

(2023) 01 GAU CK 0009
Gauhati High Court
Case No: Arb.P. No. 7 Of 2019

Prestressed Udyog

APPELLANT

Vs

General Manager
(Works)

RESPONDENT

Date of Decision: Jan. 4, 2023

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 11, 12(5), 16, 34, 37

Hon'ble Judges: N. Kotiswar Singh, J

Bench: Single Bench

Advocate: D. Das, S. Khound, R. Sarmah, B. Sarmah

Final Decision: Disposed Of

Judgement

1. Heard Mr. S. Khound, learned counsel for the petitioner. Also heard Mr. B. Sarmah, learned Standing Counsel, N.F. Railway.

2. The present petition has been filed challenging the appointment of Arbitral Tribunal consisting of Shri Bhuvanesh Prakash Khare (respondent No.2)

as Presiding Arbitrator, Shri Harsh Kumar and Shri P.K. Rai as Co-Arbitrators (respondent Nos.3 and 4) on various grounds including, firstly, that

there is no arbitration agreement between the parties for referring any dispute for arbitration and secondly, that they being retired employees of the

Railways, could not have been appointed as Arbitrators in view of the bar imposed under Section 12(5) of the Arbitration and Conciliation Act, 1996.

3. It has been submitted by Mr. Khound, learned counsel for the petitioner that when this petition was moved on 15.02.2019, this Court passed an

interim order on the same day on 15.02.2019 to the effect that until further orders, there shall be stay of arbitration proceeding before the arbitral

tribunal comprising of respondent Nos.2, 3 and 4. Unfortunately, in spite of the said stay order passed by this Court, the arbitration was proceeded and the Tribunal made the award on the same day on 15.02.2019.

4. It has been submitted by Mr. Khound that since the arbitrators appointed have no competency inasmuch as there was no arbitration agreement as well as they were retired employees of Railway, they could not have been appointed as arbitrators and as such, the entire arbitration proceeding including the award will be in nullity in law.

5. Mr. B. Sarmah, learned Standing Counsel, N.F. Railway, on the other hand, submits that the petitioner had duly participated in the arbitration proceeding and also raised the issue of the competency of the arbitrators before the Arbitral Tribunal. He submits that however, the Arbitrators had correctly rejected the pleas of the petitioner and passed the award on 15.02.2019 before the interim stay order was granted by this Court. It has been submitted that though the award was passed on 15.02.2019, it was passed around 12 noon before the Court passed the interim order, and thus, not in violation of this Court's order.

6. Mr. B. Sarmah submits that, under the circumstances, if the petitioner is aggrieved by the arbitration proceeding or the award, he would be at liberty to challenge the same before the appropriate forum as envisaged under Section 34 of the Arbitration and Conciliation Act, 1996, which he has not yet done.

7. Mr. Khound, learned counsel for the petitioner, however, submits that since the arbitration was proceeded in spite of the stay order passed by this Court which was confirmed by the subsequent order dated 24.06.2019, the arbitral proceeding and the award is nullity in law and as such, this Court can proceed to appoint the Arbitrator in terms of Section 11 of the Arbitration and Conciliation Act, 1996.

8. This Court has considered the rival contentions of the parties.

9. From the above, it is quite apparent that the petitioner has challenged the jurisdiction and competency of the Arbitral Tribunal consisting of respondent Nos.2, 3 and 4 on the ground, firstly, that there is no arbitration agreement between the parties to refer the dispute to arbitration and

secondly, that as the members of the Arbitral Tribunal being ex-employees of the Railways, they could not have been appointed as Arbitrators in view

of the bar imposed under Section 12(5) of the Arbitration and Conciliation Act, 1996 and as such, since the entire arbitration proceeding is nullity in

law, hence, there is no bar for this Court to appoint a fresh arbitrator by invoking Section 11 of the Arbitration and Conciliation Act, 1996.

10. This Court has noted the fact that the petitioner had participated in the arbitration proceeding though under protest and the present petition has

been filed at a later stage after the arbitration proceedings had commenced. Law is now settled that Arbitral Tribunal also can decide on the issue of

jurisdiction itself on the principle of "Kompetenze-Kompetenze" in terms of Section 16 of the Arbitration and Conciliation Act, 1996.

11. The petitioner can certainly raise the issue of competency before the competent forum as provided, in challenging any arbitral award. Though this

Court noted that an interim order was passed by this Court on 15.02.2019 which was made absolute on 26.04.2019, it was by way of an interim

arrangement while the matter was being considered by this Court.

Even if assuming the Arbitral Tribunal had proceeded in spite of the interim order passed by this Court, yet, the essential issue which remains to be

considered is regarding the competency of the Arbitral Tribunal which, in our opinion, can also be decided by the competent forum while challenging

the award which has been already made, as provided under Section 34 of the Arbitration and Conciliation Act, 1996.

12. The petitioner can certainly raise all these issues before the competent forum in challenging the arbitral award.

13. As far as the forum for resolution of the disputes which has been raised in this petition, in view of the fact that an award has been already made,

in the opinion of this Court, the forum which will decide the validity of the arbitral award as provided under Section 34 of Arbitration and Conciliation

Act, 1996 would be the appropriate forum, and not this Court in exercise of power under Section 11 of the Arbitration and Conciliation Act, 1996.

14. If this Court has to decide the competency of the Arbitral Tribunal and hold that it is not competent, certainly, this Court has to declare the said

arbitral proceeding and the award as null and void also, which perhaps, will be not permissible to be done by this Court in exercise of power under

Section 11 of the said Act. It has to be done by the competent forum/court as provided under Section 34 of the Arbitration and Conciliation Act, 1996.

15. Accordingly, this Court is of the view that the issues raised before this Court can be raised by the petitioner before the competent court as

contemplated under Section 34 of the Arbitration and Conciliation Act, 1996 where the petitioner can challenge the award not only on merit but also as

regards the competency of the Arbitral Tribunal. There is also the appellate forum as provided under Section 37 of the Arbitration and Conciliation

Act, 1996, which can also examine these issues.

16. If there is a finding by the competent forum that the Arbitrators appointed do not have the jurisdiction, certainly, the award will be also liable to be

set aside, in which event, the petitioner can approach this Court for appointment of an arbitrator by invoking Section 11 of the Arbitration and

Conciliation Act, 1996.

17. It has been submitted that though the arbitral award is required to be challenged within a period of 60 (sixty) days, because of the pendency of the

writ petition, the petitioner has not challenged the said award passed by the Arbitral Tribunal on 15.02.2019 and as such has sought for extension of

time to challenge the same.

18. The petitioner may accordingly challenge the arbitral award, for which, the period spent in pursuing this petition before this Court will not be

counted towards computing the period of limitation.

19. It is also made clear that till the period of 30 (thirty) days from today, the impugned arbitral award dated 15.02.2019 passed by the Arbitral

Tribunal shall not be executed.

With the above observations and directions, the present petition stands disposed of.