

(2015) 02 KAR CK 0455

In the Karnataka High Court

Case No : Writ Petition Nos. 40390, 40737, 40738 and 34991 of 2014 (GM-RES)

Karnataka Neeravari Nigam Limited

APPELLANT

Vs

Sharan D. Bandi and Others

RESPONDENT

Date of Decision : 25-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 2(1), 34, 37
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 5 ARBLR 555 : (2015) 4 KarLJ 98

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : M.R.C. Ravi, for the Appellant; Sriyuths Udaya Holla, Senior Advocate for K. Arun Kumar, M.I. Arun, Additional Government Advocate and Crest Law Partners, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Abdul Nazeer, J.—Since common questions of fact and law are involved in all these writ petitions, they are clubbed together, heard and disposed of by this order. In an arbitration proceedings between the first and third respondents pending before the second respondent-Arbitrator, the petitioner made an application for impleading itself as additional respondent. The said application has been rejected by the Arbitrator. The petitioner has called in question the validity of the said order in these writ petitions.

2. Sri M.R.C. Ravi, learned Counsel appearing for the petitioner would contend that the Government of Karnataka has passed an order dated 21-6-2014 transferring the assets and liabilities (rights and obligations) of the project in question along with the officers and staff to the petitioner. Thus, the petitioner has become the successor-in-interest in respect of the projects including the project that is concerned with the dispute before the Arbitral Tribunal. In view of the transfer of the assets and liabilities (rights and obligations) of the project including zone, circle, division and sub-division offices along with the officers and

staff to the petitioner, the terms and conditions of all contracts entered between the Executive Engineer and the Contractors for executing the project is binding on the petitioner and accordingly, the petitioner is a necessary party for effective prosecution of the arbitral case. The Executive Engineer has signed the agreement for and on behalf of the State Government. The petitioner has stepped into the shoes of the State Government and has become successor-in-interest and accordingly petitioner has become the employer and the Executive Engineer is deemed to be executing the agreement. Therefore, the Arbitral Tribunal ought to have allowed the application.

3. It is further argued that in an identical case in C.A. Nos. 8544 and 8545 of 2003, disposed of on 31-10-2010, the Apex Court has held that the petitioner has locus standi to file a review petition as it has succeeded to the assets and liabilities of the State. The Arbitrator has failed to follow the decision of the Apex Court while considering the application.

4. Learned Additional Government Advocate appearing for the third respondent has supported the case of the petitioner. It is argued that since the petitioner is the successor-in-interest, the Tribunal ought to have allowed the application of the petitioner.

5. On the other hand, Sri Udaya Holla, learned Senior Counsel appearing for respondent 1 has sought to justify the order of the Tribunal. It is argued that petitioner is not a party to the contract. Therefore, it cannot be permitted to come on record as additional respondent. It is further submitted that the writ petitions cannot be maintained as they are filed against an interim order of the Tribunal. If petitioner is aggrieved by the award of the Tribunal, it can challenge the same before the appropriate forum. Learned Senior Counsel has drawn my attention to the decision of the Apex Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, AIR 2006 SC 450 : (2005) 3 ARBLR 285 : (2005) 128 CompCas 465 : (2006) 2 ComplJ 7 : (2005) 5 CTC 302 : (2005) 9 JT 219 : (2005) 9 SCALE 1 : (2005) 8 SCC 618 : (2006) 1 UJ 156 : (2005) AIRSCW 5932 : (2005) 7 Supreme 610 and in particular, paragraph 44 of the said judgment. He has also relied on the following decisions in support of his contentions:

(i) *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, AIR 1963 SC 90 : (1963) 3 SCR 209 ;

(ii) *Jagdish Chander Vs. Ramesh Chander and Others*, (2007) 2 ARBLR 302 : (2007) 3 ComplJ 191 : (2007) 6 JT 375 : (2007) 147 PLR 18 : (2007) 6 SCALE 325 : (2007) 80 SCL 149 : (2007) 5 SCR 720 ;

(iii) *Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another*, AIR 2010 SC 1793 : (2010) 4 ComplJ 442 : (2010) 4 JT 619 : (2010) 4 SCALE 395 : (2010) 4 UJ 1961 : (2010) AIRSCW 2884 : (2010) AIRSCW 6112 : (2010) 6 Supreme 565 : (2010) 3 Supreme 669 ;

(iv) Sandeep Kumar and Others Vs. Master Ritesh and Others, (2006) 4 ARBLR 90 : (2006) 5 CTC 878 : (2006) 11 SCALE 350 : (2006) 8 SCR 57 Supp : (2006) AIRSCW 1814 : (2006) 3 Supreme 47 ;

(v) Vijay Kumar Sharma @ Manju Vs. Raghunandan Sharma @ Baburam and Others, (2010) 3 CTC 854 : (2010) 2 JT 155 : (2010) 1 SCALE 688 : (2010) 2 SCC 486 : (2010) 2 SCR 582 ;

(vi) S.N. Prasad Vs. Monnet Finance Ltd. and Others, AIR 2011 SC 442 : (2011) 100 CLA 475 : (2010) 11 JT 479 : (2012) 1 RCR(Civil) 699 : (2010) 11 SCALE 225 : (2011) 1 SCC 320 : (2010) 10 UJ 4888 ;

(vii) Vijay Jain Vs. Investnet Securities India Ltd., (2003) 1 ALLMR 818 : (2003) 2 BomCR 488 : (2003) 116 CompCas 164 : (2003) 43 SCL 177 ;

(viii) Atul Singh and Others Vs. Sunil Kumar Singh and Others, AIR 2008 SC 1016 : (2008) 1 ARBLR 1 : (2008) 1 CLT 168 : (2008) 2 CTC 856 : (2008) 1 SCALE 84 : (2008) 2 SCC 602 : (2008) 1 UJ 180 : (2009) AIRSCW 206 : (2008) AIRSCW 570 : (2008) 7 Supreme 250 : (2008) 1 Supreme 268 ;

(ix) Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, AIR 2003 SC 2252 : (2003) 2 ARBLR 43 : (2003) 3 CompLJ 68 : (2003) 2 CTC 431 : (2003) 4 JT 58 : (2003) 4 SCALE 7 : (2003) 5 SCC 531 : (2003) 44 SCL 146 : (2003) 3 SCR 558 : (2003) 2 UJ 986 : (2003) AIRSCW 2209 : (2003) 3 Supreme 324 ;

(x) Sanjay Verma Vs. Manik Roy and Others, AIR 2007 SC 1332 : (2007) 2 CTC 562 : (2007) 147 PLR 229 : (2006) 14 SCALE 81 : (2006) 13 SCC 608 : (2006) 10 SCR 469 Supp : (2007) AIRSCW 1490 : (2006) 8 Supreme 1007 ;

(xi) Akka Bai and another Vs. Gowrawwa, AIR 1990 Kar 278 : (1991) 4 KarLJ 756 ;

(xii) Electronics Corporation of India Ltd. and Others Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh and Others, AIR 1999 SC 1734(1) : (1999) 97 CompCas 470 : (1999) 5 JT 608 : (1999) 4 SCC 458 : (1999) 2 SCR 1078 ;

(xiii) Sree Balaji Nagar Residential Association Vs. State of Tamil Nadu, (2014) 10 SCALE 388 ; and

(xiv) M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd., (2009) 9 JT 374 : (2009) 9 SCALE 298 : (2009) 7 SCC 696 : (2009) 10 SCR 373 : (2009) 7 UJ 3347 : (2009) AIRSCW 5614 : (2009) 5 Supreme 679 .

6. Having regard to the contentions urged, the question for consideration is whether the Arbitral Tribunal is justified in rejecting the application filed by the petitioner to implead itself as additional respondent?

7. The Government of Karnataka has issued an order at Annexure-J, dated 4-3-2014 appointing the petitioner-company as the successor-in-interest in respect of the projects mentioned therein. This order was passed for effective administration and implementation of the Tungabhadra Left Bank Canal and

Distributaries modernisation works and transferred projects to the petitioner-company. This was followed by yet another Government order at Annexure-K, dated 21-6-2014 transferring the assets and liabilities (rights and obligations) of the project including Zone, Circle, Division and Sub-Division Officers along with the officers and staff to the Nigam. Thus, the petitioner-company has become the successor-in-interest of all the projects including the project that is concerned with the pending dispute before the Arbitral Tribunal. In view of the transferring of the assets and liabilities (rights and obligations) of the project including Zone, Circle, Division and Sub-division offices along with the officers and staff to the Nigam, the terms and conditions of all contracts entered into by the Executive Engineer and the Contractors for executing the project shall be binding on the petitioner. It is on the basis of these two Government orders, the petitioner made an application to come on record as additional respondent in the arbitration proceedings. It is to be noted here that the Executive Engineer has signed the agreement for and on behalf of the State Government and not in his individual capacity as the Executive Engineer and in view of the order dated 21-6-2014, the petitioner has stepped into the shoes of the State Government and has become the successor-in-interest.

8. A similar question arose before the Hon"ble Supreme Court in C.A. Nos. 8544 and 8545 of 2003 between Karnataka Neeravari Nigam Limited v. M/s. B.T. Patil and Sons and Others. During the pendency of the said case, the Nigam was incorporated. It was not brought on record as party to the arbitration proceedings. Therefore, Nigam made an application for review. The Hon"ble Supreme Court by order dated 31-10-2003 has held thus:

"So far as the question of locus standi of the appellant to file the review petition is concerned, we are of the opinion that if the Nigam has been incorporated during the pendency of the proceedings (without regard to the stage at which the proceedings were) and the Nigam has succeeded to the rights and liabilities of the State then insofar as these proceedings are concerned the Nigam would certainly have locus standi to file the review petition".

9. Let me consider the decisions relied on by Sri Udaya Holla, learned Senior Counsel in support of his contentions:

In paragraph 44 of M/s. S.B.P. and Company's case, the Apex Court has held that any order passed by an Arbitral Tribunal during arbitration cannot be challenged under Article 226 or 227 of the Constitution of India. Under Section 37 of the Arbitration and Conciliation Act, 1996, the aggrieved party has an avenue for ventilating his grievances against the award including any in between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The aggrieved party aggrieved by the order of the Arbitral Tribunal has a right of appeal under Section 37 of the Act, and has to wait until the award is passed by the Tribunal.

10. As noticed above, the petitioner, a successor-in-interest in respect of the

projects in question is not a party to the arbitration agreement. In view of the aforesaid two Government orders, the terms and conditions of all contracts entered into by the Executive Engineers and the Contractors for executing the project is binding on the petitioner. However, it cannot ventilate its grievances against the award under Section 34. Under Section 34, recourse against an arbitral award may be made only by a party. The expression "party" has been defined in clause (h) of Section 2(1) under which "party" means a party to an arbitration agreement. The petitioner cannot have any remedy to challenge the award despite it being a successor-in-interest. Therefore, it is just and proper to allow the petitioner to come on record as additional respondent.

11. In fact, in B.T. Patil and Sons case, the Arbitrator subsequently has allowed an identical application allowing the petitioner to come on record by order dated 29-11-2014 by holding as under:

"In that view of admitted factual and legal position of M/s. Karnataka Neeravari Nigam Limited, its position becomes clear on the record that this company is the real contestant respondent in these proceedings as it has stepped into the shoes of the original respondent, the State of Karnataka. But it transpires from the description of the opposite party in the statement of claim i.e. the claim petition of the claimant already filed in this Arbitral proceeding before the previous Arbitrator that only the State of Karnataka is described as the sole respondent. In view of the above stated actual legal position of M/s. Karnataka Neeravari Nigam Limited, it becomes essential for the claimant to implead this Government company in the claim petition cause title as the main or sole respondent in place of the existing respondent the State of Karnataka. Hence the claimant is required to take necessary step for impleadment of M/s. Karnataka Neeravari Nigam Limited as such in the claim petition cause title by the next sitting of the Tribunal".

12. In Waverly Jute Mills Company Limited's case, the Apex Court has held that an arbitration agreement is the very foundation on which the jurisdiction of Arbitrators to act rests and where that is not in existence, the proceedings must be held to be wholly without jurisdiction and this defect is not cured by appearance of parties in those proceedings even if that be without protest.

13. In Jagdish Chander's case, the Apex Court has held that it is not permissible to appoint an Arbitrator to adjudicate disputes between parties in the absence of an arbitration agreement or mutual consent.

14. In Indowind Energy Limited's case, the Apex Court has held that arbitration agreement can come into existence only in the manner contemplated under Section 7.

15. In Sandeep Kumar's case, the Supreme Court has held that arbitration agreement cannot be invoked against persons who are not parties to the arbitration agreement.

16. In Vijay Kumar Sharma alias Manju's case, the Supreme Court held that neither the will nor the unilateral subsequent declaration can be held to be arbitration agreement.

17. In Sukalu Ram Gond Vs. State of M.P. and Others, (1994) 2 ARBLR 254 : (1994) 5 JT 331 : (1994) 3 SCALE 764 : (1994) 5 SCC 570 : (1994) 3 SCC 570 : (1994) 2 SCR 421 Supp : (1994) 2 UJ 793 , the Supreme Court has held that the award against a person not party to reference for arbitration but participating in proceedings under protest is without jurisdiction and hence such person not bound by award. Arbitrator does not get authority and jurisdiction to make the award against a non-party to the contract.

18. In Deutsche Post Bank Home Finance Ltd. Vs. Taduri Sridhar and Another, AIR 2011 SC 1899 : (2011) 2 ARBLR 1 : (2011) 2 CompLJ 542 : (2011) 4 CTC 472 : (2011) 4 JT 45 : (2011) 4 RCR(Civil) 655 : (2011) 4 SCALE 33 : (2011) 11 SCC 375 : (2011) 2 UJ 1237 : (2011) AIRSCW 2304 : (2011) AIRSCW 1948 : (2011) AIRSCW 4855 : (2011) AIRSCW 4431 : (2011) 5 Supreme 193 , the Supreme Court has held that existence of arbitration agreement between parties is a condition precedent for appointing an Arbitrator. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under Section 11 of the Act, the Court should either delete such party from the array of parties or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide disputes between parties to the arbitration agreement.

19. In S.N. Prasad's case, the Supreme Court has held that there can be reference to arbitration only if there is an arbitration agreement between the parties. If there is dispute between a party to an arbitration with other parties to the arbitration agreement as also non-parties to arbitration agreement, reference to arbitration or appointment of Arbitrator can only be with respect to parties to arbitration agreement and not non-parties.

20. In Vijay Jain's case, the Bombay High Court has held that only those parties who are parties to the arbitration agreement can be made party to the arbitration proceedings. Third party who accepted the document on behalf of either of the parties cannot be impleaded as a necessary party.

21. In Atul Singh's case, the Supreme Court has held that party against whom arbitration reference sought found not to be a party to the arbitration agreement on the basis of which reference is sought.

22. In Sukanya Holdings Private Limited's case, the Supreme Court has held that there is no power conferred on the Court to add parties who are not parties to the agreement in the arbitration proceedings.

23. In Sanjay Verma's case, the Supreme Court has held that transferee pendente lite is not entitled to seek impleadment.

24. A Division Bench of this Court in Akka Bai's case, has held that application by transferee pendente lite after five years at fag end of litigation liable to be

rejected on ground of delay.

25. None of these decisions pertain to a case where the applicant was a successor-in-interest in respect of the projects including the project that is concerned with the pending dispute before the Arbitral Tribunal. These decisions are not applicable to the facts of the instant writ petitions.

26. I am of the view that the Arbitrator was not justified in rejecting the application.

27. In view of the above discussions, I pass the following:

ORDER

(i) Writ petitions are allowed.

(ii) The impugned orders passed by the second respondent dated 14-8-2014 and 1-7-2014 in all these cases are hereby quashed.

(iii) The petitioner is permitted to come on record as respondent 2 in the arbitration proceedings before the Arbitral Tribunal in the aforesaid cases.

In view of the disposal of the writ petitions as above, I.A. No. 1 of 2014 in W.P. No. 40737 of 2014 and I.A. No. 2 of 2014 in W.P. No. 34991 of 2014 do not survive for consideration. They are accordingly dismissed. No costs.