
(2005) 04 PAT CK 0026
In the Patna High Court
Case No : Arbitration Case No. 1 of 2004

Pandey and Co. Builders Pvt. Ltd.

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 26-04-2005

Acts Referred:

Citation : (2005) 04 PAT CK 0026

Final Decision : Allowed

Judgement

V.N. Sinha, J.—Heard.

2. This arbitration case has been filed to set aside the award dated 20.02.2003 passed by the successor of the named arbitrator, namely, Superintending Engineer, Sone Canal, Circle Arrah, as per Clause 23 of the 48F2 Agreement dated 30.12.1991 for renovation of canal banks between kilometres 6.70 to 8.45 kilometres, as contained in Annexure A to the supplementary affidavit filed by the State-respondents.

3. Counsel appearing in support of this application, with reference to the provisions contained in Section 42 of the Arbitration Act, 1996, submitted that the present application is maintainable in this Court and not in the court of principal civil court of original jurisdiction at Arrah as Miscellaneous Appeal No. 196/2004 filed u/s 37 of the Act arising out of the aforesaid agreement is pending before this Court. The said miscellaneous appeal has been filed against the order dated 21.05.2004 passed by the substituted arbitrator whereunder substituted arbitrator held that the arbitration proceedings before him arising out of the aforesaid agreement was not maintainable as the successor of the named arbitrator has already passed the award dated 20.02.2003. With reference to the non obstante clause contained in Section 42 of the Act and the word application mentioned therein, learned Counsel for the applicant submitted that as in the present case Miscellaneous Appeal No. 196/2004 is pending in this Court any subsequent application arising out of the aforesaid agreement shall also be maintainable in this Court itself as, according to the learned Counsel, the opening

non obstante clause of Section 42 of the Act mandates any subsequent application should be filed in the same court in which any earlier application arising out of the same agreement has been filed. In this connection, he has relied on the judgment of the Hon''ble Supreme Court in the case of *Guru Nanak Foundation Vs. Rattan Singh and Sons*, , where the Apex Court considered similar provisions contained in Sub-section (4) of Section 31 of the 1940 Act vis-a-vis Sub-section (2) of Section 14 of the said Act which enjoined the parties to assail the award by initiating proceedings in a civil court and the Hon''ble Supreme Court in that context held as follows:

In the absence of an arbitration agreement if a dispute was required to be resolved by initiating proceedings in a civil court, that court which will have jurisdiction to entertain the suit alone would have jurisdiction to entertain the award and the arbitrator in view of Section 14, Sub-section (2) would have to file the award in that court. However, then non obstante clause occurring in Sub-section (4) of Section 31 excludes anything anywhere contained in the whole Act or in any other law for the time being in force if it is contrary to or inconsistent with the substantive provision contained in Sub-section (4). To that extent, it carves out an exception to the general question of jurisdiction of the court in which award may be filed elsewhere provided in the Act in respect of the proceedings referred to in Sub-section (4). The provision contained in Sub-section (4) will have an overriding effect in relation to the filing of the award if the conditions therein prescribed are satisfied. If those conditions are satisfied the court other than the one envisaged in Section 14(2) or Section 31(1) will be the court in which award will have to be filed. Sub-section (4) of Section 31 invests exclusive jurisdiction in the court, to which an application has been made in any reference and that court is competent to entertain as the court having jurisdiction over the arbitration proceedings and all subsequent applications arising out of reference and the arbitration proceedings shall have to be made in that court and in no other court. Thus, Sub-section (4) not only confers exclusive jurisdiction on the court to which an application is made in any reference but simultaneously ousts the jurisdiction of any other court which may as well have jurisdiction in this behalf.

4. In this connection, learned Counsel for the petitioner further relied on *Prasar Bharti Broadcasting Corporation of India v. Debyajoti Bose* reported in AIR 2000 Cal 45 and *Nissho Iwai Corporation Vs. Veejay Impex and Others*, .

5. In the case in hand, what is pending before this Court is Miscellaneous Appeal No. 196/2004 arising out of the same agreement out of which the present case has arisen. Thus, according to the learned Counsel for the applicant, the present arbitration case is also maintainable in this Court as legislature by providing Section 42 in the Act has ordained that the court in which any application under Part I of the Act arising out of an arbitration agreement has been filed that court alone shall have jurisdiction to consider subsequent application arising out of that arbitration agreement so that litigation arising out of an arbitration agreement is

settled in one court and the litigant is not forced to run to different courts.

6. On the other hand, learned state Counsel Shri A.P. Jittu, with reference to Section 42 of the Act submitted that Section 42 refers to an application and miscellaneous appeal is not akin to an application, as according to the learned Counsel, there is distinction between an application and appeal as appeal is a statutory right created under the statute and an application can be filed even when there is no enabling provision permitting one to file the application. Emphasising the aforesaid difference between the appeal and application learned Counsel further submitted that pendency of Miscellaneous Appeal No. 196/2004 cannot be a ground to invoke the original jurisdiction of this Court for setting aside the award passed by the successor of the named arbitrator. He further submitted that the petitioner should have filed the present case before the civil court of original jurisdiction and Patna High Court having no original civil jurisdiction should not entertain the arbitration case. In support of his case, learned state counsel has relied on the following case-laws to submit that an appeal is a statutory remedy and can be invoked only if the statute provides for the same and its scope is different from an application: Prem Raj Vs. Ram Charan, ; Union of India and Others Vs. Dev Raj Gupta and Others, Shri Udhav Singh Vs. Madhav Rao Scindia, ; National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, . Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, AIR 1954 SC 73 , para 6-Raja Kulkarni v. The State of Bombay; AIR 1979 745 (SC); State of Maharashtra Vs. Marwanjee P. Desai and Others, Shankar Kerba Jadhav and Others Vs. The State of Maharashtra, and Nalanda Ceramic and Industries Ltd. Vs. N.S. Choudhury and Co. (P) Ltd.,

7. Having considered the rival submissions on the point of maintainability of the arbitration case I am of the view that this arbitration case is maintainable in this Court in view of the non obstante clause contained in Section 42 of the Act which, inter alia, provides that the same court shall have jurisdiction to entertain the subsequent application arising out of an arbitration agreement in which the earlier application was filed. The miscellaneous appeal arising out of the same agreement was filed in this Court, accordingly the present arbitration case to set aside the award is also maintainable in this Court notwithstanding the difference in nature and scope of an appeal and application as both contain request to set aside the adjudication made by the inferior authority/tribunal/court. In view of the overriding effect of Section 42 of the Act there is no difficulty in holding that the present arbitration case filed in this Court to set aside the award passed by the successor of the named arbitrator is, maintainable.

8. Now having held the arbitration case filed to set aside the award dated 20.02.2003 as maintainable, I proceed to examine the merits of the case as to whether award dated 20.02.2003 was nullity on the ground that the successor of the named arbitrator, had no jurisdiction to pass the said award as this Court had already intervened in the matter and had substituted the named arbitrator under

order dated 31.01.2003.

9. In order to consider the merits of the matter, it is necessary to note a few dates. The 48F2 Agreement was executed between the parties on 30.12.1991. The applicant invoked the arbitration clause on 21.07.2000. While the arbitration proceeding proceeded merrily the named arbitrator superannuated from the post of Superintending Engineer and thereafter he was succeeded by his successor in office on 31.01.2002. The successor arbitrator under letter dated 23.08.2002, Annexure 11, informed the applicant that, in view of subsequent deletion of the arbitration clause from 48F2 Agreement, the adjudication of the dispute through arbitration proceeding shall not proceed. Applicant having received the aforesaid communication dated 23.08.2002 from successor of the named arbitrator informed the Secretary of the Water Resources Deptt., as also the successor of the named arbitrator vide his letter dated 05.09.2002, Annexure 11, that he wishes to move the High Court for appointment of substituted arbitrator as the successor of the named arbitrator under his letter dated 23.08.2002 has refused to proceed with the arbitration proceedings, in view of the subsequent deletion of Clause 23 from the 48F2 Agreement. Applicant thereafter on 15.12.2002 filed Request Case No. 28/2002, inter alia, requesting the Hon"ble the Chief Justice to appoint the substituted arbitrator to adjudicate the dispute between the applicant and the Executive Engineer concerned in regard to the 48F2 Agreement dated 30.12.1991. Copy of the aforesaid request case was served on the office of the Advocate General and thereafter the matter was placed for consideration before the nominee of the Hon"ble the Chief Justice of this Court Hon"ble Mr. Justice C.K. Prasad and His Lordship under order dated 31.01.2003 appointed Hon"ble Mr. Justice P.S. Sahay, a retired Judge of this Court, as an arbitrator to adjudicate the dispute between the applicant and the Executive Engineer. In compliance of the order of this Court, the applicant appeared before Shri Justice Sahay and His Lordship thereafter issued notice to the Executive Engineer concerned whereafter the Executive Engineer filed his objection dated 21.02.2004, Annexure 23/1 to the counter affidavit. Shri Justice Sahay considered the aforesaid objection under his order dated 21.05.2004, Annexure B to the counter affidavit perusal whereof indicates that Shri Justice Sahay held in the said order that he had no jurisdiction to adjudicate the dispute between the parties as the dispute has already been settled by the successor of the named arbitrator vide his award dated 20.02.2003 and findings recorded by His Lordship refusing to proceed with the arbitration proceedings is quoted hereunder:

Now, the question that arise for consideration is whether I have the jurisdiction to continue this proceeding when there has already been an award in this case. The previous arbitrator was appointed with the consent of the parties and I have been appointed by the Hon"ble High Court under the provisions of the Act. After my appointment, award has been given in this case on 20.02.2003. Both, myself and the previous arbitrator, had concurrent powers and jurisdiction and, therefore, I cannot go into the award given by my predecessor and hold whether it was legal and valid. It will be for the superior courts under the Act to say.

10. Applicant questioned the order of Shri Justice Sahay dated 21.05.2004 by filing the aforesaid Miscellaneous Appeal No. 196/2004 which is pending in this Court.

11. Having filed the aforesaid miscellaneous appeal, applicant filed the present case for setting aside the award dated 20.02.2003 on the ground that once this Court appointed Shri Justice Sahay as the sole arbitrator under order dated 31.01.2003 the successor of the named arbitrator had no jurisdiction to proceed and adjudicate the dispute between the parties and pass the award dated 20.02.2003, In this connection, learned Counsel for the applicant has relied on the provisions contained in Sections 14 and 15 of the Act to submit that once Shri Justice Sahay was substituted as an arbitrator under order of this Court the successor of the named arbitrator had no jurisdiction to proceed with the adjudication of dispute between the parties and, thus, the award passed by him on 20.02.2003 is wholly without jurisdiction.

12. Having heard the counsel for the parties, I am satisfied that once Shri Justice Sahay was appointed as the sole arbitrator to adjudicate the dispute between the parties under the orders of the nominee of the Hon''ble the Chief Justice of this Court vide order dated 31.01.2003 the successor of the named arbitrator had no jurisdiction to proceed and adjudicate the dispute between the parties and pass the award dated 20.02.2003, as such, the award passed by the successor of the named arbitrator dated 20.02.2003 is wholly without jurisdiction and is, accordingly, set aside and the matter is remitted back to the arbitrator appointed by the nominee of the Hon''ble the Chief Justice of this Court under order dated 31.01.2003, for fresh adjudication of dispute by His Lordship Mr. Justice P.S. Sahay. This order has been passed on the undertaking of the applicant that he shall not press the Miscellaneous Appeal No. 196/2004 and withdraw the same. The award passed by the successor of the named arbitrator dated 20.02.2003 having been set aside by this Court under this order, now there shall be no difficulty for the sole arbitrator Hon''ble Mr. Justice Prem Shankar Sahay appointed by the nominee of the Hon''ble the Chief Justice of this Court under order dated 31.01.2003 to proceed and adjudicate the dispute between the applicant and the Executive Engineer concerned.

13. The present arbitration case is, accordingly, allowed. No costs.