
(2009) 04 PAT CK 0033
In the Patna High Court
Case No : CWJC No. 9440 of 2002

Rama Nand Jha

APPELLANT

Vs

The Bihar State Housing Board and Others

RESPONDENT

Date of Decision : 22-04-2009

Acts Referred:

Citation : (2009) 04 PAT CK 0033

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—Heard counsel for the petitioner and the counsel for the Board.

2. The prayer made in this writ application reads as follows:

This writ application is directed against the order No. 418 dated 7.2.2002 issued under the signature of Revenue Officer of the respondent Housing Board whereby and where under while communicating the details of the deposit and amount required to be paid towards the cost of petitioner's flat has been communicated, communicating the petitioner that due to re-determination of cost of flat in question is Rs. 1,00,700/- as on 31.3.1996. This application is also being filed for commanding the respondents to execute the deed of lease perpetuated in favour of the petitioner and return the excess amount deposited by the petitioner. This writ application is being filed for other relief as well. The petitioner was initially allotted the flat being L.I.G. Flat No. 13/436 situated in Mohalla Hanuman Nagar initially on rental basis subsequently the flat in question was allotted on hire purchase basis vide allotment order dated 16.3.1990 whereby the tentative price of the flat in question was Rs. 47,400 as on 31.3.1990 out of which the petitioner was directed to deposit 20% as earnest money amounting to Rs. 7,480/- and thus a sum of Rs. 37,920/- shown as outstanding however the flat in question was allotted in pursuant to an order passed in T.S. 28/84 whereby a further direction was given to adjust the rent already deposited however the said amount was not adjusted while showing the deposit against the price in question creating a burden on the petitioner. The petitioner immediately objected and

claimed adjustment of the rent amount on the date of the allotment order but due to callous attitude on the part of the respondent Board. Final settlement of the flat in question could not be materialized though the petitioner was ready to clear the outstanding in terms of the judgment and decree passed in T.S. 28/84.

Due to oblique motive and extraneous consideration Board did not allow the dispute to be settled creating charge on the petitioner in the shape of accumulation of the outstanding. The petitioner was compelled to move this Hon''ble Court in C.W.J.C. No. 7392/97 for quashing the exorbitant demand and other reliefs which was finally disposed of vide order dated 28.1.1998 commanding the competent committee of the Board to dispose of the petitioner's grievance in accordance with the records available. The Committee resolve to give effect to the decree passed in T.S. No. 28/84 but delayed the matter inordinately without any fault on the part of the petitioner rather such pendency has created accumulation of the outstanding, a charge on the petitioner. After the decision of the competent committee a fresh demand of Rs. 37761 as on 30.9.2001 vide letter dated 29.8.2001.

Against the letter dated 29.8.2001 the petitioner again moved this Hon''ble Court in C.W.J.C. No. 13116/2001 which was disposed of by this Hon''ble Court by order dated 9.11.2001 commanding the respondent Board to complete the details of the deposit and clearly informed the petitioner about the required amount to be paid.

In pursuant to the order dated 9.11.2001 the Board communicated the impugned order dated 7.2.2002 (Annexure 1) wherein the cost of flat in question has been shown to be enhanced a sum of Rs. 100700/-as on 31.3.1996 under the garb of expenditure made over the scheme and the financial charges. Complete divergent to the costing made in the year 1990, neither there is any cogent reason to increase the cost specifically in respect of the flat in question or any development either in respect of the flat in question or area in question. Costing is based on calculation of price of land cost incurred in construction and development in area which have been considered while costing the flat in question in the year 1990. No intervening circumstances are there to increase the cost that too, unilaterally. The Board being an instrumentality of the State has to maintain fairness and considered the welfare of the people at large.

3. The dispute in this writ petition as to whether the petitioner is being subjected to higher price of flat which was allotted to him in the year 1990 as per his own written agreement dated 31st March, 1990 in the first instance has to be gone into and adjudicated through the mode of arbitration in terms of Clause 25 of the Agreement which reads as follows:

That on matters not specifically stipulated in the agreement or provided for in the relevant rules and regulations of the Board or in case any dispute, doubt or question arises between the settlee and the Board, then and in such event every such case shall be referred for arbitration to the Managing Director of the Board

acting as such at the time and his decision in this regard shall be final and binding on both parties and shall not be liable to be questioned in any Court of Law.

4. In view this provision in the agreement the grievance of the petitioner that the impugned order communicated by the Revenue Officer of the Bihar State Housing Board (hereinafter referred to as "the Board") dated 7.2.2002 suffers from mistake of calculation and/or incorrect interpretation of Clause 4A of the Agreement and/or the calculation made in the file by the Executive Engineer on 5.3.1990 are definitely covered by the zone of dispute in terms of Clause 25 of the agreement.

5. As a matter of fact in presence of such an arbitration clause the writ petition will not be not maintainable as has been held by Apex Court in the case of State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , and again in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and this Court in an order dated 19th April, 2007 in L.P.A. No. 1157 of 2001 (Bihar State Housing Board v. Akhileshwar Kumar) disposed of on 19th April, 2007.

6. The refusal of writ jurisdiction under Article 226 of the Constitution in a case where the parties are bound by an earlier agreement providing for arbitration by now is a well settled law. The Apex Court in the case of State of U.P. v. Bridge & Roof Co. (India) Ltd. (supra) has held as follows:

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both question of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy- in this case, provided in the contract itself- is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.

7. The same law in fact has been reiterated by the Apex Court even in the case of ABL International Ltd. (supra) wherein it had been held as follows:

It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.

8. In fact in an exactly identical matter arising out of a similar agreement and demand of the Board itself the Division Bench of this Court in Akhileshwar Kumar (supra) had clearly held the writ application to be not maintainable in presence of same arbitration clause. The relevant portion of the order of the Division Bench

in Akhileshwar Kumar (supra) is quoted hereinbelow:

...In a very recent judgment rendered by the Hon"ble Supreme Court, the Supreme Court has upheld the right of the appellant Board to claim increase in price due to increase in the cost of land acquisition or due to increase in the cost of construction and accordingly, we are of the view that the writ court was not correct in holding that the clause authorizing tentative price to be revised due to increase in cost of land acquisition or due to increase in cost of construction is unfair or unreasonable. In consequence thereof, since the conclusion is that the demands, as were challenged in the writ petition, were raised on the basis of the authority granted by the said clause, the same cannot be treated as stale claims lodged belatedly. Further more, the subject demands were bare claims and admittedly no steps had been taken subsequent to lodgment of such claims to enforce the same.

The writ petitioner is contending that such claims are arbitrary claims. He is, therefore, contending that such claims are unjustified claims. In other words, he is contending that such claims cannot be made in terms of the provisions of the subject Contract.

Admittedly, the contract contains an arbitration clause. In the counter affidavit, as was filed by the appellant Board, which was over looked by the writ Court, it was specifically stated that inasmuch as the Contract contains an arbitration clause the writ Court cannot decide whether the claims lodged by the appellant Board are correct or incorrect. We think that parties having chosen to take recourse to arbitration to sort out their disputes and differences pertaining to claims and counter claims arising out of the subject contract, they were not entitled to approach the writ Court to sort out the same, as was done in the instant case.

In those circumstances, we would interfere with the judgment and order under appeal and would set aside the same and relegate the parties to arbitration. Accordingly, the judgment under appeal is set aside and the writ petition is dismissed with liberty to the parties to take recourse to arbitration in accordance with the arbitration clause contained in the said agreement.

9. The said Division Bench judgment in fact relating to an agreement containing the same clause of the Housing Board would squarely cover the case of the petitioner.

10. Counsel for the petitioner, however, would place reliance on the judgment of the Apex Court in the case of Haryana Urban Development Authority and another Vs. Ranjan Dhamina and another, , to contend that it was not open for the Housing Board to claim anything extra beyond the tentative price. The Supreme Court in that case had held that whatever be the price once communicated to the allottee that must be treated to be final. Counsel in fact further submits that Clause 9 of Haryana agreement is parameteria same as Clause 4A of the agreement of the petitioner and therefore, this Court in stead of relegating the

petitioner to arbitration, should on the basis of admitted material hold that the demand made by the Board was wholly unreasonable and illegal. Counsel in this context also refers to the judgment of the Division Bench in the case of Ram Sharan Prasad Singh v. the State of Bihar and Ors. in C.W.J.C. No. 5106/1991 disposed of on 8.7.1992 to contend that in exactly similar matter with regard to fresh demand of amount by the Board was held to be unreasonable. He has also submitted that the said judgment of Ram Sharan Prasad Singh (supra) has invariably been followed by this Court in a large number of cases including one in the case of Munna Kumar Singh Vs. The National Insurance Co. and Others, as also in the case of Bina Singh and Ors. v. Bihar State Housing Board and Ors. reported in 2006 (4) PLJR 472.

11. This Court having gone into the judgment of the Apex Court in the case of Haryana Urban Development Authority and Anr. (supra) must hold that Clause 9 of Haryana agreement which was a subject matter of the case before the Apex Court is entirely different than one in Clause 4A and for a better understanding of the same both are quoted side-by-side hereinbelow:

Clause 9 of Haryana Agreement

Clause 4A of Bihar Agreement

The above price is tentative to the extent that any enhancement in the cost of land awarded by the competent Authority under the Land Acquisition Act shall also be payable proportionately as determined by the authority. The additional price determined shall be paid within thirty days of its demand.

That the total disposal price indicated above is according to the present estimate and hence tentative. Increase in the cost of the construction of development or due to increase in cost land acquisition due to any decision/ award of court of law or legislation or due to increase in the cost due to final valuation or calculation or otherwise as per the decision of the Board shall be payable by the settlee either in instalments thereof in lump sum within the period decided by the Board. The settlee shall under no circumstances be entitled to demand any accounts relating to the cost of quantum and dispute and shall be fixed by the Board in its sole discretion.

12. Thus the moment the aforesaid two provisions of agreement are closely compared, it becomes more than clear that whereas Haryana Agreement was only containing an escalation clause on account of land acquisition, here such escalation is possible not only for increase in cost of land acquisition but for other reasons as well including development or increase in the cost of construction or for other reasons as mentioned therein. In that view of the matter, the judgment of the Apex Court in Haryana case (supra) will have no application to the facts of the present case.

13. Coming to the judgment of Ram Sharan Prasad Singh (supra) this Court must notice that there the stand of the Housing Board was that by a wrong

calculation the amount sought to be mentioned in the agreement was found to be lower amount and that such demand was deprecated by this Court by holding that Clause 4A of the agreement did not contemplate such a situation. There is no such pleading in the counter affidavit filed by the Board in the present case wherein the Board in stead of claiming any wrong calculation, has come out with its specific case that on account of so many factors as shown in the impugned order including escalation in the rate of interest of financial institution on the investment made by the Board, the price of the flat of the petitioner had to be revised.

14. That being so, this Court also would not find any application of the ratio of the case of Ram Sharan Prasad Singh (supra). Once therefore the said sheet anchor Division Bench judgment of Ram Sharan (supra) is found to be wholly inapplicable to the facts of this case, the other two judgments of the learned Single Judge following in the aforementioned judgment of Ram Sharan (supra) would automatically not apply to the facts of the present case.

15. The special feature of the present case in fact is that the petitioner was not an allottee in the year 1983, rather he was initially a tenant of the Board and he went to the civil court claiming that he should be allotted the said flat under Hire Purchase Agreement scheme of the Board and after judgment of the civil court the petitioner was treated to be an allottee only from the date of allotment in the year 1990 which was followed by a fresh agreement dated 31.3.1990. The petitioner, therefore, cannot get any advantage of his being tenant for the period 1983 to 1990 and his right to enforce the terms and conditions of the agreement dated 31.3.1990 will only flow from the date of allotment i.e. 31.3.1990, which also stands accepted and admitted by him in the writ petition stating therein that he (petitioner) was given possession in terms of the said allotment in the year 1990.

16. Once this position becomes clear that the case of the petitioner, therefore, is not one which is not covered by any of the aforementioned judgments heavily relied by the counsel for the petitioner, this Court will have no difficulty in also accepting the submission of the counsel for the Board that this writ petition is not maintainable for yet another reason that when in the first round of litigation the petitioner had approached this Court in C.W.J.C. No. 7392/1997 this Court had relegated the petitioner to seek remedy before the three men committee as would appear from the order dated 28.2.1998 passed in C.W.J.C. No. 7392/1997 (Annexure 8). Counsel for the Board, therefore, is also correct in taking a stand that after the petitioner had appeared before the three men Committee, he was required to bring on record of this case at least the order of the three men Committee but he has not done so and therefore, when a demand notice was issued against him and the petitioner had come to this Court in the second round of litigation in C.W.J.C. No. 13116/2001 which was disposed of on 9.11.2001 and this Court had only directed that the respondent Housing Board to give complete details of deposit made by the petitioner and also furnish details clearly

indicating that under what different heads the petitioner was required to pay the amount to the Housing Board, this Court in fact had not left the matter open for him to approach this Court again by omitting the arbitration clause, because the last sentence of the order of this Court it was specifically held that "if the petitioner is still dissatisfied with the said demand now to be raised, he shall be free to take recourse available to him in the law." Thus now, in the opinion of this Court, such recourse available to the petitioner in law would be to invoke the provisions of Clause 25 of the Agreement which as noted above contains an arbitration clause.

17. It has to be also kept in mind that the correctness or otherwise of the total amount of demand under the impugned order can be more effectively gone into by allowing both the parties to lead evidence which cannot be done under the limited writ jurisdiction of this Court under Article 226 of the Constitution of India.

18. That being so, this Court would find also force in the submission of the learned Counsel for the Board who places reliance on the judgment of the Apex Court in the case of *Defense Enclave Residents Society Vs. State of U.P. and Others*, , to contend that where there is a contractual dispute between the development authority and the allottees of the plot without involving violation of any fundamental rights of the allottees, the same cannot be gone into in a writ petition and the parties will have to be left to take recourse as is provided in the agreement itself. In fact this aspect of the matter stands settled by the judgment of the Apex Court in the case of *A.B.C. (India) Ltd. Vs. State of Assam and Another*, wherein it has been held as a proposition of law that in presence of an arbitration clause the writ petition will not be maintainable.

19. Thus for the reasons indicated above, this writ application is dismissed with a liberty to the petitioner to take recourse to arbitration in accordance with the arbitration clause contained in the said Agreement.