

GAHC010000242017



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Arb.A. 1/2018**

1:UNION OF INDIA AND ANR  
REPRESENTED BY THE GENERAL MANAGER (CON), N.F. RAILWAY,  
MALIGAON, GUWAHATI 781011

2: THE CHIEF ENGINEER (CON)3  
N.F. RAILWAY  
MALIGAON  
GUWAHATI 78101

VERSUS

1:M/S DURGA KRISHNA STORE PVT. LTD.  
CLUB ROAD, SILCHAR 788001, DIST. CACHAR, ASSAM.

For the Appellants : Mrs. U. Chakraborty,  
Advocate.

For the Respondent : Mr. R. Hussain,  
Advocate.

Date of Hearing and Judgment : 31.05.2018.

**BEFORE**  
**HON'BLE MR. JUSTICE MANOJIT BHUYAN**

**JUDGMENT AND ORDER (ORAL)**

Heard Mrs. U. Chakraborty, learned counsel for the appellants as well as Mr. R. Hussain, learned counsel representing the sole respondent.

2. This arbitration appeal is directed against the order dated 29.11.2017 passed by the Additional Sessions Judge, No.IV, FTC, Kamrup(M), Guwahati in Misc. (Arb) Case No.2/17 dismissing the said case on the basis of preliminary objection raised by the sole respondent herein under Section 34(5) of the Arbitration and Conciliation Act, 1996.

3. Relevant dates to be noticed are that on 06.12.2011 the appellants had issued Tender for execution of earth work for Railway embankment and construction of minor bridge etc. in connection with construction of the new Broad Gauge line from New Mainaguri (West Bengal) to Jogighopa (Assam). The sole respondent was awarded with the contract. Differences arose and on 09.04.2014, at the instance of this Hon'ble Court, Arbitrator was appointed and the said Arbitrator accepted the responsibility and entered into the Arbitration on 10.05.2014 for settlement of the disputes between the parties. The arbitration proceedings could not commence rightaway as the appellants had filed a Special Leave Petition before the Supreme Court against the order dated 09.04.2014 which, however, was dismissed on 28.11.2014. Arbitration proceedings thereafter commenced and Arbitral Award was passed on 04.10.2016. On 03.01.2017, the appellants filed application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Arbitral Award dated 04.10.2016, confining the challenge only in respect of Claim Nos.1, 2, 7 and 8. The said application filed before the Court of the Additional Sessions Judge, No.IV, FTC, Kamrup (M) was registered and numbered as Misc.(Arb) Case No.2/17. Notice in the case was issued and the sole respondent, on making appearance, raised a preliminary objection to the effect that the application filed under Section 34 of the Act by the appellants was not maintainable as prior to filing of the application the appellants did not comply with the mandatory requirement as enjoined in Section 34(5) of the aforesaid Act. The preliminary objection was accepted by the court below and accordingly the application under Section 34 filed by the appellants was

dismissed. The court below also observed that before filing an application under Section 34 of the Act, it is mandatory on the part of the party concerned to issue notice to the other party informing the intention to file petition under Section 34 of the Act. The court below also observed that the apology sought for by the appellants for not adhering to the provisions of law was not sufficient to condone or to subvert the process of law.

4. On appeal before this Court, Mrs. U. Chakraborty submits that Section 34(5) of the Act was brought into the parent Act by the Arbitration and Conciliation (Amendment) Act, 2015, which was made effective on and from 23.10.2015. Prior to this amendment, there was no requirement of issuing a prior notice to the other party before filing application under Section 34 of the Act. Reference to the amendment brought about is made to emphasize the point that since the arbitration proceedings had commenced prior to 23.10.2015, the conditions imposed in Section 34(5) cannot be made applicable. It is contended that Section 34(5) cannot be given retrospective effect and the law obtaining prior to the amendment would hold the field. Further contention is that merely because the Arbitral Award was rendered on 04.10.2016, after the amendment was brought about, the requirement of Section 34(5) cannot be made applicable. In this regard, reliance is placed in the case of Global Aviation Services Private Limited v. Airport Authority of India, rendered by a Single Bench of the Bombay High Court on 21.02.2018.

5. Per contra, Mr. R. Hussain, learned counsel representing the sole respondent submits that the submissions advanced on behalf of the appellants are inherently flawed, in as much as, the mandate under Section 34(5) of the Act is squarely applicable in the present case. Mr. Hussain have justified the same by making reference to Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and to the meaning of the word "only" finding place in Section 34(5) of the Act

and as interpreted by the Supreme Court.

6. It is seen that Section 34(5) was inserted by way of amendment under the Arbitration and Conciliation (Amendment) Act, 2015, made effective from 23.10.2015. Section 26 of the Amendment Act, which appears to be the crux of the matter, is extracted hereunder:

**“26. Act not to apply to pending arbitral proceedings.**—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

A perusal of the aforesaid provision under Section 26 of the Amendment Act, it is seen that arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act would remain unaffected by the Amendment Act unless the parties otherwise agree. The terms and conditions of the Contract in question are governed under the General Conditions of Contract, 1998. Parties have agreed to settlement of disputes in terms of Clause 16.1 of the Conditions of Contract. The said Clause 16.1 provides that arbitration and settlement of disputes between the parties would be governed under Clause 63 and 64 of the General Conditions of Contract, NF Railway, 1998. At Clause 64.7 it is made clear that the provisions of the Arbitration and Conciliation Act and the Rules thereunder and any statutory modification thereof would apply to the arbitration proceedings under the said Clause. Having noticed the terms and conditions of the Contract, which are binding on the parties, as well as the exception engrafted in Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, it cannot be held that the rigour of Section 34(5) of the Act is not applicable in the present case. Notice is also had to the expression “only” used in Section 34(5), which has been interpreted by the Supreme Court in the case of Ramesh Rout v. Rabindra Nath Rout, (2012) 1 SCC 762

to mean that it excludes any other mode and assumes a mandatory character.

7. Having noticed the provisions under Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and the interpretation given to the word "only" in Ramesh Rout (supra), I am of the considered view that the application filed by the appellants under Section 34 of the Act was not maintainable in the absence of compliance of the mandate of Section 34(5) of the Act. I find no infirmity in the order dated 29.11.2017 passed by the court below in Misc.(Arb) Case No.2/17. The arguments advanced on behalf of the appellants fails. As a necessary corollary, the present appeal being devoid of merits, stands dismissed, however, without any order as to cost. Interim order passed in the case stands vacated.

Sd/-  
**JUDGE**

**Comparing Assistant**