

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9852-53 OF 2014
(Arising out of SLP(C) Nos.10158-59 of 2014)

M/s. Ashoka Tubewell & Engineering
Corporation etc. etc.

.....Appellant(s)

Versus

Union of India etc. etc.

.....Respondent (s)

J U D G M E N T

ANIL R. DAVE, J.

1. Leave granted.
2. At the request of the learned counsel appearing for the parties, the appeals are taken up for hearing as only one legal issue is involved in both the appeals.
3. The learned counsel appearing for the appellant has submitted that the appellant is a contractor, who had entered into a contract with the respondent for certain construction works. There were certain disputes and therefore, as per the agreement between the parties, the disputes had to be resolved by an Arbitrator. The following clause was part of the agreement, which enabled

the parties to refer the dispute to an Arbitrator:

“63.3(a)(iii). 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 the arbitration at all.”

4. As the respondent did not appoint an Arbitrator, an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) had been filed before the Chief Justice and ultimately Justice Kalyanmoy Ganguly, a former High Court Judge had been appointed as a sole Arbitrator.
5. In the arbitration proceedings, the objection had been raised by the respondent with regard to validity of the appointment of an Arbitrator but the Arbitrator, after hearing the concerned parties held that his appointment was valid and thereafter he made an Award on 16th July, 2007.
6. The validity of the said Award had been challenged under Section 34 of the Act, but the Award had been upheld on 24th April, 2013. The said order had been challenged by an appeal before the Division Bench of the Calcutta High Court and the High Court was pleased to set aside the Award on the ground that the Arbitrator had not been validly appointed, thus, the Award had been quashed and set aside by an order dated 24th December, 2013.

7. The aforestated order has been challenged in these appeals.
8. The learned counsel appearing for the appellant-contractor has raised only one submission to the effect that the Arbitrator had been appointed with the consent of both the parties. He had referred to the order dated 27th March, 1988 whereby, under the provision of Section 11(6) of the Act, the Arbitrator had been appointed. The relevant portion of the said order reads as:

“Perused the order dated 19th February, 1998 of S.K. Sinha, J. Both parties have agreed that Shri Kalyanmoy Ganguly, a retired Judge of this Court be appointed as the sole arbitrator to decide all claims, counter claims”
9. It has been further submitted that after having given consent for appointment of a former High Court Judge as an Arbitrator, it would not be proper on the part of the respondent-Union of India to change its version and object to the said appointment.
10. It has been further submitted by him that the Award has been set aside only on the ground that the Arbitrator was not validly appointed.
11. In the aforestated circumstances, the learned counsel has submitted that the impugned order passed by the High Court deserves to be quashed and set aside.
12. On the other hand, the learned counsel appearing for the Union of India has submitted that in view of clause 64.3(a)(iii) of the Arbitration Agreement,

which pertains to arbitration clause, it is very clear that no person other than a Gazetted Railway Officer should be appointed as an arbitrator/umpire and if for any reason it is not possible to appoint such a person as an Arbitrator, the matter was not to be referred to an Arbitrator at all.

13. It has been submitted by him that as a Gazetted Railway Officer had not been appointed as an Arbitrator, the only option available to the parties was to file a civil suit because as per the aforestated clause, dispute was not to be referred to an Arbitrator.
14. For the aforestated reasons, it has been submitted by the learned counsel appearing for the respondent-Union of India that the Arbitrator had not been validly appointed and therefore, the Award made by him was not legal. He has, therefore, supported the order passed by the High Court and has submitted that the appeals should be dismissed.
15. Upon hearing the learned counsel and upon perusal of the arbitration clause as well as the order dated 27th March, 1998 passed by the High Court appointing a former Judge of Calcutta High Court as an Arbitrator, we are of the view that the High Court was not right in quashing and setting aside the Award on the ground that the Arbitrator had not been validly appointed.
16. It is true that as per the arbitration clause incorporated in the agreement, only a Gazetted Railway Officer could have been appointed as an

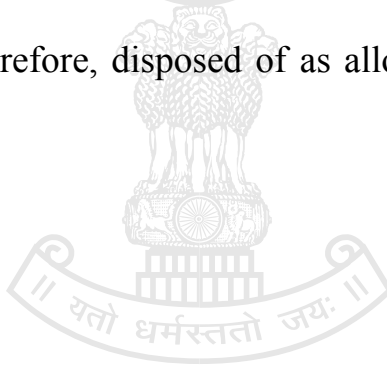
arbitrator/umpire and if such an officer was not appointed as an Arbitrator, the only option available to the parties was to approach a civil court by way of a suit.

17. It is pertinent to note in the instant case that when the Chief Justice of the High Court had appointed an Arbitrator under the provision of Section 11(6) of the Act on 27th March, 1988, both the parties i.e. the appellant-contractor as well as the respondent had agreed to appointment of Justice Kalyanmoy Ganguly, a former Judge of the Calcutta High Court, as an Arbitrator.
18. Once the respondent had given consent for appointment of a former Judge of the Calcutta High Court as an Arbitrator, one can presume that there was a new contract by way of *novatio*, whereby the parties had agreed to appointment of someone else – other than a Gazetted Railway Officer as an Arbitrator.
19. It is not in dispute at all that the respondent had given consent for appointment of a former High Court Judge as an Arbitrator. The said order dated 27th March, 1998 appointing a former High Court Judge as an Arbitrator had not been challenged by the respondent and therefore, the respondent could not have challenged the validity of the Award on the ground that the Arbitrator was not validly appointed.

20. In our opinion, after having given consent at the time when a former High Court Judge was being appointed as an Arbitrator, the respondent could not have challenged the validity of the Award on the ground that the Arbitrator was not validly appointed.

21. Except appointment of an Arbitrator, no other issue is involved in the appeals and no other argument has been advanced. In the circumstances, we quash and set aside the impugned order passed by the High Court and hold that the Award made by the Arbitrator is just, legal and proper.

22. The appeals are, therefore, disposed of as allowed, but with no order as to costs.



.....J.
(ANIL R. DAVE)

.....J.
(UDAY UMESH LALIT)

NEW DELHI,
SEPTEMBER 22, 2014.

JUDGMENT