
(2009) 11 MP CK 0048
In the Madhya Pradesh High Court
Case No : Arbitration Appeal No. 7 of 2009

Municipal Corporation

APPELLANT

Vs

A.P.S. Kushwaha

RESPONDENT

Date of Decision : 26-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16(2), 2(3), 2(4)
Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 254
High Court of Madhya Pradesh Rules, 2008 — Rule 2
Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 2(1), 3

Citation : (2010) 1 J LJ 331

Hon'ble Judges : S.S. Dwivedi, J; A.K. Shrivastava, J

Bench : Division Bench

Advocate : H.D. Gupta and Santosh Agrawal, for the Appellant; V.K. Bhardwaj, Raja Sharma and Sushri Sangeeta Pachori, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (in short the "Act of 1996") has been preferred against the order dated 9.2.2009 and 17.7.2009 passed by the learned Sixth Additional District Judge, Gwalior, in MJC No. 29/2008, by which the application for setting aside the award on the ground of want of jurisdiction and application for review have been rejected.

2. The facts in brief are that for the purpose of supplying water to the general public of Gwalior city, the Municipal Corporation installed several pumps. The work contract was given to the Respondent on 1.5.2002 for maintaining and repairing the motor pumps and starter for supply of water from the pumps. According to the Appellants, Respondent did not execute the work as per the agreement and submitted bills against the terms of agreement, hence, payment was not made to him. Resultantly, Respondent filed an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 before this Court without disclosing the

material fact that Arbitration Tribunal had already been constituted u/s 3 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (in short "the Adhiniyam of 1983"), which is applicable to the parties, for resolving the disputes arising out of work contract and which excludes the provisions of the Act of 1996. The application was registered as MCC No. 685/2006.

3. This Court while deciding the application u/s 11(6) of the Act of 1996 appointed sole arbitrator and referred the matter to it. An objection was raised before the Arbitral Tribunal to the effect that since Arbitration Tribunal constituted under the Adhiniyam of 1983 is in existence, therefore, the matter which has been referred to Arbitral Tribunal presided by the sole arbitrator appointed under the Act of 1996 has no jurisdiction. However, this objection was turned down by the arbitrator vide its order dated 30.9.2007 which has been placed on record as Annexure "A" and ultimately the sole arbitrator passed a final award directing the Appellants to pay a sum of Rs. 76,64,725/- to the Respondent with interest at the rate of 9% per annum from the date of passing of the award till its payment. The learned arbitrator also awarded costs to be paid to the Respondent.

4. The Appellants, in order to set aside the award dated 30.1.2008 passed by the learned Arbitral Tribunal presided by sole arbitrator, filed an application to set aside the arbitral award u/s 34 of the Act of 1996 inter alia on the ground that arbitrator had no jurisdiction to entertain the matter in view of the existence of Adhiniyam of 1983. A copy of the application has been placed on record as Annexure "B". The learned Court below rejected the objection of jurisdiction raised by the Appellants. Thereafter, a review application was also submitted which was also dismissed on 17.7.2009.

5. This appeal was placed and listed before the learned Single Judge, however, learned Single Judge was of the view that because the value of the appeal exceeds the pecuniary jurisdiction of Rs. 25,00,000/- therefore it would lay only before the Division Bench, and hence, learned Single Judge held that it had no jurisdiction to hear the appeal. The learned Single Judge has placed reliance on Rule 2 of Chapter IV of the High Court of Madhya Pradesh Rules, 2008. Accordingly, the matter has been placed before us.

6. It has been vehemently contended by Shri H.D. Gupta, learned senior advocate for the Appellants, that since the Adhiniyam of 1983 is applicable on the parties, therefore, the provision of Section 11 of the Act of 1996 is not applicable and therefore the appointment of the sole arbitrator by exercising powers conferred on the Chief Justice or his nominee u/s 11(6) of the Act of 1996 as well as order dated 30.9.2007 overruling the objection of inherent lack of jurisdiction of the sole arbitrator as well as its final award dated 30.1.2008 is nullity and without jurisdiction. According to learned senior counsel, if an order is nullity and is without jurisdiction, it can be challenged anywhere and wherever it is enforced to be executed and hence according to learned senior counsel since the specific remedy under the special statute namely the Adhiniyam of 1983 is

applicable to the parties, learned Court below illegally rejected the objection of Appellants challenging the jurisdiction of the arbitrator in passing the award. In support of his contention, learned senior counsel has placed heavy reliance on the Full Bench decision of this Court *Shri Shankarnarayana Construction Company v. State of M.P. and Ors.* 2008(1) JLJ 50 : 2008(1) MPJR 20. Learned senior counsel has also placed reliance on Anr. Full Bench decision of this Court *Administrator, Municipal Corporation, Durg and Others Vs. Jainco Designers and Executors, Durg, .* Learned Counsel has further placed reliance on Division Bench decision of this Court *Spedra Engineering Corporation Engineers and Contractors, Bhopal Vs. State of Madhya Pradesh, .* By placing reliance on the Single Bench decision of this Court in *Mahindra and Mahindra Ltd. v. Kishan Tractors* 1998(2) JLJ 57, it has been contended that even if the Appellants have given consent to appoint sole arbitrator under the Act of 1996, the sole arbitrator cannot assume its jurisdiction on that ground. Learned senior counsel has also placed reliance on Single Judge decision of Chhattisgarh High Court *R.S. Bajwa and Company v. State of Chhattisgarh and Ors.* 2008(4) MPHT 105 (C.G.) and also on the decision of Supreme Court *A. Jithendernath v. Jubilee Hills Cooperative House Building Society and Anr.* (2006) 10 SCC 96. On these premised submissions, it has been argued by learned senior counsel that by allowing this appeal the order of the Court below overruling the objection of Appellants of inherent lack of jurisdiction of sole arbitrator be set aside as well as final award dated 30.1.2008 passed by the sole arbitrator be also set aside being without jurisdiction and nullity by also rejecting the order dated 30.9.2007, by which the objection in respect to inherent lack of jurisdiction raised by the Appellants was rejected by the sole arbitrator.

7. Combating the aforesaid submissions of learned senior counsel for the Appellants, *Shri V.K. Bharadwaj*, learned senior counsel for the Respondent, submitted that validly the appointment of sole arbitrator was made by the nominee of the Chief Justice u/s 11 of the Act of 1996 and the consent was also given by the Appellants to appoint the sole arbitrator and therefore now somersault stand cannot be permitted to be raised. By placing reliance on Section 16(2) of the Act of 1996, it has been contended by learned senior counsel that if the sole arbitrator was not having jurisdiction, this objection ought to have been raised before entering into the submission of statement of defence and since before entering into the defence, the Appellants have not raised the objection in that regard, hence, such an objection cannot be raised by them at a later stage before the arbitrator. In support of his contention, learned senior counsel has placed heavy reliance on the decision of Supreme Court *Gas Authority of India Ltd. and Another Vs. Ketu Construction (I) Ltd. and Others, .* Further, it has been contended by learned senior counsel that the appointment of the sole arbitrator by the Chief Justice or his designate while functioning u/s 11 of the Act of 1996 can only be challenged before the Supreme Court. Since the appointment of the sole arbitrator has not been challenged before the apex Court, the jurisdiction of the sole arbitrator cannot be questioned in the

proceedings u/s 34 of the Act of 1996. To bolster his submission, learned senior counsel has placed heavy reliance on the decision of Constitution Bench of Supreme Court *SBP and Co. v. Patel Engineering Ltd. and Anr.* (2005)8 SCC 618, and also on the decision of Calcutta High Court *Niraj Kumar Bohra v. Union of India* 2009 Arb. WLJ 261 (Cal.). By putting emphasis on Sections 4 and 5 of the Act of 1996, it has been argued by learned senior counsel that in the light of these provisions, the question of validity of jurisdiction of the arbitrator now cannot be taken into consideration.

8. Having heard the learned Counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

9. In order to take out the grain from its chaff, it is to be ascertained as to whether the Adhiniyam of 1983 is applicable on the parties or not. If this Court comes to the conclusion that the provisions of Adhiniyam of 1983 are applicable, then only the contention of learned senior counsel for the Respondent can be taken into consideration on its own merit based on various provisions of the Act of 1996 and the decisions placed reliance by him. The Act of 1996 too is also very specific on this proposition. If we go through Section 2(3), (4) and (5) of the Act of 1996, we find that since the Adhiniyam of 1983 is applicable to the parties, therefore, the Act of 1996 cannot be made applicable. Because, the State Legislature was competent to make a law (Adhiniyam of 1983) although the Arbitration Act, 1940 enacted by the Central Legislature was already in existence when the Adhiniyam of 1983 was enacted by the State Legislature. The said Adhiniyam of 1983 had received the assent of the President, as provided in Clause (2) of Article 254 of the Constitution. According to this provision of the Constitution, Parliament was competent to make the Act of 1996 in the same field, but while making the Act of 1996, has expressly saved the provisions of the Adhiniyam of 1983 in Sub-sections (4) and (5) of Section 2 of the Act of 1996 which speaks of statutory arbitrations in respect of disputes arising out of work contracts between the State Government or a State Government Undertaking and the contractor from the provisions of Part I of the Act of 1996 which are inconsistent with the provisions of the Adhiniyam of 1983. Therefore, the Adhiniyam of 1983 is not repugnant to the Act of 1996 or for no rhyme or reason it can be said that the same is impliedly repealed by the Act of 1996. Our view is supported by the Full Bench decision of this Court in the case of *Shri Shankarnarayana Construction Company (supra)* (see para 24 of the said decision).

10. In *Anr. Full Bench decision of this Court Administrator, Municipal Corporation, Durg and Ors. (supra)*, it has been held that any dispute between the Administrator and contractor in execution of the work of Municipal Corporation would come under the ambit and sweep of Section 2(1)(g) of the Adhiniyam of 1983 since the Administrator is a statutory body controlled by the State Government. The Division Bench of this Court in *M/s. Spedra Engineering Corporation Engineers and Contractors, Bhopal (supra)*, also examined the

provisions of Adhiniyam of 1983 vis-a-vis the provisions of the Arbitration Act, 1940 which was in force before the commencement of the Act of 1996 and it was held by the Division Bench that the provisions of Adhiniyam of 1983 would be applicable.

11. Thus, according to us, the award of Arbitral Tribunal presided by sole arbitrator appointed under the Act of 1996 is without jurisdiction. Needless to say, if the order or award is without jurisdiction, its validity can be set up at any moment of time. According to us, the learned Court below erred in rejecting the objection of inherent lack of jurisdiction raised by the Appellants.

12. We do not find any substance in the contention of learned Counsel for the Respondent that the notification under the Adhiniyam of 1983 speaks about the disputes or agreement pertaining to the State Government only and therefore the provisions of Adhiniyam of 1983 are not applicable because in the present case the dispute is between the Municipal Corporation and the contractor/ Respondent. In this regard, we think it appropriate to quote the notification No. 17(E) 85-96-XXI-B(II), which reads thus:

(ii) Notification No. 17(E) 85-96-XXI-B(II), dated 4.11.1996. -In exercise of the powers conferred by Clause (1) of Sub-section (1) of Section 2 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (No. 29 of 1983), the State Government hereby specifies that the agreements in writing for the execution of the work relating to construction, repair or maintenance of electric lines, water supply and sewerage/drainage system shall also be "work contract".

The term "work contract" has been explained u/s 2(1)(i) of the Adhiniyam of 1983 which speaks as under:

2(i) "works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works.

The term "Public Undertaking" has also been defined u/s 2(1)(g) of the Adhiniyam of 1983 which reads thus:

2(1)(g) "Public Undertaking" means a Government company within the meaning of Section 617 of the Companies Act, 1956 (No. 1 of 1956) and includes a Corporation or other statutory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government.

13. On going through the abovesaid provisions conjointly and by keeping them in

juxtaposition since the term "Corporation" would include Municipal Corporation also, hence, we have no scintilla of doubt that the provisions of Adhiniyam of 1983 would be applicable. Admittedly, the work contract is dated 1.5.2002 viz. much after the enforcement of the notification No. 17(E) 85-96-XXI-B (II) dated 4.11.1996. Therefore, full effect to above said notification is to be given according to its true spirit.

14. Since the sole arbitrator appointed under the Act of 1996 was having inherent lack of jurisdiction to decide the arbitral dispute, according to us, award passed by it, cannot be allowed to remain stand. In this context, we may place reliance on the ratio decidendi of apex Court in the decision of A. Jithendernath (*supra*).

15. The decisions placed reliance by learned senior counsel for the Respondent are not applicable in the present factual scenario for the simple reason that in those decisions the similar provision of the enactment of the Adhiniyam of 1983 was not there and therefore according to us, the various provisions of the Act of 1996 placed reliance by learned senior counsel for the Respondent are not applicable in the present case.

16. For the reasons stated hereinabove, we hereby allow this appeal and set aside the impugned order dated 9.2.2009 passed by learned Court below overruling the objection of the Appellants that Arbitral Tribunal presided by the sole arbitrator was not having jurisdiction over the matter as well as order dated 17.7.2009 rejecting the review application of the Appellants and we hereby hold that the arbitral award dated 30.1.2008 passed by the sole arbitrator is without jurisdiction and the same is hereby set aside. However, it parties are so advised, they may seek the remedy before the Tribunal constituted under the Adhiniyam of 1983.

17. Looking to the facts and circumstances of the case, parties are directed to bear their own costs.