appointment of an 3rd Arbitrator that to in the event when the valuation of the dispute is over Rs. 3,00,000/-.

So in any view of the matter, even if the valuation of the dispute was over Rs. 3,00,000/-, the appellant Railway authorities could have appointed only 2

(two) Arbitrators and not 3 (three) Arbitrators as appointed by them. From the said point of view also the stand of the appellant Railway authorities

that they have appointed 3 (three) Arbitrators by invoking Clause 63 of the SGCC also cannot be accepted. Accordingly, objection raised by the

appellant Railway authorities, against the claim of the respondents that only a sole Arbitrator could have been appointed, is found to be unsustainable.

Under the provisions of Section 20 of the Court may either order a reference to an Arbitrator as appointed by the parties or whether the parties are

unable to appoint an Arbitrator, the Court may appoint an Arbitrator on its own.

We are of the view that as in exercise of the power under Section 20 of the Arbitration Act, 1940, the learned District Judge " 1, Guwahati had

appointed a sole Arbitrator, it would no longer be available for the appellant Railway Authorities thereafter to appoint 3 (three) Arbitrators by taking

recourse to Clause 63 of the SGCC.

The appellant Railway Authorities relies upon the pronouncement of the Hon'ble Supreme Court rendered in Hindustan Construction Co. Ltd. Vs.

Governor of Orissa and others, reported in (1995) 3 SCC 8, wherein, in paragraph 7 it had been held as follows :

"The State Government itself by a statutory notification having constituted the Special Tribunal and referred the dispute to said Special

Tribunal, we fail to appreciate as to how for the first time this stand as taken before the High Court by the State Government that the

Special Tribunal had no jurisdiction to adjudicate the dispute or to make the award. According to us, in the facts and circumstances of the

case, the High Court ought not to have permitted the State Government to raise such a contention after it had submitted to the jurisdiction of

the Special Tribunal merely because the award went against it.Ã¢â€

17. We have gone through the propositions laid down by the HonÃ¢â€ble Supreme Court but find it inapplicable in the present case in as much as in

the matter before the Supreme Court the question of jurisdiction of the Arbitration Tribunal was raised for the first time before the High Court and not

earlier. In the instant case, the objection was raised by the respondents even before the actual arbitration proceeding had started before the Arbitral

Tribunal.

18. Accordingly, the part of the judgment and order dated 20.06.2006 as regards the objection by the appellant Railway Authorities on the question of

there being a delay in filing a petition by the respondent stands interfered and the matter is remanded back to the learned Civil Judge, Senior Division

No.-2, Guwahati for deciding it on its merit as to whether the delay is required to be condoned by further providing that if required it be done only upon

proper application being filed by the respondents. But the objection raised by the appellant Railway Authorities to the ground taken by the respondents

against the appointment of a sole Arbitrator is rejected, meaning thereby that in the facts and circumstances of the present case, the appellant Railway

Authorities could not have appointed 3 (three) arbitrators without the direction of the Assistant District Judge, as upheld by this Court in the Civil

Revision No. 144/1994 was for appointment of a sole Arbitrator.

19. Accordingly, the Arbitration Appeal No. 07/2006 stands decided as indicated above.