
(2005) 09 PAT CK 0085

In the Patna High Court

Case No : Letters Patent Appeal No. 765 of 2005

Pandey and Co. Builders Pvt. Ltd.

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 21-09-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(2), 16(3), 17, 34, 37

Citation : (2006) 3 BLJR 2212 : (2005) 4 PLJR 379

Hon'ble Judges : Shashank Kumar Singh, J; Chandramauli Kumar Prasad, J

Bench : Division Bench

Advocate : Nand Kishore Singh, for the Appellant; Lalit Kishore, A.A.G. and Asha Kumari, for the Respondent

Final Decision : Allowed

Judgement

Chandramauli Kumar Prasad, J.—Appellant has preferred this appeal, being aggrieved by the order dated 26.5.2005 passed in Arbitration Case No. 1 of 2004, whereby while setting aside the award, it had remitted the matter back to the arbitrator appointed by the nominee of the Hon"ble the Chief Justice by order dated 31.1.2003 for fresh adjudication.

2. Aggrieved by the award dated 20.2.2003, appellant preferred an application before this Court u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the Act, which was registered as Arbitration Case No. 1 of 2004. A learned Single Judge of this Court by order dated 26.4.2005 set aside the award dated 20.2.2003 and remitted the matter back to the arbitrator appointed by the nominee of the Hon"ble the Chief Justice for fresh adjudication of the dispute. Appellant is not aggrieved and obviously so by setting aside the award dated 20.2.2003, but is aggrieved by that portion of the order of the learned Single Judge whereby it had directed the arbitrator appointed by nominee of the Chief Justice for fresh adjudication of the dispute.

3. It is relevant here to state that the appellant filed Request Case No. 28 of

2002 before this Court for appointment of an arbitrator. The nominee of the Hon'ble the Chief Justice by order dated 3.11.2003 appointed Mr. Justice P.S. Sahay a retired Judge of this Court to be the sole arbitrator.

4. Before the sole arbitrator, respondents took up a plea that in view of the earlier award dated 20.2.2003, he cannot proceed with the arbitral proceeding. The sole arbitrator by order dated 21.5.2004 accepted the said plea and held that he had no jurisdiction to continue with the proceeding. Aggrieved by the same, appellant has preferred Miscellaneous Appeal No. 196 of 2004. We have found the said appeal to be not maintainable and dismissed it by order passed today.

5. Me. Lalit Kishore, Additional Advocate General appearing on behalf of the State submits that arbitration case filed by the appellant before this Court is not at all maintainable and the entire order is nullity and, therefore, not only the order remitting the matter back to the sole arbitrator appointed by the nominee of Hon'ble the Chief Justice is to be set aside, but the entire order itself.

6. Mr. Nand Kishore Singh appearing on behalf of the appellant, however contends that the arbitration case filed by the appellant is maintainable u/s 37 of the Arbitration and Conciliation Act read with Section 42 of the Act, hereinafter referred to as the Act. He points out that in view of Section 42 of the Act as Misc. Appeal No. 190 of 2004 is pending before this Court this Court alone shall have jurisdiction to entertain the arbitration case.

7. Having appreciated the rival submission, I do not find any substance in the submission of the learned counsel. The question of jurisdiction was raised before the learned Single Judge and taking into account that the Misc. appeal arising out of the same agreement is pending before this Court he held that in view of the Section 42 of the Act the arbitration case is maintainable. The learned Judge upheld the contention of the appellant in regard to the maintainability in the following words :-

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. Section 37 of the Act provides for an appeal and the appealable orders. In the

arbitration case appellant has assailed an award terming the same to be a nullity. Section 37 of the Act which is relevant for the purpose reads as follows :-

37. Appealable orders.-(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely :-

(a) Granting or refusing to grant any measure u/s 9;

(b) Setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16;

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

9. From a plain reading of the aforesaid provision it is evident that certain orders have been made appealable but not the award. In that view of the matter appellant could not have taken recourse to Section 37 of the Act.

10. In order to overcome this difficulty Mr. Singh points out that as the Miscellaneous appeal is pending before this Court which is in respect of the same agreement, in view of Section 42 of the Act the action had to be brought in this Court and no other Court. The agreement, prima facie, seems to be attractive but on deeper scrutiny I am of the opinion that it has no substance. Section 42 of the Act which is relevant for the purpose reads as follows :-

42. Jurisdiction.-Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

From a plain reading of the aforesaid provision it is evident that where any application has been made in a Court in respect of an arbitration agreement, subsequent application arising out of that agreement shall be made in that Court and in no other Court. It seems that the legislature in order to prevent the party to the arbitration agreement to take recourse to different Courts having jurisdiction has provided that when an application has been made in a Court, subsequent application in respect of the same agreement shall be made in that Court and in no other Court, However, in my opinion to attract the provision of Section 42 of the Act, the application filed earlier has necessarily to be maintainable before the Court, where the subsequent application is filed. In the

present case the appellant has invoked the jurisdiction of this Court on the ground that Miscellaneous Appeal No. 196 of 2004 is pending before this Court. Had the aforesaid appeal maintainable before this Court, appellant could have approached this Court. It had filed the appeal and without any adjudication in regard to its maintainability, preferred the Arbitration case and banked on the former to contend that arbitration case is maintainable. It is very clever move. By order passed today, we have held that the High Court is not the appropriate forum where M.A. No. 196 of 2004 could lie and accordingly we have dismissed the same. Thus, in my opinion, arbitration case filed by the appellant impugning the award is neither maintainable u/s 37 of the Act and cannot be held to be maintainable with the aid of Section 42 of the Act. Accordingly, in my opinion, the entire order passed by the learned Single Judge is completely without jurisdiction.

12. Mr. Singh contends that the appellant is non aggrieved by the entire order and no body having challenged the entire order, the order passed by the learned Single Judge to the extent that it has set aside the award cannot be interfered by this Court. Mr. Lalit Kishore, however, contends that entire order is clearly illegal and completely without jurisdiction and therefore a nullity and hence when the appellant has assailed a part of the order which is a nullity, the entire order has to be declared as so.

13. Having given my most anxious consideration, I do not find any substance in the submission of Mr. Singh, I am of the opinion that arbitration case do not lie before this Court either u/s 37 or Section 37 read with Section 42 of the Act, Hence order rendered by the learned Single Judge is a nullity and when it has come to my notice I cannot ignore the said fact. Accordingly, I declare the said order to be a nullity. However, this will of preclude the appellant from taking recourse to any other remedy available to it in law.

14. In the result, the appeal is allowed, impugned judgment of the learned Single Judge is set aside and same is declared to be a nullity.

Shashank Kumar Singh, J.

15. I agree.