

(1979) 05 PAT CK 0004
In the Patna High Court
Case No : M.A. No. 216 of 1976

M/s. Chatterjee Bros and Company

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 10-05-1979

Acts Referred:

Arbitration Act, 1940 — Section 20, 39(1)(vi), 8

Citation : (1979) PLJR 582

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Advocate : K.D. Chatterji and Anish Chandra Sinha, for the Appellant; Rambalak Mahto and Ashutosh Jha, for the Respondent

Judgement

Lalit Mohan Sharma, J.—This appeal u/s 39(1)(vi) of the Arbitration Act is directed against the order passed by the court below setting aside an award. The appellant and the defendant-State of Bihar entered into a contract for construction of a bridge at the cost of Rs. 8,08,600/-. The formal agreement was executed on behalf of the State by the Superintending Engineer, Public Works Department, East Bihar Circle, defendant No. 2. According to the case of the plaintiff, some alterations were made in regard to the work to be executed by the Chief Engineer, in the department concerned and the defendant also delayed in supplying some materials in time and this resulted in the plaintiff incurring extra expenditure. An additional claim was, therefore; made by the plaintiff amounting to Rs. 6,32,537/- and a further sum of Rs. 73007.12 was claimed as part of the original contract amount. As the claim was not accepted, the plaintiff filed an application u/s 8 and 20 of the Arbitration Act on the basis of the arbitration clause in the agreement. The court appointed one Mr. P.K. Bhattacharjee as the sole Arbitrator. The State challenged the choice of the Arbitrator by a revision application in this Court which was registered as C.R. 342 of 1972. The revision application remained pending in this court for several months and, in the meantime, the Arbitrator made his award dated 19th May, 1972 ex parte directing the State to pay a sum of Rs. 4,75,759.12. He also allowed interest. An

order of stay was passed in C.R. 342 of 1972 on 1.9.1972 staying the operation of the order of the court dated 18.1.1972 appointing Mr. P.K. Bhattacharjee as the sole Arbitrator. The question for vacating the stay order was considered and rejected on 14.11.1972 with a direction that the revision application should be heard expeditiously. At the time of final hearing of the case, it was appreciated that the award had already been submitted in court and the civil revision application was dismissed by a judgment dated 9.1.1973.

2. On the filing of the award by the Arbitrator in Court, several objections were filed by the defendant State, details whereof are not necessary to be stated in view of the limited scope of the hearing of this appeal at this stage before me. The State raised serious objection to the award being made rule of the Court, inter alia, on the ground that the Arbitrator had failed to serve a notice of the arbitration proceeding on the State which has vitiated the entire proceeding. Upholding this objection, the Court below held that no valid notice or information was ever sent or received by the State of Bihar. The award was accordingly declared to be invalid and set aside. The Court also held that with respect to certain amounts, the award was beyond the scope of the reference and was bad and the direction in regard to payment of future interest was also illegal. The plaintiff then filed the present appeal which was placed for hearing before a Division Bench constituted by Mr. Justice B.P. Jha and Mr. Justice H.L. Agrawal; but since they differed in their views, the case now has been referred by the Hon^{ble} the Chief Justice to me.

3. The learned Judges agreed that the Arbitrator could not grant future interest beyond the period of the decree, but Mr. Justice H.L. Agrawal, after modifying the award accordingly allowed future interest at the rate of 6 per cent per annum u/s 29 of the Arbitration Act. On the main question as to whether the entire arbitration proceeding is vitiated in law on account of non-service of a notice on the State of Bihar, the learned Judges differed. Mr. Justice B.P. Jha agreed with the trial court that the award was illegal and held that the same should be remitted u/s 16 of the Act to the Arbitrator for fresh consideration in accordance with law. Mr. Justice Agrawal directed the award to be made rule of the Court. The learned Judges; however, did not formulate the points upon which they differed according to Clause 28 of the Letters Patent and Section 98(2) proviso of the Code of Civil Procedure, but for that reason, the reference of the appeal to a third judge cannot be held to be illegal (See 1979 B.B.C.J. 49).

4. From the judgment under appeal, it appears that several other questions also had been argued and decided by the Court, but the learned counsel for the parties appearing before me jointly stated that in this reference to me as a third judge, I am not concerned with any other question excepting the one mentioned above, that is, whether the State was served with a valid notice of the arbitration proceeding and whether in the circumstances the ex parte award is legal. On behalf of the appellant, Mr. K.D. Chatterji has further said that I should also express my opinion on the question whether interest should be allowed u/s 29 of

the Act or not.

5. Mr. K.D. Chatterji stated, when he commenced his argument that I should confine myself to a consideration of only those facts and evidence as are mentioned in the two judgments given by the learned judges constituting the Division Bench and should not travel to any other material. Mr. Government Advocate, appearing for the State, also agreed to the suggestion and arguments were addressed accordingly. After Mr. Chatterji's argument on behalf of the appellant, the State Counsel made his submissions and just before he was going to close, Mr. Chatterji prayed that an additional point based on the principle of *res judicata* should be permitted to be raised by the plaintiff. He said that on 21-4-1972 the Arbitrator, by a petition, asked for more time for submission of the award which was granted as the parties did not raise any objection. This order by itself constructively overruled the present objection against the award. Mr. Government Advocate objected to the belated raising of this new point. I reserved my Judgment at that stage about the right of the appellant to raise this question. Mr. Chatterji further faintly suggested at that stage that the first two points mentioned in paragraph 3 of the Judgment of the court below relating to limitation also may be considered. I did not permit him to argue these questions, since they are not the subject matter of difference between the two learned judges of this Court. These questions had not been seriously pressed on behalf of the appellant when the appeal was argued before the Division Bench as mentioned in para 12 of the judgment of Mr. Justice B.P. Jha and it was categorically stated by Mr. Chatterji at the outset of his argument before me that no question other than those mentioned in the judgment of Mr. Justice Agrawal on which he took a different view has to be decided by me. The learned Judges did not disagree on these questions and they are, therefore, not the subject-matter of difference before me. When I pointed out this aspect to Mr. Chatterji and the fact that these points have not been pressed by him in his main argument, he did not pursue them.

6. It is well established that a proceeding before an Arbitrator is judicial in nature and the conduct of the proceeding must conform to the well established principles of natural justice. It has been observed in Halsbury's Laws of England that subject to any direction contained in the agreement of reference itself, an Arbitrator should observe as far as may be practicable rules which prevail at the trial of action in Court. The deviations from these rules are permitted but not so as to retard the substance of justice. One of the basic principles of natural justice reserves for the parties the right to have proper notice of the application in regard to the date and time fixed by the Arbitrator for hearing the parties. The question of notice is not a matter of formality; it is of vital importance being based on the principle of *audi alteram partem*. It has not been suggested before me that the arbitration agreement contained any clause in regard to the manner in which notice was to be served by the Arbitrator. The Arbitrator, therefore, had to adopt ordinary mode of sending notice to the parties. The question which, however, arises is whether the notice was sent to the State of Bihar at all in the

eye of law. If it is found that notice was not given to the State, it will have to be held that the Arbitrator has misconducted the proceedings as a result of which the award should be set aside; and Mr. Chatterji has been fair not to challenge this proposition. Both the learned Judges constituting the Division Bench, which heard this appeal earlier, have also assumed this. It has not been suggested on behalf of the appellant, and rightly, that even if the question of service of notice be decided against it, the Arbitrator can be held not to have misconducted the proceeding; nor could it be suggested that the State was not prejudiced as a result of the defect. The proceeding was conducted *ex parte* and the award was made without State's participation. Since the case of the State could not be placed before the Arbitrator for his consideration, I am of the view that the State actually suffered a serious injury, accordingly, the questions which have been argued by the learned counsel for the parties before me are (a) whether the State of Bihar was served with the notice of the proceeding and (b) whether the State should be prevented from challenging the award on principles of estoppel, in the facts and circumstances of the case.

7. It is contended on behalf of the appellant that the service on the Superintending Engineer as representing the State must be treated as valid service. Alternatively, the State should be estopped from repudiating his representative capacity. The allegation that the Arbitrator had sent notice to the Superintending Engineer as representing the State before proceeding with the arbitration, has not been challenged on behalf of the State. But the contention is that it cannot amount to proper service in the eye of law nor can the principle of estoppel be applied in the facts and circumstances of the case. Mr. Chatterji argued that since the contract giving rise to the dispute was executed by the Superintending Engineer on behalf of the State, his representative capacity must be upheld in all matters connected therewith. He further emphasised on the facts that (i) in the application u/s 20, the State was represented through Superintending Engineer without any objection thereto, (ii) the State has been similarly described in C.R. 342 of 1972 and in the present appeal, (iii) at one stage, the Executive Engineer, an officer subordinate to the Superintending Engineer filed an application before the Arbitrator praying for adjournment and (iv) no objection was raised by the Government Pleader appearing for the State in the Court below to the extension of the period for the submission of the award. He seriously challenged the application of order 27 of the CPC or any other provision of the Code to a proceeding before the Arbitrator. On behalf of the State it has been argued that by virtue of the provisions of Section 79, 80 and Order 27 of the Code of Civil Procedure, notice should have been sent to the Collector or Secretary to Government or to the Government pleader. The difference in the scope of Articles 166 and 299 of the Constitution was emphasised and it was argued that the fact that the Superintending Engineer executed the contract on behalf of the State is wholly immaterial for deciding the present dispute. The learned counsel also urged that there is no scope of application of principle of estoppel to this case.

8. Before proceeding to consider the arguments, I would like to emphasise the difference in the matter of representation of an individual and of a Government or for that matter any corporate body. State being a juridical person without physical body or soul has to act through human agency and having regard to the very wide duties to perform; power to wield and responsibility to shoulder, it is neither practical nor safe for the State to have general agents like those of individual persons. The necessity of protection of public interest demands special officers to be designated in unambiguous terms to represent the State with clearly defined limits to their capacity in this respect. If the matter were left at large permitting the theory of general representation in the matter of facts and omissions of the Government the service of notice on it, or for the purpose of knowledge of the State, a chaotic condition can arise by irresponsible acts of some government servants. Merely, for the reason that an act has been done by a government servant it cannot be assumed that it has been so done by or on behalf of the Government; and one who desires to bind the Government by the consequences of such an act must show that the government servant had, in law, the authority to act on behalf of the principal, that is the State, I am, therefore, of the view that the general observations made in Halsbury and in Bowsted on Agency relied upon by the appellant do not have any application in the present case. The observations of the Privy Council in (1) Attorney General for Ceylon v. A.D. Silva (1953 App. Cas, 461 at 479) may be usefully considered:

It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise.

9. The first question which has been argued before me is whether Order 27 of the CPC applied to the proceeding before the Arbitrator. The learned Government Advocate contended that the proceeding is a judicial one in which the Arbitrator has to consider and determine dispute raised by parties and give an award which is final and binding. As the nature of the dispute, which an Arbitrator decides is civil, the CPC must be held to apply, Mr. Chatterji has seriously challenged the proposition that the procedure before an Arbitrator will be governed by the Code of Civil Procedure. He appears to be right.

10. The preamble of the CPC indicates that the Code was enacted for consolidating and amending the laws relating to procedure of Courts of civil judicature and by no stretch of imagination, an Arbitrator can be considered to be a Civil Court. Section 41 of the Arbitration Act lays down that the provisions of the CPC shall apply to all proceedings and appeals under the Act. But does not extend them to arbitration proceeding. This is the reason that by Section 3 of the Arbitration Act, the provisions set out in the first schedule of the Act have been fictionally made part of the arbitration agreement. If the Code were applicable, the sixth paragraph of the schedule which is in the following terms, would not have been necessary:--

6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force submit to be examined by the Arbitrators or Umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the Arbitrators or Umpire, all books, deeds, papers, account, writings and documents within their possession or power respectively which may be required or called for and do all other things while doing the proceedings on the reference, the Arbitrators or Umpire may require.

I, therefore, hold that the CPC does not apply to the proceeding before the Arbitrator and the contention of Mr. Government Advocate that the Arbitrator was bound to give notice to the government pleader as prescribed in order 27 Rule 4 must be rejected.

11. That does not solve the problem of the appellants. As the State denies service on it, of notice of the proceeding before the Arbitrator; the burden lies on the appellant to prove valid service. The admitted position is that notices were sent to the Super-Intending Engineer and Executive Engineer in the Public Works Department and to no body else. It is the duty of the appellant, therefore, to show that they or any of them had the authority to receive the notice on behalf of the State. It has been strenuously contended that since the contract in question had been executed on behalf of the State by the Superintending Engineer, he must be held to be a representative of the State in all connected matters. I am afraid, there does not appear to be any sound reasons for accepting this proposition. The Constitution has considered contracts executed by Governments separately under Article 299 while dealing with other functions of the State in other articles. Clause (i) of Article 299 reads as follows:--

299. contracts:--(1) All contracts made in the exercise of the Executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

The general executive power of the State is dealt with in Part VI of the Constitution and of the Union in Part V. Article 154 says that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officer subordinate to him in accordance with the Constitution; and clause 2(b) permits delegation of the executive functions on subordinate authorities. Clause 3 of Article 166 enjoins the Governor to make rules for convenient transactions of the business of the Government. Part XII of the Constitution deals with finance, property, contracts etc. and suits and due to growing modern trend of the State taking part in commercial activities, contracts have been separately dealt with in Article 299. The authority to enter into a contract on behalf of the State, dealt with in Article 299, has to be confined to contracts and cannot be permitted to include within its sweep other executive

functions. It has not been shown by the appellant that the representative capacity of the Superintending Engineer was extended beyond contracts. The authority to represent the State in a dispute leading to a proceeding in court is distinct and I separate and has to be proved independently. In a case governed by the Code of Civil Procedure, Sections 79, 80 and order 27 are relevant. For the purpose of the suit, commenced on the application of the appellant u/s 20, the Government pleader was authorised to represent the State, but the proceeding before the Arbitrator was a separate proceeding and the representation in that proceeding would be covered by the other pro-visions dealing with executive functions.

12. Mr. Government Advocate referred to the rules of executive business of the State of Bihar made under Article 166(3) of the Constitution. Rule 4 refers to schedule 1 allocating the executive business to different departments. The item 9 of Section 18(1) of the schedule indicates that the arbitration matter has been included in the Law Department judicial section and it has, therefore, been urged that the appropriate officer in the Law Department can alone be treated as the authority to represent the State for receiving notice of an arbitration proceeding. The Superintending Engineer of Public Works Department has nothing to do with Legal Department and is referable to another head, namely, item (7) of Section 17 (P.W.D. etc.). The purpose of a notice is to apprise the proper person to take part in the proceeding and this object will be defeated if it be permissible to the Arbitrator to send a notice to a department not entrusted with the duty of taking proper steps in that regard. I, therefore, hold that the service of the notice of the proceeding by the Arbitrator on the Superintending Engineer or the Executive Engineer of Public Works Department could not be treated as valid notice in accordance with law on the State of Bihar.

13. In his judgment, Mr. Justice H.L. Agrawal has referred to the decisions in (2) Bholanath Roy Vs. Bata Krishna Roy and Others, and (3) Bhola Nath Mallick Vs. Mahadev Mallick, . Although Mr. Chatterji has not relied upon them before me, but it may be desirable to consider them briefly. In Bholanath Roy Vs. Bata Krishna Roy and Others, an award, partitioning properties in suit, had been Sled by the Arbitrator in Court and an entry was made in the order sheet that the parties should be informed. This order was shown to the pleaders of both parties and no objection was taken thereto within time. In support of his objection, the plaintiff contended before the High Court that he was not given any notice of the filing of the award which he was entitled to. Repelling the argument it was pointed out that the order sheet of the Court had been shown to his counsel who had put his initial as an acknowledgment that he had received the notice of the filing. The Bench further referred to several provisions of the CPC relating to the service of summons and notices including Order 3 Rule 5 providing for service of process on the pleader of a party, giving rise to a presumption of due communication and knowledge of the party, as if the same had been given to and served on the party concerned. The case related to service of notice of a proceeding in Court where the party concerned was represented by a lawyer who

was duly served and so with great respect. I think, the decision cannot be applied to the present case. Besides, notice of the arbitration proceeding was admittedly not served on the Government Pleader or any other State counsel. Similar was the consideration arising before the Calcutta High Court in the other case.

14. On the question of estoppel, strong reliance was placed on behalf of the appellants on the description of the State as a party in the suit, in C.R. 342/72 and in the present appeal. The State of Bihar has been sued through the Superintending Engineer in the suit and the same description has been carried on in the revision application and in this appeal. Mr. Government Advocate argued that so far as the application u/s 20 of the Arbitration Act and the present memorandum of appeal are concerned, the description as stated above has been mentioned by the appellant and in civil revision, the petitioner's name had to be mentioned according to the plaint. No advantage, therefore, can be permitted to be taken by the appellant on this basis.

15. Article 300 of the Constitution and Section 79 of the CPC say that the Government of State may sue or be sued by the name of the State, it is not necessary to mention in a plaint or memorandum of appeal the particular department of the State which may be concerned with the litigation or the authority empowered to represent the State. This question arises only when notice has to be served on the State. The description in the plaint of the State through Superintending Engineer was, therefore, unnecessary. It has to be remembered that the State has not appeared in Court through the Superintending Engineer, the representation has been in accordance with Order 27 of the Code of Civil Procedure. And a party in a court proceeding may appear without service of notice or without service in accordance with law. The fact of appearance of the State in the cases, therefore, does not indicate that its representation through the Superintending Engineer is either accepted or proved. Be that as it may, the main reason why I think a plea of estoppel cannot be entertained on the aforesaid description is the fact that the representation of the State in the suit and in the proceeding before the Arbitrator is not same or similar. A notice u/s 80 proceeding a suit, has to be served on a Secretary to Government or the Collector of the district concerned and they represent the State for the purpose of receiving the notice. Rule 1 of Order 27 of the CPC states that the plaint or written statement in a suit by or against the State shall be signed by such person as the Government may appoint. Rule 2 lays down that persons being ex officio or otherwise authorised to act for the Government in respect of any judicial proceeding shall be deemed to be the recognised agents by whom appearances; acts and applications under the Code may be made or done on behalf of the Government. The Government Pleader has been designated by law to be the agent of the Government for the purposes of receiving process against the Government by Rule 4 of Order 27, it is not the case of the appellant that the Superintending Engineer or the Executive Engineer was at all appointed as the Government's agent under Order 27. On behalf of

the appellant. Mr. Chatterji has successfully argued that Order 27 or for that matter any provision of the Code has no application whatsoever to a proceeding before an Arbitrator. It follows that any statement made in the plaint, the civil revision application or this appeal about the re-representation of the State through a particular person is wholly irrelevant for the purpose of the representation before the Arbitrator. Any act or omission on the part of the agent of the State on the question of representation of the State in a Court proceeding cannot have any relevance to the question of its representation before the Arbitrator. The description of the State in the aforesaid documents, therefore, cannot be made the basis of applying the principles of estoppel against the State on the question of its representation before the Arbitrator. Even if it be assumed that the State can be estopped from denying that the Superintending Engineer represents the State in this Court and in the court below; it will not lead to the further inference that the Superintending Engineer represented the State before the Arbitrator also. It has not been asserted that the Executive Engineer who had at one point of time applied for adjournment before the Arbitrator represents the State, it is, therefore, futile to suggest that this act by a person, not authorised to act, can, in any way, bind the State in any manner whatsoever. I would like to emphasise that there is no suggestion on behalf of the appellant that the Superintending Engineer or the Executive Engineer acted in obedience to any order passed by an authority who could have represented the State before the Arbitrator.

16. The only other fact on the basis of which the plea of estoppel has been raised is the absence of an objection by the Government Pleader to the extension of time by court below for submission of the award. There does not appear to be any merit in the argument. In the court, the Government Pleader was appearing for the State and it is not suggested that he was instructed to appear in the proceeding before the Arbitrator nor it is the case of the appellant that he had any information whatsoever about any fact relating to the proceeding including the service of notice by the Arbitrator on the Superintending Engineer or the Executive Engineer. It is also not suggested that the Government Pleader had any information about the place, the date and the time fixed in the arbitration proceeding. The prayer for extension of the time for the submission of the award was made by the Arbitrator as the proceeding could not be completed within the prescribed time. The question of extension of the period did not involve any fact relating to the notice of the proceeding and neither the Court nor the Government Pleader was at all concerned with those facts. It is, therefore, futile to suggest that the Government Pleader could or actually did in the present case waive the requirement of the service of notice of the arbitration proceeding on the State. On account of the Government Pleader not objecting to the grant of the further time the State of course will be estopped from challenging the award on the grounds of its being made after the expiry of the prescribed period, but it will not be estopped from raising any other objection. Besides the question of representation of the State in the arbitration proceeding being controlled by the Constitution and law, the plea of estoppel cannot be entertained. For all these

reasons I hold that the appeal cannot succeed on the argument relating to estoppel and ratification or res judicata.

17. For the reason mentioned by me above, I affirm the finding of the Court below that the award must be set aside I regret taking a view different from Mr. Justice H.L. Agrawal for whom I have great respect. The court below has indicated towards the end of its judgment that fresh orders will be passed in the suit and Mr. Justice B.P. Jha has directed that the entire award would be remitted to the Arbitrator for fresh consideration in accordance with law. The learned Government Advocate has stated in this appeal that on service of a notice by the Arbitrator of the hearing of the Arbitration proceeding on the Government Pleader in the court below, the State undertakes to appear before the Arbitrator without waiting for any other notice in accordance with law. In view of this stand taken by the State in the present appeal, now a notice as suggested may be given to the Government Pleader in the court below which will be deemed to be binding on the State for the purpose of the present arbitration proceeding. If Mr. P.K. Bhattacharjee the appointed Arbitrator be not available, the court below may appoint another Arbitrator in his place as directed in the judgment of Mr. Justice B.P. Jha.

18. I have mentioned above that Mr. Chatterji invited my opinion on the question whether interest should be allowed u/s 29 of the Act in the present case or not. In view of my decision as indicated above, the question does not arise. For the reasons mentioned above, the appeal is dismissed, but without costs.