

National Council of Science Museums (NCSM) Vs M/S. Bridge and Roof Company (India) Ltd.

Court: Calcutta High Court

Date of Decision: Sept. 24, 2012

Acts Referred: Arbitration Act, 1940 " Section 31(1)
Arbitration and Conciliation Act, 1996 " Section 34, 37
Constitution of India, 1950 " Article 227

Citation: (2013) 1 CALLT 193

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: H.K. Mitra, Mr. S. Som and Mr. D.K. Mondal, for the Appellant; S.N. Mookherjee, D. Basak, P. Gorai and Mr. P. Mishra, for the Respondent

Final Decision: Dismissed

Judgement

Prasenjit Mandal, J.

Challenge is to the award/order dated May 18, 2010 passed by the Advisor of Law Minister, Ministry of Law and

Justice, New Delhi being the Appellate Authority in Appeal No. 6 of 2007. Three separate agreements dated March 18, 1994, September 7,

1994 and July 6, 1995 were the subject-matters of the arbitral award and then orders passed in appeal against the order of the arbitral Tribunal

are now under consideration before this Court.

2. The first agreement dated March 18, 1994 lays down in Clause No. 44 to the effect that all questions and disputes relating to the meaning of the

specifications, designs and other matters relating to claim, right, matter or thing whatsoever arising out of the contract, etc., shall be referred to the

sole arbitration of a person nominated by the Director General, National Council of Science Museums and if the former is unable or unwilling to act

to the sole arbitration, of some other person appointed by the Director General, NCSM willing to act as such arbitrator and the submission shall be

deemed to be submission to arbitration under the meaning of the Arbitration Act, 1940.

3. The second agreement dated September 7, 1994 lays down the arbitration clause in Paragraph No. 6 of the agreement to the effect that in the

event of any dispute or difference relating to the interpretation and application of the provisions of contract, such dispute or difference shall be

referred by either party to the arbitration of one of the arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the

Government of India, In-charge of the Bureau of Public Enterprises. The Arbitration Act, 1940 shall not be applicable to the arbitration under this

Clause. The award of the arbitration shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may

make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice,

Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when

so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively.

4. In the third agreement under LOI dated July 6, 1995, there is no arbitration clause at all.

5. Accordingly, Mr. Brijender Singh Meena, Joint Secretary and Government Counsel, Government of India, was appointed as sole arbitrator by

the Department of Public Enterprises in connection with the reference dated January 6, 2006. The said reference involved the disputes under the

three separate agreements referred to above by the opposite party. The petitioner contested the reference by filing the statement of defence and

their counterclaim. After contested hearing, Mr. Brijender Singh Meena published the award dated September 18, 2007. Being aggrieved by the

said award, the petitioner made an application for setting aside the award before the Law Secretary in terms of the agreement dated September 7,

1994. The then Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Mr. T.K. Viswanathan dealt with the appeal as per

clause 6 of the agreement dated September 7, 1994 and completed the hearing of the parties on March 22, 2009 but reserved his judgment for

more than an year and made and published the appellate award dated May 18, 2010. By that time, he retired and he signed the appellate award in

the capacity of Advisor to Law Minister, on superannuation. The Secretary of Ministry of Law and Justice, Government of India shall be Persona

Designata under the arbitration clause and as such, on his superannuation, he was denuded of his power to act as Appellate Authority and became

functus officio and thus, had no legal authority to make and publish an award as he had done so as Advisor to the Minister of Law, on

superannuation. There is no provision for second appeal as per arbitration clause devised by the Bureau of Public Enterprises and as such, this

revisional application has been preferred by the petitioner being aggrieved by the appellate award dated May 18, 2010.

6. Now, the question is whether the impugned order should be sustained.

7. On hearing the Learned Counsel for the parties and on going through the materials-on-record, it is evident that the facts as recorded above are

not in dispute.

8. Mr. Hirak Kumar Mitra, learned Senior Advocate appearing for the petitioner, has submitted that three distinct and separate agreements are

altogether different but the disputes in respect of the three agreements had been clubbed together. The agreement dated September 7, 1994 is

illegal per se in view of the fact that the relevant arbitration clause excludes the provision of the Arbitration Act, 1940. So, the arbitration Clause is

illegal, null and void, per se. The act complained of being illegal, such illegality cannot be waived.

9. He has also contended that since Mr. T.K. Viswanathan acted in the capacity of Advisor and not as Secretary, Law, the appellate award

cannot be sustained. He has also contended that since there is no provision for second appeal, this application under Article 227 of the

Constitution is quite maintainable before the Hon"ble High Court, Calcutta.

10. Mr. Mitra has referred to the following decisions in support of his contention:-

(i) Vishanji Dungarmal Futnani Vs. Mohanlal Dungarmal Futnani and Others, and thus, he has submitted that illegal arbitration clause had been

followed and so, the award is void.

(ii) Madan Mohan Vs. Ram Chander Rao, and thus, he has submitted that the parties are not entitled to contract themselves out of the statute and

to say in effect that the provisions of Section 73, Agra Tenancy Act, would not apply to them. It would be quite contrary to public policy to allow

the provisions of Section 73 to be ignored by the plaintiff.

(iii) Abdula Saheb v. Guruvappa & Co. reported in AIR 1944 Mad. 387 and thus, he has submitted that the objection that the contract is illegal

must be considered even though taken late.

(iv) Kiran Singh and Others Vs. Chaman Paswan and Others, and thus, he has submitted that the decree passed without jurisdiction is a nullity.

(v) Macfoy v. United Africa Co., Ltd. reported in 1961(3) All. E.R. 1169 and thus, he has submitted that non-compliance of any Rule of practice

for the time being in force may be set aside by exercising discretionary power if the Act is voidable and not a nullity..

(vi) Cityscope Developers (P) Ltd. v. Akla Builders Pvt. Ltd. & ors. reported in 2000(2) CLJ 539 and M/s. Unik Accurates Pvt. Ltd. v. M/s.

Sumedha Fiscal Services Ltd. reported in 2000(2) CHN 340 and thus, he has submitted that an application under Article 227 of the Constitution

of India is quite maintainable in the instant case.

(vii) S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and contended that according to this decision amongst others during the progress of

arbitration, an application under Article 227 of the Constitution does not lie, but, it does not hold that if an award is passed, an application under

Article 227 of the Constitution shall not be maintainable.

(viii) Gulati Constructions Co. Vs. Betwa River Board, and Election Commission, India Vs. Saka Venkata Subba Rao and, Mr. Mitra has

contended that the question that the arbitration Tribunal was held outside Kolkata is irrelevant. So, these decisions need not be considered.

(ix) Fuerst Day Lawson Ltd. and Others Vs. Jindal Exports Ltd. and Others etc. etc., and thus, he has submitted in reply that as per Clause 15

Letters Patent did not apply because of Section 37 of this Act of 1996 has been excluded. The Arbitration and Conciliation Act is a complete

code and so, steps are to be taken according to the provisions of the said Act. Under the circumstances, there being no second appeal, this

revisional application is quite maintainable. But, I hold that the matter under challenge is not under the Act of 1996 at all.

(x) Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd., and thus, he has submitted in reply that the appeal from the award was

heard by the Law Secretary, New Delhi but, there cannot be any merger of the two decisions as the award was illegal. So, this decision will not

apply.

(xi) Gas Authority of India Ltd. and Another Vs. Ketu Construction (I) Ltd. and Others, and thus, he has submitted in reply that there is illegality

regarding the appointment of an Arbitrator (in the instant case Appellate Authority) but there is no illegality in the arbitration agreement. This

decision, I am of the view, will not be applicable in the instant situation for the reasons discussed afterwards.

(xii) Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., and thus, he has submitted in reply that there is no illegality in the

arbitration clause. So, this decision will not apply.

(xiii) Krishan Lal Vs. Haryana State Agricultural Marketing Board and Another, and thus, he has submitted that where an arbitrator appointed by

designation, on relinquishment of his post, after reference of dispute, either by transfer, retirement, resignation or otherwise the arbitrator so

appointed is divested of his jurisdiction to act as arbitrator in the matter and consequently the awards rendered by him, when he no longer held the

post will be without jurisdiction.

(xiv) Airport Authority of India and ors. v. Alcon Resort Holdings Pvt. Ltd. reported in 2009(8) Bom. L.R. 3489 and thus, he has submitted that

the petitioner cannot be said to have acquiesced in his appointment and lost his right to object to appointment by the mere fact that the parties have

participated without any objection, if the arbitrator lacks inherent jurisdiction.

(xv) Gangaram Ratanlal Vs. Simplex Mills Co. Ltd., and thus, he has submitted that mere acquiescence by a party to the jurisdiction and admission

of liability before him would not estop such party from questioning arbitrator's jurisdiction. And

(xvi) National Research Development Corporation Vs. Silicon Ceramics Ltd., and thus, he has submitted that even if a party has participated in the

proceeding before the arbitrator he can challenge as to the very existence of arbitration agreement on the ground that it was a nullity.

11. Mr. S.N. Mookherjee, learned Senior Advocate, for the opposite party has contended that the impugned order is not revisable at all and an

appeal lies against the impugned order. Parties to the application agreed to the terms of the arbitration clause and they participated in the matter of

hearing the appeal before the Appellate Authority. No step was taken to challenge the order of the Appellate Authority or the jurisdiction of the

Appellate Authority at the very beginning of the hearing of the appeal but the petitioner proceeded with the appeal. So, the revisional application is

not maintainable.

12. Mr. Mookherjee has also contended that when there is an alternative remedy by way of an appeal, this application is not maintainable. Mr.

Mookherjee has also contended that the decisions of 2000(2)CHN 340 and 2000(2) CLJ 539 would not be maintainable in the instant case,

inasmuch as, these two decisions relate to the matter under the provisions of the Arbitration and Conciliation Act, 1996. The petitioner did not

raise any objection as to the inclusion of the third agreement in the arbitral proceeding. So, it has waived its objection.

13. In support of his contention, Mr. Mookherjee has referred to the following decisions:-

(a) Miss Maneck Gustedji Burjarji Vs. Sarafazali Nawabali Mirza, and thus, Mr. Mookherjee has submitted that when other adequate and

comprehensive remedy by way of appeal to High Court itself, available but not availed of - Circumstances not extraordinary - Interference under

Article 227 in favour of petitioner held was erroneous and quashed.

(b) S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, particularly the Paragraph No. 89 and thus, he has submitted that the parties are

permitted to approach the Court only in terms of Sections 37 or 34 of the 1996 Act and not otherwise.

(c) Navin Jain and Others Vs. State Bank of India and Another, on jurisdiction. The aggrieved party should approach that High Court within

whose territorial limits, original tribunal exercises jurisdiction (i.e., Delhi High Court).

(d) Election Commission, India Vs. Saka Venkata Subba Rao and, particularly the Paragraph No. 6 and Collector of Customs, Calcutta Vs. East

India Commercial Co. Ltd., particularly the Paragraph No. 4 on jurisdiction. Mr. Mookherjee has contended that the Appellate Authority having

situated outside the jurisdiction of the High Court - Writ cannot be issued even against the original order.

(e) Gas Authority of India Ltd. and Another Vs. Ket Construction (I) Ltd. and Others, - there had been compliance with the appointment

procedure under the agreement and the petitioner having not raised any objection to jurisdiction before the Appellate Authority, the application is

not maintainable.

(f) Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., particularly the Para No. 39 and thus, he has contended that as the

petitioner has failed to raise objection at the very beginning before the Appellate Authority, its right to object was deemed to have been waived.

And

(g) Fuerst Day Lawson Ltd. and Others Vs. Jindal Exports Ltd. and Others etc. etc., and thus, Mr. Mookherjee has submitted that where special

Act sets out a self-contained code applicability of general law procedure would be impliedly excluded.

14. By referring the decisions of Election Commission, India Vs. Saka Venkata Subba Rao and, nd Collector of Customs, Calcutta Vs. East India

Commercial Co. Ltd., , Mr. Mookherjee has contended that since the Appellate Authority had the permanent seat at New Delhi, the application

under Article 227 is not maintainable in the High Court of Calcutta on the ground that this Hon"ble Court has no jurisdiction over the said

Appellate Authority in New Delhi. The award was also passed by the arbitral Tribunal at New Delhi.

15. In reply, Mr. Mitra has submitted that though the Appellate Authority has the Office in New Delhi, the defendant resides in Kolkata and the

entire cause of action arose in Kolkata. So, this application is quite maintainable before this Hon"ble Court, Calcutta. He has also contended that

the decisions such as S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , Fuerst Day Lawson Ltd. and Others Vs. Jindal Exports Ltd. and

Others etc. etc., Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., referred to the 1996 Act and the agreements having been

entered into in between the parties prior to the enactment of 1996 Act, the aforesaid decisions will not apply in the matter we are dealing. Thus, he

has submitted that this application is quite maintainable and appropriate reliefs can well be passed in this application. The above decisions being

related to the provisions of the 1996 Act, I am of the opinion that these decisions cannot be made applicable in the instant case to arrive at a

conclusion, although some basic principles on the matters which are common to both the Acts of 1940 and 1996 may be adopted as guiding

principles.

16. Upon due consideration of the entire matter as a whole, I find that though the defendant"s office is in Kolkata and the entire construction had

been done in Kolkata, yet this matter is not in consideration before this Bench. At present, I am concerned with the Orders passed by the

Appellate Authority arising out of an award passed by an arbitral Tribunal at New Delhi. The Appellate Authority had the permanent seat of Office

at New Delhi. Challenge is to the Order dated May 18, 2010 of Appeal No. 6 of 2007 passed by the Appellate Authority, Office of which is

situated in New Delhi. Under the circumstances, according to the decision of Election Commission, India Vs. Saka Venkata Subba Rao and, and

Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd., the writ issued by the Court cannot run beyond the territories subject to its

jurisdiction. The person or authority to whom the High Court is empowered to issue such writs must be ""within those territories"", which clearly

implies that they must be amenable to its jurisdiction either by resident or location ""within those territories"".

17. In the case of Collector of Customs, Calcutta (supra) it has been specifically decided that on principle when once an order of an original

authority is taken in appeal to the appellate authority which is located beyond the territorial jurisdiction of the High Court, it is the order of the latter

authority which is the operative order after the appeal is disposed of; and as the High Court cannot issue a writ against the appellate authority for

want of territorial jurisdiction it would not be open to it to issue a writ to the original authority which may be within its territorial jurisdiction once the

appeal is disposed of, though it may be that the appellate authority has merely confirmed the order of the original authority and dismissed the

appeal.

18. Therefore, in view of the aforesaid two decisions, I am of the opinion that this application is not maintainable before this Hon"ble Court.

19. So far as the decision of M/s. Gulati Construction Co. (supra) referred to by Mr. Mitra is concerned, I am of the view that this decision is not

applicable in the instant situation. In that decision, it was held that by agreement of parties, the jurisdiction cannot be conferred on Courts which

have no territorial jurisdiction to decide the matter. In that case, the arbitrator was to file his award to which Court as per Section 31(1) of the

Arbitration Act, 1940. It is not the situation in the instant case.

20. Again, so far as the agreement dated July 6, 1995 is concerned, I find it has been indicated in Clause No. 6 of the agreement that the

Arbitration Act, 1940 shall not be applicable to the arbitration under this Clause. Therefore, the provisions of the Arbitration Act, 1940 will not be

a guiding factor in deciding of the fate of this application. However, it has been recorded in the agreement that any person being aggrieved by the

award made by the arbitrator may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal

Affairs, Ministry of Law and Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special

Secretary/Additional Secretary when so authorized by the Law Secretary. In the instant case, the Law Secretary was appointed as the Appellate

Authority and parties to the arbitration proceeding submitted their jurisdiction to the Appellate Authority, i.e., the Law Secretary. Hearing was

made before him and either of the parties to the appeal did not raise any objection as to the jurisdiction of the Appellate Authority. The matter

proceeded accordingly. After completion of hearing on March 22, 2009, the Law Secretary reserved his judgment for more than one year and

published the appellate award dated May 18, 2010.

21. The contention of the petitioner is that Mr. T.K. Viswanathan did not submit his appellate award as Law Secretary but in the capacity of

Advisor to Law Minister, on his superannuation. Since the Law Secretary was a Persona Designata under the arbitration Clause, the Law

Secretary Mr. T.K. Viswanathan was denuded of his power to act as an Appellate Authority and became functus officio and thus, he had no legal

authority to make and publish an award as he had done as an Advisor to the Minister of Law. In this regard, I am of the view that since the said

appellate award was not furnished either under the Act of 1940 or of 1996 by relevant provisions of the Acts need not be looked into to decide

the fate of the award. When either of the two Acts would not be applicable to any arbitration proceeding, the fate of the award shall be dealt with

according to natural justice, conscience and equity and the agreement between the parties, provided the agreement is not contrary to the public

policy.

22. Anyway, though the matter was heard by Mr. T.K. Viswanathan as Law Secretary, as soon as he retired from that post and there is an

alternative Persona Designata to submit the appellate award as per Clause No. 6, I am of the view that either of the parties could have taken steps

for appointment of another Appellate Authority.

23. Another defect is noticed to the effect that the three matters have been clubbed together in one arbitration proceeding although the one

arbitration agreement lays down that the parties have submitted to the provisions of the Arbitration Act, 1940, the other arbitration agreement lays

down that the Arbitration Act of 1940 would not apply and in the third one, there was no Clause for arbitration at all, I am of the view that the

clubbing of the three matters together was not justified at all in one arbitration proceeding. So, no relief, I am of the view, can be granted in the

instant case in exercising the jurisdiction of superintendence under Article 227 of the Constitution of India.

24. Anyway, inasmuch as the application is not maintainable for want of territorial jurisdiction, I am of the view that no relief can be granted at all in

favour of the petitioner. Accordingly, this application should be dismissed.

25. In that view of the matter, the application is dismissed.

26. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the

learned Advocates for the parties on their usual undertaking.