

(2016) 09 PAT CK 0062

In the Patna High Court

Case No : Civil Miscellaneous Jurisdiction No. 746 of 2016

Bihar Rajya Bhumi Vikas Bank Simit

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 06-09-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(5)

Citation : (2016) 4 PLJR 294

Hon'ble Judges : Mr. Mungeshwar Sahoo, J.

Bench : Single Bench

Advocate : Mr. Y.V. Giri, Senior Advocate, for the Petitioner; Mr. Raghwendra Kumar, S.C. 22, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Mungeshwar Sahoo, J.—I have heard learned senior counsel Mr. Y.V. Giri for the petitioner and learned S.C. 22 on behalf of the respondents.

2. The petitioner has filed this application under Article 227 of the Constitution of India for setting aside order dated 18.07.2016 passed by learned District Judge, Patna whereby the application filed by the respondents under Section 34 of the Arbitration and Conciliation Act, 1996 which was registered as Miscellaneous Case No. 32 of 2016 was admitted and notices were directed to be issued on the opposite party of miscellaneous case i.e. the petitioner of this civil miscellaneous application.

3. It appears that Arbitrator was appointed by the High Court in Request Case No. 04 of 2013. Against the order of High Court, S.L.P. was filed before the Supreme Court, which was dismissed. The Arbitrator by order dated 06.01.2016 passed the Award. The dispute between the parties is regarding payment of Rs. 570.79 cores. After the Award the respondent herein i.e. State of Bihar filed application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Conciliation Act, 1996"), which was registered as

Miscellaneous Case No. 32 of 2016 in the Court of District Judge, Patna. By the impugned order, the District Judge admitted the miscellaneous case and directed to issue notice.

4. Learned Senior Counsel Mr. Y.V. Giri for the petitioner submitted that the office of the District Judge submitted a report dated 26.05.2016 in the miscellaneous case to the effect that the provision as contained in sub section (5) of Section 34 of the Conciliation Act, 1996 has not been complied with but without considering the said report of the office, the District Judge has admitted the miscellaneous case. According to the learned Senior Counsel, the provision of Section 34 (5) has been inserted by way of amendment in the year 2015 with effect from 23.10.2015, which is mandatory provision and for noncompliance thereof the miscellaneous case filed by the respondent under Section 34 of the Conciliation Act, 1996 itself was not maintainable, as such, it could not have been admitted by the District Judge. Therefore, the order admitting the miscellaneous case is without jurisdiction and liable to be set aside.

5. Learned Senior Counsel Mr. Y.V. Giri relied upon decision of the Supreme Court, (2014) 3 Supreme Court Cases 502 (Dipak Babaria v. State of Gujarat), A.I.R. 1976 Supreme Court 789 (Hukam Chand Shyam Lal v. Union of India and others).

6. On the other hand, the learned S.C. 22 for the respondents submitted that there was no arbitration agreement and moreover the Award is to be tested by the Court and the provision under Section 34 (5) of the Conciliation Act, 1996 is only a procedural law. For non-compliance thereof the right to file application under Section 34 cannot be taken away.

7. Perused the impugned order.

8. Section 34 (5) of the Conciliation Act, 1996 reads as follows : -

"(5) An application under this Section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement".

9. From the above provision it becomes clear that it prescribes the procedure how the application under Section 34 of Conciliation Act, 1996 is to be filed.

10. So far the decision relied upon by the learned Senior Counsel for the petitioner is concerned, the Supreme Court has held that where the statutes provides for a thing to be done in a particular manner then it has to be done in that manner and in no other manner vide paragraph 61, which has been referred to by learned Senior Counsel for the petitioner. The other decision i.e. Hukam Chand Shyam Lal (supra) is concerned, at paragraph 18 it has been held by the Supreme Court that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden.

11. From perusal of the decision in the case of Dipak Babaria (supra), it appears that in that case neither the procedural law either C.P.C. or Arbitration Act was interpreted. From perusal of paragraph 59, it appears that in that case instead of statutory authority viz. the Collector acting in accordance with the statutory mandate, only because a direction was given by the Minister that the statutory authority was bypassed, and even the enquiry as contemplated under sub section (5) of Section 89A was given a go-by. In that context the Supreme Court decided the law. Likewise, in the case of Hukam Chand Shyam Lal (supra) the Supreme Court was interpreting Telegraph Act, the meaning of public emergency, economic emergency. In view of that the Supreme Court interpreted Section 115 C.P.C. and held that where a power is required to be exercised by a certain authority in a certain way it should be exercised in that manner. So far these decisions of the Supreme Court are concerned, there is no dispute at all but that cannot be the exhaustive law for interpreting all other provisions of the procedural law of different acts.

12. It may be mentioned here that the Conciliation Act, 1996 was enacted to provide speedy disposal of cases relating to Arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of provisions of the Act by Courts in some cases have resulted in delay of disposal of Arbitration proceeding. With a view to overcome the difficulties the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. With this Report the Amendment Bill was introduced in the Rajya Sabha in 2003, which was referred to the Department related Parliamentary Standing Committee on personal public grievance, law and Justice for examination of Report. The Committee submitted Report to the Parliament in August, 2005 wherein the Committee recommended that many provisions of the Bill were contentious, it may be withdrawn and fresh legislation may be brought. Again reference was made to the Law Commission. The Law Commission examined and submitted its 246th Report on amendment to The Arbitration and Conciliation Act, 1996 in August, 2014 and recommended various amendments to facilitate and encourage alternative dispute mechanism, especially arbitration, for settlement of dispute in a more user friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases. Therefore, the main object of the Act is to expedite the arbitration matter and for that this provision (sub section 5) has been inserted by Amendment Act, 2015. It only prescribes the procedure how the application is to be filed.

13. So far the submission that the provision in section 34 (5) is mandatory is concerned, it is better to consider similar type of other procedural law. Order 41, Rule 1 C.P.C. provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment. The wordings of this provision and the other provisions are also couched in mandatory form. Likewise by Amendment

Act of C.P.C., Order 8, Rule 1 was also amended. After amendment, Order 8, Rule 1 provides that the defendant shall within 30 days from the date of service of summons on him present a written statement of his defence. Proviso has been added to the effect that the defendant shall be allowed to file the same on such other day as may be specified by the courts for the reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. This is also couched in the mandatory form. However, this provision has been interpreted by the Supreme Court in the case of *Kailash v. Nanhku & Ors.*, (2005) 4 Supreme Court Cases 480 and it has been held that it is not mandatory provision. The power of the Court to extend the time cannot be taken away by the amendment. The Supreme Court further held that in special circumstances the Court has the jurisdiction to extend the period beyond 90 days, if reason assigned by the defendant is satisfactory to the Court. This provision has been held to be directory. No doubt the Supreme Court held that because it is directory, it cannot be ignored but it should be followed.

14. Likewise Section 34 (5) of the Conciliation Act, 1996 provides a particular method to the objector but that does not mean that it is mandatory and if it is not complied with then it cannot be said that the court has the only option to reject the application filed under Section 34. The power of the Court is not taken away because of this legislation, particularly when the object of this legislation is to expedite the disposal of the arbitration matter and, therefore, this procedure for giving prior notice before filing has been provided.

15. It may be mentioned here that notice is issued to the opposite party so that the opposite party may know that a proceeding has been filed before the Court. Earlier much time was consumed in issuance of notice. Here, the only opposite party in the miscellaneous case is the present petitioner. the opposite party is knowing the fact that a proceeding has been initiated by filing application under Section 34 of the Conciliation Act, 1996 but instead of appearing before the District Judge, the opposite party has filed this civil miscellaneous application before the High Court.

16. It is well settled principles of law that the Conciliation Act, 1996 is a self contained Code dealing with the procedural matter. The Hon''ble Supreme Court while dealing with the Code of Civil Procedure held that C.P.C. is a law relating to procedure and procedural law is always intended to facilitate process of achieving ends of justice and normally, not to shut the doors of justice for parties at the very threshold. Courts would favour in interpretation which will achieve said object, viz. 2011 (4) BBCJ IV - 107 (*Mahadev Govind Gharge v. The Special Land Acquisition Officer*). In view of the decision of the Supreme Court this provision of Conciliation Act, 1996 section 34(5) is also a procedural law and, therefore, it should be interpreted so as to facilitate process of achieving ends of justice and not to shut the doors of justice on the technical ground of non-compliance thereof.

17. The Hon''ble Supreme Court in various decisions i.e. (2010) 8 Supreme Court

Cases 329, 2011 (3) PLJR 46 (SC), (2015) 5 Supreme Court Cases 423, (2010) 9 Supreme Court Cases 385 has held that the supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. In the present case, in no case it can be said that the District Judge has no jurisdiction to admit the application under Section 34 of the Conciliation Act, 1996. Merely the miscellaneous case has been admitted, therefore, right of the parties is still to be decided according to law. Therefore, neither there is any jurisdictional error nor the order sought to be set aside has been passed in the manner not permitted by law nor it occasioned failure of justice nor the District Judge has assumed a jurisdiction not vested in it by law.

18. The Hon"ble Supreme Court in the case of Regional Provident Fund Commissioner v. Hooghly Mills. Co. Ltd., 2012 (2) PLJR 31 (SC) has held that the remedial statute always receives liberal constructions whereas the penal statute calls for strict construction. In case of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted. An interpretation of the statute which harmonizes with its avowed object is always to be accepted than the one which dilutes it. The words used in the statutes may present a problem of meaning which is the essence of business of judges in construing legislation and while construing the statutes the court has to consider the statute as a whole-its design, its purpose and the remedy which it seeks to achieve. Here, if the order admitting application under Section 34 is set aside and the respondent is directed to comply sub-section (5) of Section 34 (although the petitioner is watching the proceeding and has got knowledge about the filing of application under Section 34) and then to file it again will lead to serious consequence and it will be nothing but a penalty as if we are construing a provision of penal law as the second filing will be time barred. In view of this, in my opinion, it will lead to multiplicity of proceeding and cause hardship to respondent and more time will be consumed and thereby the object of amendment of Conciliation Act, 1996 shall be frustrated on this technical procedural law. Therefore, the Court has the power to direct the party to comply the provision and for that purpose time can be granted and direction may be made by the Court according to law.

19. In view of the above settled principles of law and in view of my discussion above I find that section 34 (5) of the Conciliation Act, 1996 is not mandatory rather it is directory. It was inserted for the purpose of expeditious disposal of the arbitration matter i.e. the period which was being consumed in issuing the notice is sought to be shortened by providing this provision by amendment but that does not mean that for noncompliance thereof the application is to be dismissed at the very threshold. The courts have the jurisdiction to entertain the application and by inserting sub-section (5) of Section 34, the power of the Court

has not been taken away. This does not mean that always this provision should not be complied with. Further by the impugned order no prejudice is caused to the petitioner. Now the petitioner has got the knowledge, therefore, the petitioner may appear and file objection. Huge amount is involved and, therefore, the proceeding cannot be rejected at the very threshold on technical ground, particularly when I have held that the provision is not mandatory rather it is directory.

20. In the result, this civil miscellaneous application is dismissed.