

(2011) 04 OHC CK 0011

In the Orissa High Court

Case No : Misc. Case No. 49 and 57 of 2009 (Arising Out of ARBP No. 65 of 2008)

G.C. Kanungo

APPELLANT

Vs

Rourkela Steel Plant and Another

RESPONDENT

Date of Decision : 15-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(2), 11(6), 11(7), 43
Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 114

Citation : (2012) 1 ILR (Ori) 1

Hon'ble Judges : V. Gopala Gowda, C.J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.Gopal Gowda, C.J.—The petitioner has filed Misc. Case No. 49 of 2009 to modify the order dated 20.5.2009 to the extent of indicating RMD/1 of 1993-94 in place of agreement dated 1.4.1991, whereas the opposite parties have filed Misc. Case No. 57 of 2009 for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2008 and order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 arising out of the said arbitration petition urging various factual and legal grounds.

2. The brief facts are stated for the purpose of appreciating the rival legal contentions urged on behalf of the parties with a view to find out as to whether the opposite parties are entitled for the relief sought for in the aforesaid Misc. Case.

3. Contract bearing No. RMD/1 of 1993-94 was executed between SAIL and the petitioner for handling of different raw materials wagons etc. at different stockyards inside Rourkela Steel Plant by the claimant-contractor. Initially the contract value was for Rs. 4,47,66,000/-. The contract was for a period of fifteen months with effect from 1.4.1993 and the same was extended for a further

period of two months upto August, 1994. The contract value was amended to Rs. 6,53,16,000/-. The contractor was submitting the running bills and he was receiving the admitted amounts as per the terms of the contract. It is stated that he had submitted the final bill and final payment was made vide letter dated 11.02.1999 for an amount of Rs. 4,25,677.98 and there was no further claim of the claimant. Therefore, the contract was closed without any objection. Hence, it is stated that the claim now made by the petitioner is an after-thought and with a motive to make wrongful gain for himself. The agreement between the parties provides for resolution of the dispute, i.e., Arbitration Clause 15.0 to 15.5 by arbitration through Arbitrator and certain terms and conditions are stipulated in the said contract, vide Clauses 15.1, 15.2., 15.3, 15.4, 15.5 regarding nomination of the Arbitrator by the Managing Director and the dispute regarding supply of materials etc. along with the condition that sittings of the Arbitrator shall take place at Rourkela.

4. The petitioner filed a petition before this Court bearing M.J.C No. 18 of 2002 for appointment of an Arbitrator. This Court vide order dated 1.10.2007 dismissed the petition for the reason that learned counsel for the petitioner was not able to point out the arbitration clause in the agreement. Apart from that no application appeared to have been filed for invoking the arbitration clause and there was also no averment to that effect in the body of the petition.

5. The petitioner filed a review petition before this Court, which was registered as RVWPET No. 3 of 2008. After hearing the learned counsel for the parties, the same came to be dismissed for the reason that though there is an arbitration clause in the agreement, but it was not indicated anywhere that at any point of time the petitioner approached the opposite parties for appointment of an Arbitrator and the opposite parties have disputed the amount, which is to be paid to the petitioner. Therefore, this Court found no ground for review of the order except granting liberty to the petitioner to approach again to the Chief Justice invoking the jurisdiction u/s 11 of the Arbitration and Conciliation Act, 1996 in short, "the Act" in case there exists dispute as mentioned in the arbitration clause and the opposite party failed to appoint the Arbitrator. Therefore, the review petition was dismissed without interfering with the order dated 1.10.2007 passed in M.J.C.No. 18 of 2002 with the liberty as mentioned above.

6. It is the further case of the opposite parties that the petitioner without making any request to the named authorities for appointment of an Arbitrator as provided in clause 15.1 of the agreement, by manufacturing a letter dated 29.12.2001 stated to have been sent to the opposite party no.1 by way of Under Certificate of Posting though in fact no such letter was sent to the opposite party no.1 at any point of time requesting him for appointment of an Arbitrator, filed another Arbitration petition before the Chief Justice of this Court, which was registered as ARBP No. 65 of 2008. The said petition was neither served on SAIL, Rourkela Steel Plant nor notice was sent from this Court in the said petition to the opposite parties. However, copy of the petition was served by the claimant-

petitioner's counsel on one Mr.Asim Amitav Das, a practicing Advocate of this Court. According to the opposite parties, Mr.Das was never authorized by the SAIL to appear in the aforesaid case. This Court after hearing Mr.Milan Kanungo and Mr.Asim Amitav Das, learned counsel appearing for the petitioner and Rourkela Steel Plant respectively disposed of the aforesaid Arbitration case vide its order dated 20.5.2009 with reference to the clause 15 of the agreement dated 1.4.1991. The then Acting Chief Justice of this Court after hearing the learned counsel for the parties for the reasons recorded in the order referring to the arbitration clause, held that there is no dispute that arbitration clause exists in the agreement and that there are admitted disputes and differences between them and with the consent of the learned counsel appearing for both parties, appointed Mr.Justice K.P.Mohapatra, a former Judge of this Court as an Arbitrator to decide the dispute between the parties and to pass an award. Accordingly, the Arbitration petition was disposed of.

7. It is stated by the opposite parties that the petitioner by suppressing many material facts, as stated above, and not complying with the statutory requirements as provided in sub-section (6) clauses (a) & (c) of Section 11 of the Act filed ARBP No. 65 of 2008 seeking the indulgence of this Court for appointment of an Arbitrator. For granting such prayer, the petitioner should have served notice upon the opposite party no. 1 as required under law and only after giving opportunity of hearing to the parties, necessary appropriate direction should have been given to the respective parties, who have failed to comply with the appointment procedure of an Arbitrator as provided in the clause of the agreement, if any, in relation to any subsisting dispute between them on the date of application. In support of such submission, Mr.N.K.Sahu, learned counsel for the opposite parties has placed reliance upon the decision of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another,

8. It is the further case of the opposite parties that they never authorized or instructed Mr.Asim Amitav Das, Advocate to appear in the said arbitration case to represent them in the proceedings and vakalatnama was also never given to the said advocate engaging him on their behalf to appear in the above arbitration proceedings before the Chief Justice. It is stated that Mr.Das on the basis of a copy of the arbitration petition being served upon him by the petitioner's counsel appeared in the case without there being any authorization given by the opposite parties. On hearing the learned counsel for both the parties, the said arbitration case was allowed. Further the operative portion of the order dated 20.5.2009 clearly reflects that the then Acting Chief Justice of this Court passed an order on the basis that there is admitted dispute between the parties and both of them have given consent for appointment of Arbitrator to resolve the dispute. In this regard it is vehemently stated by the opposite parties that there is no existing dispute between the parties in terms of the contract on the date of application for appointment of Arbitrator, as final payment was received by the petitioner on 11.2.1999 without raising any objection regarding such payment.

9. It is the further case of the opposite parties with regard to the settled position of law that the Chief Justice or his nominee and the Arbitrator before entertaining a claim of the parties must satisfy himself whether the claim of the party is well within the time on the question of limitation. The claim of the petitioner is liable to be rejected on the ground of limitation without calling for any other legal proof since final payment to the petitioner in respect of the work in question was made way back in the year 1999 and as per the requirement of law, the right accrued in favour of the petitioner to apply for appointment of an Arbitrator within three years from the date the final payment was made. The final payment was made on 10.2.1999 and no material evidence was produced in the arbitration case to justify that the petitioner approached the authorities within the prescribed period of limitation for appointment of Arbitrator. According to the petitioner the only document available in the arbitration petition is Annexure-4, the letter dated 29.12.2001 purported to have been sent by the petitioner to opposite party no. 1 approaching him for appointment of an Arbitrator in terms of the agreement. The same was said to have been sent Under Certificate of Posting, which is seriously disputed by the opposite parties. The authenticity of the said letter is seriously disputed by specifically denying receipt of such letter by the opposite parties at any point of time. Further the documents produced along with the arbitration case would clearly show that the letter claiming payment of final bill was sent by the petitioner to the opposite parties by registered post to the Managing Director for either settlement of the claim or appointment of an Arbitrator for resolution of the dispute between the parties. The said plea has been obviously taken to create cause of action for the petitioner for filing Arbitration petition though the petitioner was not legally entitled to approach the Chief Justice of this Court for appointment of an Arbitrator as the said letter was alleged to have been sent to a party under Certificate of Posting. It is further stated that a letter sent under certificate of posting by a sender is not comparable with a communication sent by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the post office. But when a letter is sent under certificate of posting only a certificate is given to the sender and no record is maintained by the Post Office either about receipt of the letter or the certificate issued. It is stated that certificate can be procured by affixing antedated seal with the connivance of the employee of the post office. No direct evidence is available on record that the original letter was actually put in an envelop and posted Under Certificate of Posting to opposite party no.1 to draw a presumption u/s 114 of the Evidence Act that the letter was posted and received by him. In view of the aforesaid factual and legal position, when the sending of the letter is seriously disputed, the court cannot presume in law in the absence of the materials on record that the opposite parties have received such letter on the basis of the alleged postal seal attached to the letter sent under Certificate posting. Further, it is stated that even assuming though not admitting that such letter was sent, the dispute was not subsisting between the parties as the petitioner never approached opposite party no.1 for referring the dispute to the Arbitrator as per the agreement, which is a condition precedent as provided u/s

11 of the Act and binding between the parties to the contract. In support of such submission, learned counsel for the opposite parties placed reliance upon the decision of the Supreme Court in the case of State of Maharashtra Vs. Rashid Babubhai Mulani,

10. It is further contended by the learned counsel for the opposite parties that after disposal of the earlier Arbitration petition in M.J.C.No. 18 of 2002, review petition bearing RVWPET No.3 of 2008 was filed. The then Acting Chief Justice has held that there is no material available on record to substantiate that the petitioner had approached the concerned authorities by sending notice and serving upon them for appointment of an Arbitrator, and therefore review petition bearing RVWPET No.3 of 2008 was dismissed. However, liberty was given to the petitioner to file another petition after following due procedure. Therefore, it is contended by learned counsel for the opposite parties that this Court has rightly dismissed the review petition. In support of such contention, he has relied upon the decision of the Supreme Court in M/s.Narendra Nath Panda and Co. v. Union of India and three others, 2007 Supp. (SC) (2) OLR, 545.

11. It is further stated that if the letter was sent in the year 2001 to the Managing Director of the Company preferring a claim for appointment of an Arbitrator, the same could have been mentioned in its earlier arbitration petition M.J.C.No. 18 of 2002 filed by the petitioner. From the said fact, an adverse inference to be drawn is that such letter was never in existence and the same has been fabricated for the purpose of this case in order to defeat the statutory requirement as provided in the Act as well as to frustrate the law of limitation regarding maintainability of the application seeking for appointment of an Arbitrator by the then Chief Justice of this Court. In support of such contention, the learned counsel for the opposite parties has placed reliance upon the case of Union of India Vs. M/s. Momin Construction Company,

12. It is further submitted by him that the plea taken by the petitioner in Misc. Case No. 49 of 2009 that he has approached the Managing Director of the Company on 29.12.2001 for appointment of an Arbitrator to resolve the dispute is barred by the principles of constructive res-judicata. Learned counsel for the opposite parties placed reliance upon the decision of the Supreme Court in Konda Lakshmana Bapuji Vs. Government of Andhra Pradesh and Others, and Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, .

13. It is further urged that the wrong concession made by a counsel who was not authorized by the opposite parties cannot bind the parties if the statutory provision clearly provides otherwise. The applicability of the statutory provision in a given situation or question of liability of a person under any provisions of law invariably depend upon the scope and meaning of the provision and the same has got to be adjudged not on any concession made. Any such concession made by an advocate in the case, who has no authority to represent the party has no relevance and the same could not have even accepted by the then Acting Chief

Justice to determine the valuable rights and liability incurred or acquired by the parties in view of the axiomatic principle there can be no estoppel against statute. In relation to the order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 only after receipt of the notice from the named Arbitrator appointed by this Court vide order dated 20.5.2009 in ARBP No. 65 of 2008, the opposite parties came to know that Arbitrator has been appointed. Immediately after receipt of the notice from the Arbitrator on 16.7.2009, the Law Officer of the opposite parties wrote a letter to the concerned Advocate referring to the letter received from the Arbitrator stating that the petitioner has never approached the Managing Director for appointment of an Arbitrator and therefore, the petition u/s 11(6) of the Act filed by the petitioner is not maintainable in law and approaching the Chief Justice of this Court for appointment of an Arbitrator is premature and the Managing Director of Rourkela Steel Plant was neither consulted for appointment of any Arbitrator nor any instruction was given to the said Advocate and the Law Officer requested to file appropriate petition seeking modification of the order. Again on 27.7.2009 the Law Officer requested the said Advocate to send a copy of the petition filed by the petitioner for appointment of an Arbitrator before this Court and to file a petition for modification of the order and also an application for stay of the arbitration proceeding before the Arbitrator in ARBP No. 65 of 2008. After receipt of the letter from the Law Officer, the advocate filed two Misc. Cases, i.e., Misc. Case No.23 of 2009 for recalling of the order dated 20.5.2009 and another Misc. Case No. 24 of 2009 for stay of further proceedings of the arbitration proceedings before the learned Arbitrator. It is stated that from the aforesaid correspondence between the concerned Advocate and the Law Officer of SAIL, Rourkela Steel Plant, it is ascertained that the Company has not received the petition from the petitioner seeking for appointment of an Arbitrator. Therefore, it is not possible on their part to give any comment in the matter. The Acting Chief Justice of this Court disposed of the aforesaid Misc. Cases on 3.9.2009 with the following observation:

As I remember, I put a question to the learned counsel for the parties that if he has any objection in the appointment of Mr. Justice K.P. Mohapatra a retired Judge of this Court as Arbitrator, he had no objection to the same. Therefore, Mr. Justice K.P. Mohapatra was appointed as Arbitrator. This was asked before making appointment of Justice K.P. Mohapatra as Arbitrator only with an intention that if any grievance or bias is reported by the opp. parties, RSP, the same can be said in the instant application.

14. It is further submitted that the reasons assigned by this Court while disposing of the aforesaid Misc. Case Nos. 23 and 24 of 2009 filed by the concerned Advocate has been given with reference to the statement made by the said advocate in the Court while the order was passed on 20.5.2009 in ARBP No.65 of 2008. With reference to the aforesaid factual position, it is stated that the circumstances reveal that the order dated 20.5.2009 passed by the then Acting Chief Justice of this Court is not sustainable in law in view of the fact that no consent was ever given by the opposite parties for appointment of Justice

K.P.Mohapatra as the Arbitrator to resolve the dispute between the parties. The so called statement, stated to have been made on behalf of the opposite parties in Court being contrary to the statutory provisions of law, such concession/ consent, if any, made by the Advocate, who had no authority to represent the opposite parties is not binding on them and the said concession or consent does not operate as estoppel against the statute. Under sub-section (6) of Section 11 of the Act, the legislative scheme of Section 11 and the agreement executed by the parties has to be given great importance. If the parties have agreed upon certain procedure for appointing an arbitrator as contemplated under subsection (2) thereof, then such procedure should be adhered to appoint an Arbitrator to resolve the dispute between the parties. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing an Arbitrator as contemplated under sub-section (2) of Section 11 of the Act or the various contingencies as provided in subsection (6). In the instant case the parties have agreed on the procedure for appointment of an Arbitrator for settlement of the dispute by an Arbitrator as provided in sub-section (2) and accordingly executed the agreement with specific clause providing procedure for appointment of an Arbitrator. In the absence of materials whatsoever on record to show that any of the contingencies enumerated in clause (a) or (c) of sub-section (6) has arisen, the application moved by the petitioner before the Chief Justice of this Court was clearly not maintainable in law and as such, the said application deserved to be dismissed as not maintainable in law for not following the agreed procedure and the claim is barred by limitation and the then Acting Chief Justice had no authority to appoint an Arbitrator. These legal aspects of the matter were not considered by the then Acting Chief Justice in the Misc. Cases filed by the concerned advocate and the opposite parties have no opportunity to ventilate their grievances inasmuch as no notice was issued to them for their appearance in the Arbitration petition proceedings and the circumstances under which the order sought to be recalled was passed, were not within the knowledge of the opposite parties and they had no occasion to bring all these facts for allowing the Misc. Cases filed by them.

15. In support of the averments, an additional affidavit of the Assistant General Manager is filed along with the letter sent by them to the Arbitrator on 27.7.2009.

16. The said petition has been opposed by the petitioner by submitting a date chart along with written note of submission. It is stated that the orders dated 20.5.2009 passed in ARBP No.65 of 2008 and dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 have become final as the same were not challenged before the Supreme Court and therefore, the present Misc. Case, seeking review of the aforesaid orders is not maintainable in law. Further, it is contended by Mr.R.K.Rath, learned Sr. Counsel that after the Misc. Cases were dismissed for the reasons recorded in the order, on 3.10.2009 Vakalatnama was filed by the Managing Director of Rourkela Steel Plant before the learned Arbitrator (a memo is produced for my perusal). On 30.11.2009 Misc. Case No. 49 of 2009 was filed by the petitioner for modification of the order dated 20.5.2009 due to

typographical mistake regarding the date of agreement and on 5.12.2009 the order of the learned Arbitrator reflects the deposit of Rs. 40,000/- towards his fees for five sittings by the opposite parties, (memo of the documents is filed for my perusal). On 16.12.2009 counter to the Misc. Case No. 49 of 2009 as well as another Misc. Case No. 57 of 2009 for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2008 and order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 was filed by the opposite parties. It is stated that the said orders operate as res- judicata for entertaining the above Misc. Case. In support of such contention, the learned Senior Counsel placed reliance upon decisions of the Supreme Court in M.R.F. Ltd. Vs. Manohar Parrikar and Others, , Madhvi Amma Bhawani Amma and Others Vs. Kunjikutty Pillai Meenakshi Pillai and Others, and S. Nagaraj (dead) by LRs. and Others Vs. B.R. Vasudeva Murthy and Others etc. etc.,

17. Mr.Rath, learned Sr. Counsel further stated that the present Misc. Case filed by the opposite parties is barred by limitation as provided u/s 43 of the Act. In support of this contention, reliance is placed upon the decision of the apex Court in Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd.,

18. In view of the aforesaid legal contentions, Mr.Rath, learned Sr. Counsel contends that the order dated 20.5.2009 be modified by allowing Misc. Case No. 49 of 2009 and Misc. Case No. 57 of 2009 be dismissed as not maintainable in law being barred by res judicata as well as being barred by limitation u/s 43 of the Act.

19. With reference to the said rival, factual and legal contentions, the following points would arise for my consideration:

(i) Whether the Misc. Case filed for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2009 and the consequential order dated 3.9.2009 in Misc. Case Nos.23 and 24 of 2009 is maintainable in the eye of law?

(ii) Whether the opposite parties have made out a case for recalling of the aforesaid orders ?

(iii) Whether the filing of the arbitration petition bearing ARBP No.65 of 2008 by the petitioner invoking the power of the Chief Justice u/s 11(6) of the Act for appointment of Arbitrator is barred by law of limitation?

(iv) Whether the filing of the subsequent petition u/s 11(6) of the Act is at all maintainable without fulfilling the statutory and contractual requirements as provided under the Act and in the agreement in question?

(v) Whether in order to satisfy the pre-requisite condition for entertaining an application u/s 11(6) of the Act, the purported letter dated 29.12.2001 filed by the petitioner is at all to be accepted under the law as a valid piece of evidence to substantiate the fact that the petitioner had approached the Managing Director for appointment of Arbitrator and he failed to do so ?

(vi) Whether the plea taken by the petitioner with regard to approach to the Managing Director by issuing the purported letter for filing ARBP No. 65 of 2008 after the earlier M.J.C.No. 18 of 2002 was dismissed on 1.10.2007, which was also affirmed in SLP (Civil) No. 24867 of 2007, is barred by the principle of constructive res judicata ?

(vii) Whether the review petition bearing RVWPET No.3 of 2008 challenging the order dated 1.10.2007 passed in M.J.C. No. 18 of 2002 was at all held to be maintainable in the eye of law and on the basis of the operative portion of the order dated 10.7.2008 passed in the aforesaid review, the second arbitration petition bearing ARBP No. 65 of 2008 is at all maintainable under law ?

(viii) Whether it can at all be held that as the opposite parties have participated in the proceeding before the Arbitrator, their right to challenge the order dated 20.5.2009 by filing the recall petition has been waived ?

20. Points (i) & (ii) are required to be answered in favour of the opposite parties for the following reasons.

21. It is an undisputed fact that earlier arbitration petition u/s 11(6) of the Act filed by the petitioner in M.J.C.No. 18 of 2002 was dismissed vide order dated 1.10.2007. That order was affirmed by the Supreme Court in SLP (Civil) No. 24867 of 2007 vide its order dated 10.1.2008. While disposing of the said Special Leave Petition, it was observed that learned counsel for the petitioner desires to withdraw the SLP with a view to file review petition before the High Court and the Supreme Court allowed the counsel for the petitioner to withdraw and the SLP was dismissed as withdrawn. Pursuant to the same, review petition being RVWPET No.3 of 2008 was filed. Learned the then Acting Chief Justice of this Court dismissed the same holding that though there is an arbitration clause in the agreement, it was not indicated any where at any point of time that the petitioner approached the opposite parties to appoint an Arbitrator and the opposite parties have disputed the amount, which is to be paid to the petitioner. Therefore, there was no ground for review of the said order except granting liberty to the petitioner to approach again to the Chief Justice invoking the jurisdiction u/s 11 of the Act. The then Acting Chief Justice while making such observation has made it clear that the review petition was disposed of without interfering with the order dated 1.10.2007 passed in M.J.C.No. 18 of 2002. The said observation made in the review petition order would confer a statutory right upon the petitioner to approach the Chief Justice of the High Court again by filing another arbitration petition u/s 11(6), even though there is no live claim of the petitioner as the same is barred by limitation in view of the assertion made by the opposite parties that final bill was settled on 11.02.1999 and with the dismissal of the earlier arbitration case, the same operates as res-judicata and the review petition was dismissed without interfering with the order dated 1.10.2007. The liberty given to the petitioner in review petition order is subject to the right available to the petitioner under the provisions of the Act. Therefore, I have to state that the second arbitration petition without placing demand upon

the Managing Director of the Company as required in law to settle the claim Or appoint an Arbitrator as provided under clause 15.1 as per the finding recorded in the earlier order, the Arbitration petition is not maintainable as the claim of the petitioner was also barred by limitation because the provisions of the Limitation Act would apply to the Arbitration proceeding under the Act in view of Section 43 of the Act, since the same was filed by the petitioner in the year 2008. Therefore, the order allowing the petition without issuing notice to the opposite parties and serving the same upon the opposite parties on the basis of the concession made by Mr.Asim Amitav Das on whom a copy of the petition was served by the learned counsel for the petitioner in the second Arbitration petition who has no authority or instruction to represent the Company and appointing Justice K.P.Mohapatra as the Arbitrator, therefore, is a nullity in the eye of law for more than one reason, namely, the petition is barred by constructive res-judicata as held by the Supreme Court in Konda Lakshmana Bapuji (supra). The relevant portion of the said judgment is extracted below:

..... Section 11 of the CPC incorporates the principles of res judicata which, in short, means a matter which has already been adjudged judicially between the same parties. In substance, Section 11 bars a Court from trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court and has been heard and finally decided by such Court which is competent to try such subsequent suit or the suit in which such suit has been subsequently raised..... (para-23)

This important legal aspect of the matter has not been considered by the then Acting Chief Justice when the order was passed in the second arbitration petition. This aspect was also not noticed by the learned the then Acting Chief Justice of this Court while disposing of Misc. Case Nos.23 and 24 of 2009 filed by the opposite parties. Therefore, the petition filed by them to recall the order urging various grounds and legal contentions is maintainable as the order was obtained in ignorance of the fact that necessary notice in the proceedings had not been served at all upon the opposite parties. If the judgment was obtained by fraud by a party to the proceedings and a party had no notice in the proceedings, the order is a nullity in the eye of law. In support of such contention, he has placed reliance upon the decision of this Court in Budhia Swain and others v. Gopinath Deb and others, 1999(2) OLR (SC) 151, the relevant portion of which is extracted below:

.....The grounds on which the Courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorizing such actions. Invalidity of the judgment of such a nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the fact of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter a judgment may be vacated on that ground. However, in general a judgment will not be opened or vacated on grounds which could

have been pleaded in the original action..... (para-7)

In view of the aforesaid settled position of law, it is apparent on the face of the record that no notice was sent to the opposite parties in the second arbitration proceedings. The above aspect was not being considered by the then Acting Chief Justice while disposing of Misc. Case Nos. 23 and 24 of 2009 vide common order dated 3.9.2009. Therefore, the Misc. Case filed by the opposite parties is maintainable in law and the same is neither barred by constructive res-judicata nor limitation as the order of appointment of the Arbitrator is a nullity in the eye of law and the orders passed in Miscellaneous petitions without considering legal aspects is bad in law, hence, the said order does not operate as res-judicata. It is apt to extract what the apex Court said in this regard in Kewal Singh Vs. Smt. Lajwanti, :

.....as regards the question of constructive res judicata it has no application whatsoever in the instant case. It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally decided between the parties.

22. In view of the aforesaid reasons, the contention urged by Mr.R.K.Rath, learned Sr. Counsel that the order passed in the Misc. Cases referred to supra operates as res-judicata, has no application to the facts of the case as the said decision will apply against the petitioner in view of the dismissal of the earlier arbitration case since the same has become final and the petitioner has no right to maintain the second Arbitration petition solely on the basis of the liberty given in the order passed in the Review Petition. The liberty given to a party has to be examined with reference to the law and if the claim is barred by limitation, the second petition is not at all maintainable.

23. For the reasons stated supra, the opposite parties have made out a case for recalling the aforesaid order. Accordingly, point nos.(i) & (ii) are answered in favour of the opposite parties.

24. Point Nos.(iii) and (iv) are also required to be answered in favour of the opposite parties for the reasons that the claim for appointment of Arbitrator is barred by limitation because the final bill was submitted by the petitioner in the year 1999 and payment was made on 11.02.1999 and the same was received by the petitioner either without any objection or without prejudice to raise the dispute. The earlier arbitration case being M.J.C.No. 18 of 2002 was dismissed on 1.10.2007 for the reasons that no claim was made upon the Managing Director of the opposite party company and the same has attained finality as the SLP filed by the petitioner came to be withdrawn on 10.1.2008 and the review petition filed was also dismissed on 10.7.2008. In respect of the very same claim the subsequent application is barred by limitation as the provisions of the Limitation Act are applicable to the arbitration proceedings under the Arbitration & Conciliation Act as per Section 43 of the Act. Therefore, the claim of the

petitioner is not at all maintainable in law as the same has been filed without satisfying the prerequisite condition of service of statutory notice upon the opposite party no.1 to entertain an application u/s 11(6) of the Act as the purported letter dated 29.12.2001 alleged to have been sent to the opposite party no.1 under Certificate of Posting was not mentioned in MJC No. 18 of 2002 and not produced and no tenable explanation is forthcoming as to why the same is not produced before the apex Court and in the Review Petition and therefore, I have to hold that the said document is a fabricated document which could not have even accepted by the then Chief Justice. The notice must have been sent to the opposite party no.1 by registered post with acknowledgment due either for settlement of claim or for appointment of an Arbitrator. In the absence of such material the finding recorded in the earlier arbitration case bearing MJC No. 18 of 2002 that there is no notice served upon the opposite party no.1 is factually correct and in view of the said finding placing the very same letter by the petitioner in the subsequent second Arbitration proceedings, the contention urged on behalf of the opposite parties that it is a concocted document to maintain the arbitration petition before this Court has to be accepted as correct. The Supreme Court in the case of State of Maharashtra Vs. Rashid Babubhai Mulani, held that a certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the post office either about the receipt of the letter or the certificate issued. The relevant portion of the said judgment is quoted below:

A certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the Post Office. But no record is maintained by the Post office either about the receipt of the letter or the certificate issued. The ease with which such certificate can be procured by affixing ante-dated seal with the connivance of any employee of the Post Office is a matter of concern. The Department of Posts may have to evolve some procedure whereby a record in regard to the issuance of certificates is regularly maintained showing a serial number, date, sender's name and addressee's name to avoid misuse. In the absence of such a record, a certificate of posting may be of very little assistance, where the dispatch of such communications is disputed or denied.....(para 14)

In the absence of such a record, a certificate of posting may be of very little assistance to the petitioner, where the dispatch of such communications is disputed or denied as in the present case. Therefore, I have to reiterate the finding recorded by my predecessor in his order dated 1.10.2007 that there is no notice issued and served upon the opposite parties to maintain the arbitration case. Hence, point no.(v) is also accordingly answered against the petitioner.

25. Point No.(vi) is also required to be answered against the petitioner in view of the finding recorded that Misc. Case filed by the opposite parties is maintainable

holding that the second arbitration petition operated as constructive res judicata u/s 11(4). The Apex Court in *Devilal Modi v. Sales Tax Officer* (supra) held that if constructive res-judicata were not applied to such proceedings, a party could file as many writ petitions as he liked and take one or two points every time. That clearly was opposed to considerations of public policy on which res-judicata was based and would mean harassment and hardship to the opponent. Besides, if such a course were allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected. The relevant portion of the said judgment is extracted below:

..... At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive res-judicata is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected.....

In view of the aforesaid decision of the apex Court, the point No. (vi) is also answered in favour of the opposite parties.

26. For the reasons stated supra and dismissal of the review petition being RVWPET No. 3 of 2008 not interfering with the order dated 1.10.2007 passed in MJC No. 18 of 2002, the second arbitration petition filed by the petitioner is not at all maintainable in law. This Court in *M/s.Narendra Nath Panda & Co. and another v. Union of India and three others*, 2007(Supp.II) OLR-545 referring to the decisions of the Supreme Court held that a provision for review is not normally procedural at all. Review is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given u/s 11(7) of the Act finality to a decision of the Chief Justice or his designate u/s 11(6) of the Act and has not provided for review, then to read a right of review in such provisions by an interpretation process would, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act. The relevant portion of the said judgment is quoted below:

A provision for review is not normally procedural at all. Review is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given u/s 11(7) finality to a decision of the Chief Justice or his designate u/s 11(6) of the Act and has not provided for review, then to read a right of review in such provisions by an interpretation process would, in my opinion, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act. Therefore, the decision on the construction of purely procedural aspect of law does not cover the present situation.

Keeping in view the decision referred to above, point no.(vii) is answered against the petitioner.

27. Point No.(viii) is also required to be answered against the petitioner for the reason that the order, which was passed is held to be a nullity and mere engaging a lawyer or depositing the amount towards the fees of the Arbitrator will not waive the right of the opposite parties to challenge the order dated 20.5.2009 for filing petition for recalling the order, which is vitiated in law and suffers from nullity in the eye of law. For the reasons recorded above in answer to the aforesaid contentious points, the order passed on 20.5.2009 is a nullity for various reasons as indicated above. Therefore, the right of the opposite parties is not waived. Engaging a lawyer or depositing the amount shall not come in the way for the opposite parties to challenge the said orders seeking for setting aside the same. Accordingly, the said point is also answered in favour of the opposite parties.

28. For the aforesaid reasons, as all the contentious points have been answered in favour of the opposite parties by accepting the legal contentions urged on their behalf which are based on the decisions of the Apex Court on various legal principles therefore, the same are accepted as they are well founded. But on the other hand, the submissions made by the learned Senior Counsel appearing on behalf of the petitioner are wholly untenable in law and therefore, the same cannot be accepted.

29. For the reasons stated above, the Misc. Case No. 57 of 2009 is allowed and orders dated 20.5.2009 passed in ARBP No.65 of 2008 and dated 3.9.2009 passed Misc. Case Nos.23 and 24 of 2009 are hereby recalled. The Misc. Case No. 49 of 2009 filed by the petitioner for modification of the order dated 20.5.2009 stands dismissed.