
(2004) 09 AHC CK 0065
In the Allahabad High Court
Case No : C.M.W.P. No. 20168 of 2004

Ram Kumar Pathak

APPELLANT

Vs

Krishna Narain Pathak and Others

RESPONDENT

Date of Decision : 09-09-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 85, 85(2)
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115, 151
Constitution of India, 1950 — Article 226

Citation : (2005) 1 AWC 718

Hon'ble Judges : Anjani Kumar, J

Bench : Single Bench

Advocate : M.P. Sarraf and S.N. Verma, for the Appellant; Pankaj Bhatia and M.C. Tripathi, S.C., for the Respondent

Final Decision : Dismissed

Judgement

Anjani Kumar, J.—This writ petition under Article 226 of the Constitution of India is directed against an order passed by the District Judge, Kanpur Nagar, dated 21st April, 2004 in Civil Revision No. 116 of 2003, copy whereof is annexed as Annexure-11 to the writ petition, whereby the revision filed by the petitioner has been dismissed and the order passed by the trial court is maintained.

2. The facts leading to the filing of the revision out of which the present writ petition has arisen are that Krishna Narain Pathak filed an application purported to be an application under Order IX. Rule 13, read with Section 151 of the CPC with the prayer that the award of the arbitrator in Case No. 104/70 of 1998 dated 15th April, 1999. He has also filed an application that the award which has been obtained by practicing fraud and concealment of fact out of which the so called dispute was got referred to the Arbitrator, which ultimately resulted into award, which has subsequently been made rule of the Court, was wholly without jurisdiction and was obtained, as already stated, by practicing fraud and was a nullity. The application further states that for the first time, applicant acquired

knowledge with regard to the aforesaid fraud only on 5th May, 2001, he therefore filed an application for recall of the order dated 15th April, 1999 by which the award has been made rule of the Court. The objection has been filed on behalf of Ram Kumar Pathak that applicant Krishna Narain Pathak has nothing to do with the controversy in dispute and he was not a party to the proceedings, he has made incorrect statement. The award has already been made the rule of the Court and pursuant to the aforesaid rule of the Court, the decree has been executed. He further states that he has not played any fraud, he, therefore contested the application filed by Krishna Narain Pathak under Order IX, Rule 13, read with Section 151 of the CPC and prayed that the said application may be rejected.

3. The admitted fact as emerged from the pleadings of the parties as discussed by the trial court as well as the revisional court that the Arbitration Act, 1940, has been repealed by Arbitration Act, 1996, with effect from 25th January, 1996, when the Arbitration Act, 1996, which shall hereinafter refer to as "new Act", has come into force, whereas the application out of which the matter was referred to the Arbitrator and the Arbitrator gave the award which has become subsequently the rule of the Court, was filed under the provision of the Arbitration Act, 1940, which shall hereinafter refer to as "old Act" stood repealed. It is also stated that the new Act was enforced on 24th January, 1996 and till 25th January, 1996, the old Act was enforced and in view of the transitory provision of the new Act only those proceedings were saved, which were initiated before coming into force of the new Act, i.e., Arbitration Act, 1996, as already stated that the new Act came into force on 25th January, 1996, therefore the application pursuant to which the matter was referred to the Arbitrator, which was filed on 25th October, 1996 and the award of the Arbitrator and consequent rule of the Court were all proceedings, which were wholly without jurisdiction, apart from the same has been obtained by practicing fraud.

4. In the teeth of the finding of the Arbitrator and the law laid down by the Apex Court and this Court, if after coming into force of new Arbitration Act, 1996, the position in law would be, as if the old Act had never been enforced and was never in existence for the trial court if the aforesaid proposition relied upon a decision in Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., . The trial court has also considered the plea of the proceedings having been commenced before coming into force of the new Arbitration Act, which, according to the petitioner has come into force on 25th January, 1996. The trial court refers to the provision of Section 85 Sub-section (2) of the new Arbitration Act, 1996, which specifically provides that only such of the proceedings would be saved, which are initiated and commenced before coming into force of new Arbitration Act, 1996, i.e., 25th January, 1996. In view of the aforesaid factual background, the trial court has set aside the order passed in Misc. Case No. 104/70 of 1998, Ram Kumar Pathak v. Kanpur Development Authority, dated 15th April, 1999 and the award dated 27th February, 1998.

5. Aggrieved thereby, the present petitioner filed revision u/s 115 of the Code of Civil Procedure. The revisional court found that there is no error of the jurisdiction, nor the case of the revisionist is covered by any of the main clauses of Section 115 of the Code of Civil Procedure, as amended in the State of U. P., which is reproduced below :

"115. Revision.--The High Court, in Cases arising out of original suits or other proceedings (of the value exceeding one lakh rupees or such higher amount not exceeding five lakh rupees as the High Court may from time to time fix, by notification published in the official Gazette including such suits or other proceedings instituted before the date of commencement of the U. P. Civil Laws (Amendment) Act, 1991, or as the case may be, the date of commencement of such notification] and the district court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of any case which has been decided by any Court subordinate to such High Court or district court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears--

(a) to have exercised a jurisdiction not vested in it by law ; or

(b) to have failed to exercise a jurisdiction so vested ; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court or the district court, as the case may be, may make such order in the case as it thinks fit :

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the district court, the High Court alone shall be competent to make an order under this Section :

Provided further that the High Court or the district court shall not, under this Section, vary or reverse any order including an order deciding as issue, made in the course of a suit or other proceeding, except where,--

(i) the order, if so varied or reversed, would finally dispose of the suit or other proceeding ; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made :

Provided also that where a proceeding of the nature in which the district court may call for the record and pass orders under this section was pending immediately before the relevant date of commencement referred to above, in the High Court, such Court shall proceed to dispose of the same."

6. The revisional court therefore dismissed the revision. In view of the law laid down by the Apex Court in the case in Milkfood Ltd. v. G.M.C. Ice Cream (P.) Ltd. AIR 2004 SCW 2235 wherein in para 41 the Apex Court has ruled as under :--

"41. Issuance of notice is required to be interpreted broadly not only for the purpose of limitation but also for other purposes (See Allianz Versicherungs A.G. v. Fortuna Co. Inc.. (1999) 2 ALLER 625 and Vosnoc Ltd, v. Transglobal Projects Ltd. (1998) 1 WLR 101)."

7. In para 51 of the aforesaid judgment, the Apex Court deals with the provision of Section 85(2)(a) of the new Arbitration Act, 1996, which provides saving of the proceedings and effect of new Arbitration Act, 1996, which is reproduced below :

"51. In Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, , it was held :

"A mere look at Sub-section (2) (a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 25.1.1996. The question, therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 25.1.1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act. As seen from the aforementioned factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in all these cases months before 25.1.1996, in March and April, 1995 and in fact thereafter all the four arbitration suits were filed on 24.8.1995. These suits were obviously filed prior to 26.1.1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments has impliedly treated them."

8. In this view of the matter, in my opinion, the revisional court has not committed any error while affirming the order passed by the trial court impugned in the present writ petition, which may warrant any interference by this Court in exercise of power under Article 226 of the Constitution of India. This writ petition, therefore, has no force and is accordingly dismissed. The interim order, if any, stands vacated. However, the parties shall bear their own costs.