

(2005) 08 CAL CK 0085

Calcutta High Court

Case No: Writ Petition No. 1359 of 2005

Union of India (UOI) and Another

APPELLANT

Vs

The Hon"ble Chief Justice, High
Court and Others

RESPONDENT

Date of Decision: Aug. 12, 2005

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6)
- Constitution of India, 1950 - Article 226

Citation: (2006) 2 ARBLR 447 : (2006) 1 CALLT 21

Hon'ble Judges: Jayanta Kumar Biswas, J

Bench: Single Bench

Advocate: Nripendra Ranjan Mukherjee and Atish Ghosh, for the Appellant; Deepak Basu and Susanta Dutta, for the third Respondent, for the Respondent

Final Decision: Dismissed

Judgement

Jayanta Kumar Biswas, J.

The petitioners in this writ petition have questioned the decision, of the judge designated by the Chief Justice, dated November 29th, 2004, given in an application u/s 11(6) of the Arbitration and Conciliation Act, 1996, and also the consequential order of the acting Chief justice dated February 24th, 2005 appointing the arbitrator.

2. The undisputed facts are these. On the terms and conditions of tender No. ASN/3 of 2002-03 certain construction works connected with railway quarters were given to the third respondent on March 17th, 2003. The works were to be completed by December 16th, 2003. Alleging failure to complete the works even after grant of repeated extensions, the petitioners rescinded the contract. Consequently, by a letter dated August 31, 2004 the third respondent called upon the petitioners either to settle its legitimate claims or to refer the case for arbitration in accordance with the arbitration clause.

3. According to clause 64(l)(i) of the general conditions of contract (they were applicable to the contract in question) the agreed procedure for arbitration was, "In the event of any dispute or difference between the parties here to as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in clause 63 of these conditions, the contractor after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration."

4. On October 6th, 2004 the third respondent filed the Section 11 application. At the time of its hearing on November 29th, 2004 advocate for the petitioners informed the learned judge considering the application that according to the procedure for appointing arbitrator, a communication dated November 10th, 2004, being the requisite panel, had been sent to the third respondent for communicating its choice of the arbitrator. The learned judge held that the petitioners having lost their right to make the appointment, the Chief Justice was required to appoint the arbitrator under provisions of the Arbitration and Conciliation Act, 1996.

5. As to choice of person to act as arbitrator, the parties were again bound by the general conditions of contract, clause 63(3)(a)(iii), which said. "It is a term of this contract that no person other than a Gazetted Railway Officer should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all."

6. On being appointed by the Chief Justice, the arbitrator (not a gazetted Railway Officer) gave notice to the parties on March 7th, 2005, and held the first sitting of the Tribunal on March 30th, 2005. He directed the parties to file their respective statements of claim. At such stage this writ petition dated June 20th, 2005 was taken out. The third respondent chose to contest it without filling any opposition.

7. In view of the apex Court decision in [State of Orissa and Others Vs. Gokulananda Jena](#), , it cannot be contended that against the decision of the designate of the Chief Justice, recording the requirement of appointment of the arbitrator by the Chief justice, this writ petition under Article 226 of the Constitution of India is not maintainable. A writ petition is maintainable before the High Court against a decision u/s 11(6) of the Arbitration and Conciliation Act. 1996, either appointing an arbitrator or refusing to do so.

8. But then, in view of the constitution bench decision of the apex Court in [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.](#), , it is open to the aggrieved party to require the arbitral Tribunal to rule on its own jurisdiction even on the ground that the Chief Justice or his designate improperly constituted it.

Counsel for the third respondent has contended that for availability of such remedy before the Tribunal the writ petition should not be entertained.

9. The position was further explained by their Lordships of the apex Court in [State of Orissa and Others Vs. Gokulananda Jena](#), , saying. "Almost all disputes which could be presently contemplated can be raised and agitated before the arbitrator appointed by the designated Judge u/s 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the arbitrator appointed by the designated Judge. If that be so, since an alternative efficacious remedy is available before the arbitrator, a writ Court normally would not entertain a challenge to an order of the designated Judge made u/s 11(6) of the Act which includes considering the question of jurisdiction of the arbitrator himself."

10. In State of Orissa & Ors. v. Gokulananda Jena, the grounds on which the decision u/s 11(6) was challenged were: "(i) The contract between the parties was executed before the Act came into force, hence, the Act does not apply; (ii) Dispute is a stale one having arisen nearly 20 years ago; (iii) Clause 23 of the agreement contemplates the adjudication of a dispute by a company arbitrator; (iv) No person other than an arbitrator nominated in clause 23 of the agreement has any jurisdiction to entertain the disputes."

11. In para. 11 of the report (SCC) their Lordships held: "All these grounds of attack, in our opinion, can very well be raised before the arbitrator appointed by the Designated Judge, hence, on the facts of "the case, we find that the writ petition of the appellant was liable to be dismissed by the High Court. For this reason, we do not think it appropriate to remand the matter back to the High Court. Therefore, we dismiss this appeal permitting the appellant to raise all its contentions before the arbitrator appointed by the Designated Judge:"

12. Here the petitioners are questioning the decision u/s 11(6) on the grounds (a) that it is vitiated by an incurable error of jurisdiction, since it was given on a premature application, (b) that the designate of the Chief Justice erroneously held that they had lost right to appoint arbitrator, and (c) that, in any case, person other than the one mentioned in the agreement could not have been appointed as arbitrator.

13. After hearing the counsel at length, I felt the need of further deliberation over the principal question: whether in the face of the law explained by the apex Court in Konkan Railway and Gokulananda Jena, the grounds on which the petitioners question the decision, should be examined by the writ Court. I must confess that the grounds posed before me a serious question: on what ground or grounds a decision given u/s 11(6) of the Arbitration and Conciliation Act, 1996 can indeed be challenged by filing a writ petition in the High Court?

14. My conclusion is that as the law stands today, the answers to the questions arising in this case are all available in the two apex Court decisions: Konkan Railway and Gokulananda Jena. In view of what their Lordships said in Gokulananda Jena (already quoted hereinbefore), there can be little doubt that on the grounds (noted before) taken to question the decision, the petitioners should not be allowed to invoke the writ jurisdiction, and they must avail of the remedy available before the arbitral Tribunal.

15. The untiring efforts of advocate for the petitioners to persuade me into holding otherwise, cannot be rewarded, as I find no assistance from any of the large number of authorities he cited to me. None of them, in my reading and understanding, can lead to a change in the conclusion that I have reached on the basis of the two apex Court decisions. I believe, I shall not be thought of disrespectful to the authorities for not dealing with them. They are just not relevant in the face of the law explained by the apex Court.

16. I venture to suggest that in view of the existing position of law it is only in the rarest of the rare cases that a decision appointing arbitrator, given in an application u/s 11(6) of the Arbitration and Conciliation Act, 1996, should be allowed to be questioned by filing a writ petition. For example, it may be entertained when it is alleged that an *ex parte* decision was obtained by practising fraud, or that the decision, if allowed to remain, is bound to cause grave miscarriage of Justice.

17. But when such decision is not an *ex parte* one, in my opinion, none of the parties heard before giving it, should be allowed to invoke the writ jurisdiction of the High Court for questioning it on any ground. The fast track procedure brought into existence by provisions of the Arbitration and Conciliation Act. 1996 should not be permitted to be derailed; the party aggrieved being not without any meaningful remedy before the arbitral Tribunal that is empowered to rule even on its own jurisdiction.

18. In this case the decision impugned was given after hearing the petitioners. In view of the apex Court decisions, noted before, all the grounds on which they question it by filing this writ petition can be taken and agitated by them before the arbitral Tribunal. There is no exceptional reason to permit them to invoke the writ jurisdiction. Hence I am not supposed to say anything regarding the merits of the grounds on which the decision is challenged; the connected authorities cited to me are also not being dealt with for the same reason.

For these reasons I dismiss the writ petition. There shall be no order for costs in it.

Urgent certified xerox copy of this judgment and order shall be supplied to the parties, if applied for.