

(2023) 01 GAU CK 0002

Gauhati High Court

Case No: Arb.A. No. 13 Of 2016

Union Of India

APPELLANT

Vs

M/S Build Worth Pvt.
Ltd.

RESPONDENT

Date of Decision: Jan. 5, 2023

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 30, 33, 34, 34(2), 34(2)(b), 37
- Arbitration (Protocol And Convention) Act, 1937 - Section 7(1)
- Foreign Awards (Recognition And Enforcement) Act, 1961 - Section 7(1)(b)(ii)

Hon'ble Judges: Parthivjyoti Saikia, J

Bench: Single Bench

Advocate: S. Gupta, S. Sarma

Final Decision: Dismissed

Judgement

1. Heard Mr. S. Gupta, learned counsel appearing for the appellant. Also heard Mr. S. Sarma, the learned counsel representing the respondent.

2. This is an application under Section 37 of the Arbitration and Conciliation Act, 1996 challenging the judgment and order dated 24.06.2014 passed by

the learned Addl. District Judge No.2, Kamrup(M) in Misc. Arb. Case No.9 of 2006 dismissing the appeal filed by the appellant.

3. The appellant Union of India is represented by the Chief Engineer, Project Dantak, C/O. 99 APO and the respondent is a private limited company.

4. On the basis of an agreement between both sides, the respondent was given the task of designing and erection of six bridges on Indo-Bangladesh

border roads under project Dantak in the State of Meghalaya. Out of the six bridges, for five of them, there was a stipulated construction time of 270

days. It was not done accordingly and therefore, an extension of time of 159 days was given. Even within that time period, the construction of the bridges could not be completed. There was further extension of time given to the respondent. In fact, the respondent had taken a total of 1258 days against original stipulated time period of 270 days.

5. For the aforesaid reasons, according to the terms of the agreement, the appellant levied a compensation of Rs.7.5 lakhs upon the respondent as compensation and it was recovered from the respondent's bill.

6. Thereafter, the respondent took the matter for arbitration. The Arbitrator directed the appellant to refund the sum of Rs.7.5 Lakh to the respondent.

7. The appellant approached the court of the Addl. District Judge, Kamrup under Section 34 of the Act of 1996 and the learned appellate court agreed with the respondent and dismissed the appeal. Hence, the present application has been filed before this Court.

8. I have given my anxious considerations to the submissions made by the learned counsel of both sides.

9. Section 34 of the Act of 1996 is based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award is far less than it was under the Sections 30 or 33 of the 1940 Act. The new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

10. Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. These grounds are:

1. Incapacity of a party
2. Arbitration agreement not being valid
3. Party not given proper notice of arbitral proceedings
4. Nature of dispute not falling within the terms of submission to arbitration
5. Arbitral procedure not being in accordance with the agreement

11. Section 34(2)(b) mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award:

1. Dispute is not capable of settlement by arbitral process

2. The award is in conflict with the public policy of India.

12. Thus the powers of the court U/S. 34 is limited and courts should not expand their own powers granted by the statute. Any such attempts by the courts while exercising their powers under S.34 of the Arbitration and Conciliation Act, 1996 shall frustrate the purpose of the above said Act itself.

13. In P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594 it was held that a Court does not sit in appeal over

the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in

Section 34(2) and in the absence of any such ground it is not possible to re examine the facts to find out whether a different decision can be arrived at.

14. Deliberating upon the phrase "public policy" as referred to in section 34 of the Act, in Renusagar Power Co. Ltd. v. General Electric Co.

[1994 Supp. (1) SCC 644], considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign

award may not be enforced under the said Act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the

Public Policy. After elaborate discussion, the Court arrived at the conclusion that Public Policy comprehended in Section 7(1)(b)(ii) of the Foreign

Awards (Recognition and Enforcement) Act, 1961 is the 'Public Policy of India' and does not cover the public policy of any other country.

15. For giving meaning to the term 'Public Policy', in Renusagar Power Co. Ltd. (supra) the Court observed thus:-

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition

and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined

to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to

indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not

used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of

1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

16. Referring to Renusagar Power Co. Ltd. (supra) the Apex Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (AIR 2003 SC 2629)

has held ---

“The phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of

public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be

injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in

violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of

justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that

the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could

also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.â€

17. The Supreme Court in ONGC Vs Western Geo International Ltd (2014) 9 SCC 263 further has expanded the scope of ""Public policy"" including

reasonableness, fundamental principles providing a basis for administration of Justice and enforcement of law in addition to the principles laid down by

the above said SAW pipes judgment (supra). Hence the term public policy as per the Western Geo Judgment includes all the following aspects:

(i) Judicial Approach (Judicial approach ensures the authority to act in a fair, reasonable and objective manner and not based on some extraneous considerations

(ii) Application of mind and recording reasons

(iii) Decision should not fall out of reasonableness if tested on the touch stone of Wednesbury principle of reasonableness

18. In Associate Builders v. Delhi Development Authority AIR 2015 SC 620, the Hon,ble Supreme Court has explained what constituted the

fundamental policy of Indian law. In that process, it extracted certain passages from its earlier decision in ONGC Ltd. v. Western Geco International

Ltd (supra).In para 40 of that judgment, it was observed as under:

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor

is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved

before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it,

untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the

joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable

from the rest.

19. In Associate Builders (supra) the Apex Court also referred to the decisions in P.R. Shah, Shares & Stock Brokers (P) Ltd. (supra) where it was

reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged only on the grounds mentioned under Section 34(2) of the Act.

20. In *Haryana Tourism Ltd. v. Kandhari Beverages Ltd.*, (2022) 3 SCC 237 , in paragraph 9, it is held as under---

“9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public

policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy

of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to

the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration

Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has

exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [*Kandhari Beverages Ltd. v.*

Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable.”

21. When two parties sign the arbitration agreement under Section 7 of the Act, the agreement is binding upon both the parties. Subsequently when a

dispute arises between them and when they opt for arbitration, the award passed by the appointed arbitrator will be binding on both the parties.

22. But when both the parties or either of the party is not satisfied with the award, in that case a recourse is also provided in the Act. For this, Section

34 of the Act provides certain grounds in which application for setting aside of an award can be made and further Section 37 provides for the

provision of appeal regarding certain orders.

23. Section 34(2) of the Act provides following grounds for setting aside of an arbitral award by the Court-

1. If there was some incapacity, or

2. The law which the parties are subjected to makes the agreement void, or

3. The party making the application was not provides with proper notification about the appointment of arbitrator or about arbitral proceedings or was

not give a chance to present his case, or

4. The award deals with the matters beyond the scope the arbitration agreement, or

5. The composition of the arbitral tribunal or the arbitral procedure was not according with the agreement of the parties, or

6. Where the subject-matter of the dispute is not capable of settlement by arbitration or the award is in conflict with any public policy of India.

24. Thus, the law is very clear. I find that under the given circumstances of the case, the present appeal is devoid of merit and stands dismissed

accordingly.

Send back the LCR.