

(1991) 01 GAU CK 0002

Gauhati High Court

Case No: Second Appeal No. 112 of 1982

Union of India

APPELLANT

Vs

Barthakur Industries and
Agencies

RESPONDENT

Date of Decision: Jan. 2, 1991

Acts Referred:

- Arbitration Act, 1940 - Section 32, 32, 33, 33

Citation: (1991) 2 GLJ 159

Hon'ble Judges: R.K.Manisana Singh, J

Bench: Single Bench

Advocate: S.Ali, B.M.Choudhary, D.K.Bhattacharyya, Sk.Chand Mohammad, Advocates
appearing for Parties

Judgement

1. This is an appeal from the decree passed by the Assistant District Judge (2), Gauhati in Title Appeal No. 11 of 1979 allowing the appeal from the decree passed by the Sadar Munsiff, Gauhati in Title Suit No. 183 of 1970.

2. The facts of the case, in brief, are these. M/s Barthakur Industries & Agencies is a registered partnership firm. On 31. 5. 1969, the Commander Works Engineer, Shillong informed the plaintiff that the contract under agreement No CWE (P)/SHL/7 of 196667 executed by the plaintiff had been terminated for nonexecution of works and the works had been completed by the defendants at the plaintiff's risk and cost. Thereafter, the Chief Engineer, defendant No. 2, at the instance of the defendant No. 1, appointed defendant No. 3, the Superintending Engineer Sri R. D. Singh as the sole arbitrator for resolution of the dispute. Accordingly, the arbitrator directed the plaintiff to file statement of claims and defence. The plaintiff wrote a letter dated 1.11. 69 informing the defendant that the plaintiff firm or any of its partners had not entered into contract with the defendant 1, and as there was no contract, no question of breach of agreement or referring to arbitration arises. Thereafter the

plaintiff brought the suit against the defendants for declaration that the appointment of arbitrator is illegal and void and there was no agreement or contract at all between the parties. The plaintiff has further prayed for permanent injunction restraining the Arbitrator from proceeding with the arbitration proceeding. The defendants resisted the suit denying claim of the plaintiff and asserted that the authorised agent of the plaintiff executed the agreement. The trial Court dismissed the suit. On appeal by the plaintiff, the lower appellate Court set the decree aside by allowing the appeal and decreeing the suit in favour of the plaintiff. Hence this appeal by the defendants.

3. The learned counsel for the appellants has submitted that the plaintiff has denied the existence of the arbitration agreement in the sense that the plaintiff never entered into contract with the defendant No. 1 as alleged and, therefore, the plaintiff has to challenge the existence of the arbitration agreement under section 33 of the Arbitration Act, and as such the suit is not maintainable under section 32 read with section 33 of the Arbitration Act. Section 32 and 33 read thus:

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or an award, nor shall any arbitration agreement or award be enforced, set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

5. The expression "on any ground whatsoever" occurring under section 32 is very wide and it denotes, *inter alia*, that, if existence or validity of an arbitration agreement is questioned on any ground whatsoever, it cannot be a subject matter of a suit. Therefore, section 32 creates bar against the institution of a suit if a party challenges the existence or validity of an arbitration agreement.

6. Under section 33, it is permissible to a Court to decide the existence or validity of an arbitration agreement on affidavits in a summary manner as a general rule. However, where a case under section 33 involves complicated question of fact and law, the Court also, under the proviso to section 33, take evidence.

7. The question which, therefore, arises for consideration is whether the present suit is hit by section 32. In the instant case, the question to be decided is whether the plaintiff entered into a contract with the defendant No. 1. As already stated, the case

of the plaintiff is that the plaintiff firm or any of its partners never executed any agreement whereas the case of the defendants is that the authorised agent of the plaintiff executed the agreement. If there was no contract, the question of existence of an arbitration agreement would not arise. If there was a contract, the existence of an arbitration agreement or its validity would arise. Therefore, formation of a binding contract comes first and then the existence of an arbitration agreement or its validity shall follow. The plaintiff has challenged the very existence of a binding contract itself and not of any arbitration agreement. For these reasons, the present dispute cannot be a subject matter of section 32 read with section 33 of the Arbitration Act, and as such the suit is not hit by section 32.

8. The next question which arises for consideration is whether there was an agreement or a contract. The lower appellate Court, after considering the evidence and materials on record, came to the conclusion that there was no binding agreement or contract between the plaintiff and the defendant¹ because there was no evidence that any person authorised by the plaintiffs had executed the agreement. The findings are based on the evidence and materials on record. I, am, therefore, not inclined to interfere with the findings in second appeal. In that view of the matter, the submission relating to Article 229 of the Constitution of India is not required to be considered.

For the foregoing reasons, the appeal is dismissed. No costs.