

IN THE COURT OF DISTRICT JUDGE, SONITPUR AT TEZPUR

Misc. Arbitration Case No. :- **15 of 2009**

In the Matter of :- An application u/s 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Arbitral Award dated 22/10/2008 passed by the sole Arbitrator Sri J.S.Mitra, Chief Engineer, HQ Chief Engineer , Shillong Zone, Spread Eagle falls, Shillong-793 011.

Present :- **Mridul Kumar Kalita, AJS District Judge, Sonitpur Tezpur**

Petitioner :- **M/s Bhamrah Brothers**
Represented by its Partner,
Sri Manmohan Singh Bhamrah
P.O.- Ketekibari, Tezpur, District –
Sonitpur, Assam

Respondents :- **-vs-**
1. **The Union of India**
Garrison Engineer, Tezpur, PIN
901217,c/o 99 APO
2. **Sole Arbitrator Sri J.S. Mitra**, Chief
Engineer, HQ Chief Engineer , Shillong
Zone, Spread Eagle falls, Shillong-793
011.

Date of Hearing :- 25-02-2015 & 18-05-2015

Date of Judgment :- 27-05-2015

Counsel for the Petitioner :- Sri S.K.Singh, Advocate.

Counsel for Respondent :- Sri Krishna Kanta Sharma, Govt.Pleader.

JUDGMENT

1. This Miscellaneous Arbitration Case has been registered on the basis of an application filed, by M/s Bhamrah Brothers, P.O. - Ketekibari, Tezpur, District- Sonitpur, Assam, through one of its partner namely, Manmohan Singh Bhamrah u/s 34 of the Arbitration and Conciliation Act, 1996, for setting aside the Arbitral Award dated 22/10/2008 passed by the sole Arbitrator Sri J.S. Mitra, the then Chief Engineer, Shillong Zone, Spread Eagle Falls, Shillong.

2. The case of the Petitioner, as averred in the petition, u/s 34 of the Arbitration and Conciliation Act, 1996, in brief, is as follows:-

- (a)** The Union of India invited Tenders for work of provision of Fly proofing in JCO's/living accommodation (Building No. P/1 and P/2) at 4 Corps AIR SP SIG unit under GE, Tezpur. The petitioner submitted his tender which was accepted by the Government for a sum of Rs. 1,10,377/- only, as its tender was the lowest.
- (b)** The GE, Tezpur, accordingly issued Work Order No.1 dated 31-05-1993 against the Contract Agreement No. GE/Tez/3 of 93-94 for the execution of the said work but, it is stated by the petitioner, that the site of the work was never handed over to the petitioner though the Govt. falsely claimed to have handed over the site to the petitioner/contractor on 07-06-93.
- (c)** The Govt. cancelled the work allegedly on the ground that the petitioner/contractor could not execute the work. Before cancellation of the said contract, the Govt. wrote a letter No. 8495/32/E8 dated 14-07-1994 expressing to cancel the work and the petitioner/contractor replied vide letter dated 15-09-1994 to the GE, Tezpur, challenging his authority to cancel the work.
- (d)** The Govt. directed the petitioner/contractor to deposit Rs. 79,230/- in the Treasury/SBI, Mission Chariali, Tezpur by its letter No. 8495/42/E8 dt. 10-03-1995.
- (e)** The petitioner has further stated that this after receiving the said letter on 21-03-1995 and replied on 25-03-95 to the Govt. with a copy to the CE, Shillong Zone and CWE, Tezpur. The petitioner indicated that it was not bound to deposit the sum of Rs. 79,230/- and the Govt. ought not to recover the said amount from any amount due to the contractor. The petitioner also requested the Govt. to refer the dispute to an Arbitrator for adjudication.

- (f)** The petitioner could not execute the work for non-handing over the side. There was no fault of the petitioner. The Govt. got the work executed most illegally by another agency at the risk and cost of the contractor.
- (g)** As dispute arose between the petitioner/contractor and the Govt. and on attempt being made by the Govt. to recover the amount of Rs. 79,230/-, the petitioner, legally and under the terms and conditions of contract agreement requested the Govt. for appointment of an Arbitrator by approaching the Court of Civil Judge (Se. Divn), Tezpur by filing a suit (TS (Arb) No. 15/95). The petitioner also filed an application (Misc.(Arb) Case No. 28/95) for issuance of a prohibitory order injunction the Govt. from deducting any amount from any other contract. The Hon'ble Court was satisfied with the contention of the petitioner and accordingly, issued an ad-interim order of injunction on 18-04-95 and later on 16-12-95 made the said order absolute prohibiting the Govt. from giving effect to its letter No. 8495/42/E8 dt. 10-03-1995.
- (h)** In the said suit, the Govt. Submitted its written statements and came out with certain letters dated 8-08-93, 21-0-93, 16-10-93 and 23-11-93 and the same were not handed over to the petitioner at any point of time.
- (i)** In this regard reference of another work (CA No. GE/Tez/32 of 91-92 ::: Provn. of repairs of Road at Amaribari & Phulbari under GE, Tezpur) is very relevant. The handing over the side against the said work was to be done on 27-02-92 and the work was to be completed within four months from the date of its commencement. But the Govt. handing over the site only on 16-02-1994 almost two years after the actual date of handing over o the site. The lapse on the part of the Govt. and the Govt. failed to issue Sch. B stores. The Govt. being aware of its lapses, with a view to hiding the same, kept on granting extension and the final extension up to 31-12-1994 was granted by letter No. 8413/41/E8 dated 17-02-95. However, to safeguard itself from future complicacies that

might arise in case of claim lodged by the contractor for delay, the Govt. vide letter Nos. 8413/41/E8 dated 15-01-94, 8413/41/E8 dated 16-07-94, 8413/41/E8 dated 19-07-94 and 8413/41/E8 dated 01-08-94 directed the contractor for commencement of work whereas fact remained that either the site was not handed over or when it was handed over in Feb, 1994 schedule "b" stores were not supplied. This contractor suffered huge loss due to unnecessary prolongation of the work. It needs to be borne in mind that this contractor's other contract for which the present arbitration proceedings initiated was cancelled on 14-07-1994 and despite illegal cancellation of the said work, this contractor, just to keep its goodwill intact, continued with the contract work No. GE/TEZ/32 of 92-93 and completed the same within stipulated extended time.

- (j)** In the same way, there was no fault on the part of the contractor in completion of the work of GE/TEZ/3 as the site was not handed over to it and the petitioner on receipt of letter of cancellation dated 14-07-94 replied by its letter dated 15-09-94 wherein it was specifically mentioned about the identical lapse in the contract works pertaining to CA No. GE/Tez/32 of 91-92 and thereafter, the Govt. illegally withheld the final bill of GE/Tez/32 of 91-92 amounting to Rs. 71,000/- without making any attempt to find out the real cause of delay. Moreover, withholding of any amount is illegal as per order of Directorate General of Supplies & Transport, QMG's Branch, Army Head Quarters, No. 68988/Q/ST-26 dated 12-12-89.
- (k)** Thereafter, the petitioner approached the Hon'ble Civil Judge, (Sr. Divn), Tezpur with a prayer to refer the dispute to an Arbitrator, two issues relevant for the Hon'ble Arbitrator came up for decisions before the Hon'ble Court before finally deciding whether or not to appoint arbitrator, namely, (i) whether the site where the work are to be executed was handed over to the plaintiff (contractor)? (ii) Whether the defendant No. 4 (GE, Tezpur) got the work executed by another agency illegally?

- (l) The petitioner has stated that Hon'ble Court decided both the issued in favour of the petitioner by its Judgment dated 16-12-2000 after meticulous reading of the evidence of Sri Manmohan Singh Bhamrah, witness of the petitioner and Sri Manmohan Singh, AGE, who deposed on behalf of the Govt. as also of the documentary evidences produced and exhibited by the parties. So, these questions having already been decided by a competent court, the decisions therein will operate as *Res Judicata* and the Hon'ble Arbitrator was simply required to decide the quantum of compensation that was to be awarded in favour of the petitioner.
- (m) In the mean while, due to illegal cancellation of the contract work No. GE/Tez/32 of 93-94, the petitioner name was also removed from the approved list of contractor. The petitioner received a letter No. 138301/A-12/207/Engrs/E8 dated 23-06-97 from the HQ Eastern Command informing it thereby that its name has been permanently removed from the approved list.
- (n) The petitioner has stated that the stand of the Govt. had always been dubious. The Govt. challenged first the very prayer of this contractor for referring the dispute to an Arbitrator. When the Court of the first instance allowed the said prayer by its Judgment and order dated 16-12-2000, the Govt. after considerable delay went in revision (CRP NO. 366/01) before the Hon'ble High Court and prolonged unnecessarily the appointment of Arbitrator. Ultimately, the Hon'ble High Court dismissed the application (Misc. Case No. 163/01) on 19-04-2004 along with the above revision praying for condonation of delay. The Govt. remained silent and to their own admission sought opinion of the GA to prefer fresh appeal. They did practically nothing for long four years after dismissal of their revision petition by the Hon'ble High Court. Had the order of the Civil Judge (Sr. Divn) been adhered to or had the Govt. agreed for resolving the dispute through arbitration long back, the matter would have been solved long back saving valuable time, money and energy of this humble contractor. The actions of the Govt. only

consolidated the humble opinion of the contractor that the Govt. was bent upon to harass the contractor and unnecessarily dragged the issue for such a long period of time. In fact, the Govt. was more bothered about the findings already arrived at by the Hon'ble Civil Judge (Sr. Divn), Tezpur which clearly spelt out their lapses in not handing over the site to the contractor and getting the work done through another agency. Learned Arbitrator in para 22 of his award dated 22-10-08 also came to the conclusion that Govt. delayed in getting the matter resolved even after passing of the order by the Hon'ble High Court.

- (o)** It is also stated by the petitioner that when it was awaiting response to its prayer for extension of time, it received a letter bearing No. JSM/ARB/GE TEZ/7 dated 16-09-08 from the learned Arbitrator intimating therein change of venue of arbitration proceedings as also regarding date of hearing. This petitioner enquired of through his letter dated 18-09-08 to the learned Arbitrator regarding another letter JSM/ARB/GE TEZ/7 dated 09-09-08 which had found a reference in the letter dated 16-09-08. Through forwarding letter dated 18-09-08, the petitioner forwarded its statement of case annexing therewith documents relied upon by it to the learned Arbitrator as also to the Govt. On demand the letter dated 09-09-08 of the learned Arbitrator was handed over to this petitioner by the Office of the GE, TEZ on 19-09-08. In the letter dated 09-09-08 the learned Arbitrator had re-fixed the dates for submission of Statement of case but surprisingly by both the parties and their respective counters on such statement of case with a particular timeframe. The petitioner and has stated that this was an afterthought by the learned Arbitrator to justify submission of statement of case by the Govt., that too, after receiving the same from the Govt. These circumstances reveal that the learned Arbitrator started acting in a partisan manner from the very beginning. Learned Arbitrator even did not refer to about the letter dated 09-09-08 in his final award.
- (p)** The Govt. vide letter dated 27-09-08 submitted its reply on the statement of case of the petitioner. In the same manner, the petitioner

submitted its reply dated 22-09-08 on the statement of case filed by the Govt. but under protest. Both the parties annexed certain documents and relied upon it.

- (q)** The Govt. in its reply dated 27-09-08 undermined the authority of the court by making derogatory statements in para 14 & 14.1. As stated therein, the Govt. knew well that that the learned Arbitrator was to simply decide the amount of compensation to be awarded to this petitioner in view of the fact that while challenging the very application for referring the dispute to arbitration, the Govt. took shelter under some purported letters which the Hon'ble Court (Civil Judge, Sr. Divn, Tezpur) rejected while turning out its judgment dated 16-12-2000. The Court further held that getting the work through another agency was also illegal.
- (r)** The petitioner has further stated that to bring home the fact that the Govt. showed falsely to have sent letters dated 28-08-93, 21-09-93, 16-10-93 and 23-11-93 in connection with the work for which the present arbitration proceeding was initiated, the petitioner very aptly referred to CA No. GE/Tez/32 of 91-92 ::: Provn. of repairs of Road at Amaribari & Phulbari under GE, Tezpur. The petitioner referred in details in para 3.10 of its Statement of Case and in para 3.5 of its reply. In the said contract work, the Govt. issued certain letters knowing fully well that the contents of those letters were false. Those letters were meant to protect the skin of Govt. officials. The petitioner gave notice to the Govt. vide para 5.17 of its Statement of Case as also vide para 3.5 of its Statement of Reply to bring the letters relating to CA No. GE/Tez/32 of 91-92. The Govt. chose not to bring those letters. In such a situation an adverse presumption ought to have been drawn against the Govt. by the learned Arbitrator which he did not.
- (s)** The learned Arbitrator, as per the earlier schedule, took up the arbitration proceedings in presence of the parties at HQ Chief Engineer, Shillong Zone on 03-10-08. This petitioner raised a preliminary objection at the very outset of the arbitration proceeding relating to learned

Arbitrator's jurisdiction over the issue of handing over of the site since the same had already been adjudicated upon by a competent court of law decisions whereon would operate as res judicata. However, to the astonishment of the petitioner, the Govt. not only agitated over the said issue and claimed to have dispatched the above mentioned letters to the contractor/petitioner before cancellation of the work but the Arbitrator was also found reopening the said issue and to try to do a favour to the Govt. by allowing it time to show proof of dispatch of the letters. The learned Arbitrator heard the parties on their respective claims and concluded the proceedings by drawing the minutes of the meeting.

- (t)** The Govt. vide its letter No. 8495/ARB/615/E8 dated 16-10-08 stated that the postal authority could not confirm receipt of letter in question, the matter being very old. The petitioner has stated that the Govt. did not show any proof of dispatch of letters before the learned Arbitrator or even before the learned Civil Judge (Sr. Divn), Tezpur. Without showing the postal receipts in proof of dispatch, how could there be any confirmation even by the postal authority of delivery of the letters to the petitioner.
- (u)** Learned Arbitrator finally disposed of the proceedings by publishing an award dated 22-10-08, his last date in the said office as the Chief Engineer of the Shillong Zone before his transfer to a new place of posting. The copy of the award was served on this contractor on 29-11-08.

Being highly aggrieved and dis-satisfied with the award passed by the sole arbitrator, the petitioner has preferred this instant application U/s 34 of the Arbitration and Conciliation Act, 1996, mainly on following grounds:

- (i)** The impugned award suffers from the vices of decision on matters not referred to arbitration and decisions on matters beyond the scope of arbitration.

(ii) The arbitration award is against the Law of Contract to which the parties to the agreement were subjected. The award is also against the Principles of Res Judicata as two important issues had already been decided by a competent court of law.

(iii) The learned Arbitrator delved in the issue pertaining to handing over/taking over of work side. It was an illegal attempt. Learned Arbitrator did not consider the objection raised by this petitioner/contractor before embarking upon deciding the said nonexistent issue. This is apparent from a reading of 13,17 and 24 of the impugned award. Learned Arbitrator relied upon exhibit GS 1 or CS 1 which is a copy of the Work Order No. 1 dated 31-05-1993. In the said work order, the date of handing over of the site and date of completion of the work have been mentioned as 07-06-93 and 06-10-93 respectively. This document contained the time schedule to be adhered to but the said work order could not be used to show that the site was, in reality, handed over on 07-06-93. Learned Arbitrator did not take into account similar lapse in relation to CA No. GE/TEZ/32 of 91-92. This contract was referred to even in the letter dated 15-09-1994 (Ext. CS -3) which was written in response to Govt.'s letter dated 14-07-94 (Ext. CS-2). Learned Arbitrator did not consider at all the intentional withholding of the correspondences relating to the other contract work (CA GE/TEZ/32 of 91-92) and the fact that a competent court of law had already decided the issue relating to handing over and taking over of the site.

(iv) The Arbitrator reflected in his award one aspect of the matter, that is, that the petitioner/contractor admitted that it did not write any letter but this was in response of the fact that no letter as claimed by the Govt. was ever served on it asking it to commence work and hence there was no question of writing letters in reply. Learned Arbitrator allowed claim No.1 of the Govt. He awarded a sum of RS. 81,695.32 in favour of Govt. (UOI) on the premise that the work was justifiably cancelled by Govt. This finding was contrary to materials on record and as the matter

pertaining to handing over and taking over of site was a point not contemplated and hence impugned award deserves interference.

(v) The claims of the petitioner/contractor (claim No. 1 to 3) were rejected mainly on the ground that the contractor failed to execute the work and that the contract was legally cancelled and got executed through another agency at the cost and risks of this petitioner/contractor. This matter was beyond the scope of arbitration as it had already been decided by a competent Civil Court.

(vi) That in any view of the matter the award is unsustainable under the law and needs to be set aside.

3. The respondent appeared and contested the case of the petitioner by filing written objection wherein, the Respondent denied the allegation as well as the averments made by the petitioner in the petition. The respondent has, *inter-alia*, took following stand against the petitioner's case in its written objection:

(a) That the grounds which are mentioned in the petition for setting aside award are not valid grounds under section 34 of the Arbitration and Conciliation Act 1996.

(b) That the work order no.1 dated 1993 was duly issued and the petitioner accepted the same without any reservation to commence the work on 07/06/1993. The respondent stoutly denied that the site was never handed over to the petitioner. The garrison engineer, Tezpur Vide his letter No 0495/19/E8 dated 1-6-1993 requested the contract engineer-in-charge concerned for immediate commencement of the work under the said contract.

(c) That the statement of the petitioner that it could not execute the work for non-handing over of the site was afterthought, baseless and false.

(d) That the Sole Arbitrator had given equal opportunities to both the parties to present their case, hence, The Sole Arbitrator has not violated the provisions of law contained in the Arbitration and Conciliation Act.

4. I have perused the arbitral award and documents annexed therewith and other materials on record thoroughly and heard learned counsel for both sides at length

5. Now, let me, before considering the rival contentions, look into the relevant portion of Section 34 of the Arbitration and Conciliation Act, 1996 which are as follows:

"34. Application for setting aside arbitral award-- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force of

(ii) the arbitral award is in conflict with the public policy of India.

Explanation--Without prejudice to the generality of Sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the

making of the award was induced or affected by fraud of corruption or was in violation of Section 75 or Section 81."

6. As regards role of courts when an Arbitral Award is challenged before it, Hon'ble the Supreme court of India in "***McDermott International Inc v. Burn Standard Co. Ltd. and Ors.***" reported in ***(2006)11 SCC 181*** has observed that:-

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

7. In view of the abovementioned position of law, let me now, look into the main contention raised by the Petitioner in this case. It appears that the dispute arose between the parties due to non-completion of work, as per the contract, within stipulated time by the petitioner and imposition of liability of Rs 81,695.32 on the petitioner by the sole arbitrator. The petitioner all along took the stand that the site of the work was not handed over to it and hence the work could not be completed within the stipulated time. Whereas, the Government took the stand that the site was handed over to the contractor on 07/06/1993 (*Vide CS-1 and exhibited before sole arbitrator*).

8. The learned sole Arbitrator, while deciding the Claim No.1, during the arbitration proceeding, held as follows:-

"Union of India stated that the contractor failed to commence the work on ground inspite of various notices issued from the commencement of work from the date of issue of work order. The Exhibit GS-2 to GS-5 have been referred by UOI in this regard. On the exhibits contractor during the hearing has stated that no such letters/notices

issues by the deptt have been received by them. The UOI produced two letters sent to the contractor through registered post but was unable to produce proof of dispatch by Post Office who claimed that they have no records now that the case is 15 years old. When asked whether such reply is given from the contractor side to the UOI, no proof could be produced by the contractor. Moreover, contractor brought out just to deny the claim of UOI that no site was handed over to them by the GE. Immediately the copy of Work Order No. 1 signed by Mr. Manmohan Singh, partner was shown to the contractor wherein the date of handing over of site has been mentioned. (Exhibit GS -1 enclosed by contractor). Further during the hearing contractor has agreed that he has never written a letter asking UOI that no site has been handed over to them though arguing repeatedly.

I have heard and considered the submission of UOI and the arguments from the contractor. Considering the facts in the subject case from the documents enclosed by UOI and the records substantiating the reason for cancellation of work, I ascertain that contractor is liable to pay the extra expenditure incurred by UOI in getting the balance work completed as per condition 54 of IAFW-2249, General Conditions of Contracts, forming part of the contract.

In view of above, I award a sum of RS. 81,695.32 in favour of UOI against this claim."

9. On perusal of the aforementioned order of the sole arbitrator, it appears that, for awarding the aforesaid sum of Rs. 81,695.32 in favour of Union of India, he has reopened the issue as to whether the site of work was handed over to the contractor or not. He has observed that "*Moreover, contractor brought out just to deny the claim of UOI that no site was handed over to them by the GE.*" Though, learned Arbitrator refrained himself from specifically stating that site was handed over to the petitioner, however, it clearly appears from the tone and tenor of the language used by him in the aforesaid order that he proceeded to award the aforesaid sum of Rs. 81,695.32 in favour of Union of India on the ground that the site of work was handed over to the petitioner and it failed to complete the work within the stipulated time.

10. Learned Counsel for the petitioner, during the course of the argument, has submitted that it was pointed out to the sole arbitrator that the question of handing over of the work site has already been decided by the Court of Civil Judge (Sr.Div.), Tezpur and same cannot be reopened by the sole arbitrator. However, the sole arbitrator ignored the submission and gave his observations on the question of handing over the work site and decided the claim No.1 on the basis of such observation. On perusal of the Minutes of the meeting of the arbitration proceeding held on 3rd of October 2008, which is signed by the representative of both the parties as well as the sole arbitrator, it appears that in paragraph no. 8 of the said minutes it is specifically mentioned that *"the contractor also claimed that arbitrator has no jurisdiction over the issue of handing/taking over of the site since the same has already been adjudicated up on by the Court of Civil Judge (Sr.Div.), Tezpur."* Thus it is apparent, that it was pointed out to the sole arbitrator that the issue of handing/taking over of the site has already been decided by Court of Civil Judge (Sr.Div.), Tezpur.

11. I have perused the Judgment, dated 16/12/2000, passed by the Court of Civil Judge (Sr.Div.), Tezpur, in T.S.(Arb) No. 15 /95 . It appears that, in that case, the Court framed five issues for adjudication. The issue No.1 was as follows:-

"Whether the site, with the work are to be executed was handed over to the plaintiff ?"

After hearing Ld. Counsel for both the parties and on the basis of the evidence on record the Court of Civil Judge (Sr.Div.), Tezpur, came to the following specific and categorical conclusion on the aforesaid issue-

"I have absolutely no hesitation to hold that the site of work to be executed was not handed over to the plaintiff"

There is absolutely nothing on record to show that this finding of the Court of Civil Judge (Sr. Div.), Tezpur, has been set aside, reversed, altered or modified by any Court of competent jurisdiction.

12. As discussed, herein before, that an arbitral award may be set aside, by the Court, only when the party making application furnishes proof of the existence of any of the circumstances provided in Section 34 (2) (i) to (v). Further, on a quick look at the

contentions raised by the petitioner in his petition, u/s 34 of the Arbitration and Conciliation Act, it appears that the petitioner intends to bring his case under section 34 (2)(b)(ii) ,i.e., that the arbitral award is in conflict with the public policy of India.

13. As regards what can be regarded as "in conflict with the public policy of India" Hon'ble the Supreme court of India in "***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.***" reported in **(2003) 5 SCC 705** has observed that:-

"court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal."

Hon'ble Supreme Court also explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

14. In the instant case it is clear, from what has been discussed above, that the issue, which is the most important issue in connection with the dispute between the parties, as to "*whether the site of work was handed over to the petitioner*" has been already decided by the Court of Civil Judge, Sr. Divn., Tezpur in TS (Arbitration) No. 15/95, however, it was again reopened by the sole Arbitrator and a contrary view has been taken by him while deciding the Claim No. 1 in the arbitration proceeding. Learned counsel for the petitioner has submitted that the principle of "*res judicata*" is applicable in the instant case and when an issue has been finally decided by a Court of competent jurisdiction, it cannot be again reopened, between the same parties, unless the said order of the Court is set aside, reversed or modified by the Court of competent jurisdiction. The submissions made by the learned counsel for the petitioner appears to be plausible and I agree with the same. The conduct of the sole Arbitrator in ignoring the finding of a competent Court and acting contrary to what has been decided by the Court is, in my considered opinion, an act reflecting arbitrariness on the part of sole Arbitrator and opposed to the

fundamental policy of Indian Law. This patent illegality, in my considered opinion goes to the very root of the matter and it is so unfair and unreasonable that it shocks the conscience of this Court.

15. For the reasons stated above, this Court is of considered opinion that the Arbitral Award dated 22-10-2008 passed by sole Arbitrator Sri J.S. Mitra, the then Chief Engineer, HQ Civil Engineer, Shillong Zone, Spread Eagle Falls, Shillong - 793011 is in conflict with the public policy of India and accordingly, it is hereby set aside.

Given under my hand and seal of this court, on this the 27th day of May 2015.

(M. K. Kalita)
DISTRICT JUDGE
SONITPUR: TEZPUR

Dictated and corrected by me

(M. K. Kalita)
DISTRICT JUDGE,
SONITPUR :: TEZPUR.

Dictation taken and transcribed by me :

R. Hazarika, Steno