
(2007) 04 AHC CK 0236
In the Allahabad High Court

Rampal Singh Mukhtar Ahmed	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 06-04-2007

Acts Referred:

Arbitration Act, 1940 — Section 31
Arbitration and Conciliation Act, 1996 — Section 11, 12, 13, 14, 15

Citation : (2007) 4 ADJ 272 : (2007) 78 AWC 2424 : (2007) 3 AWC 2424

Hon'ble Judges : Pankaj Mithal, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This appeal arises out of a decision of the arbitral Tribunal dated 21st December, 2004.

2. By an order dated 22nd April, 2004 Hon"ble Mr. Justice Tarun Chatterjee, the then Hon"ble Chief Justice of the High Court of Judicature at Allahabad, was pleased to appoint Hon"ble Mr. Justice Anil Kumar Sen, former Chief Justice of High Court at Calcutta, as an Arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") to adjudicate upon the dispute under reference.

3. According to Mr. Anil Sharma, learned Counsel appearing for the appellant, the learned Arbitrator entered into the reference. Both the parties, i.e., the appellant and State respondent had submitted to his Jurisdiction. Even thereafter State had raised a dispute before the Arbitrator about the competency of the reference and his jurisdiction to be appointed as Arbitrator. The State had moved an application relying upon Clauses 34 and 44 of the agreement to establish that the Chief Engineer, Ganga Eastern Ganga, Moradabad is the final authority to adjudicate the dispute but not the learned Arbitrator appointed by the Court. Learned Arbitrator called upon the parties to place the application at first to decide the issue.

4. In interpreting the aforesaid two clauses the Arbitrator held that only when situation under Clause 44(c) will arise, the Court can intervene but not before. Learned Arbitrator further held that the objection cannot be considered as objection u/s 13(2) of the Act, i.e., challenge in relation to procedure in respect of the arbitration but in respect of maintainability of the reference and jurisdiction of the Arbitrator. Learned Arbitrator further held that Section 13 is correlated to Section 12, i.e. grounds for challenge about impartiality etc. and since the present objection is not one contemplated by Section 12, the plea of the claimant/appellant is not acceptable. Therefore, the Arbitrator himself held that the reference is not competent in law and he has no jurisdiction to hold any adjudication on arbitration of the present dispute amongst the parties.

5. By preferring this appeal, Mr. Sharma relied upon the various judgments to establish that the language of the aforesaid clauses of the agreement does not mean to say that the dispute cannot be referred to an independent Arbitrator by the High Court. In this line he relied upon State of U.P. Vs. Tipper Chand, State of West Bengal and Anr. v. Haripada Santra 1990 (1) ArbLR 251 ; Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, and BASF Styrenics Pvt. Ltd. Vs. Offshore Industrial Construction Pvt. Ltd., . The last judgment is applicable to Act 1996 which otherwise repeals the existence of the earlier Arbitration Act, 1940. By showing such last Judgment Mr. Sharma wanted to establish that there should not be piecemeal decision but on all points at a time by the Arbitrator.

6. Learned standing counsel appearing on behalf of the State contended that this appeal cannot lie directly before this High Court since it does not possess ordinary original civil jurisdiction unlike some other High Courts. Therefore, an appeal, from the order of the arbitral Tribunal shall lie only in a principal civil court of original Jurisdiction of the concerned district. He has brought our attention to Section 37 of the Act 1996 which is as follows:

(1) An appeal shall lie from the following orders (and from no others) to the Court authorized 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; or

(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.

7. He said that while Section 37(1) speaks about appeal from the orders of the Court under Sections 9 and 34 of the Act, Section 37(2) speaks about appeal from the orders of the arbitral Tribunal under Sub-section (2) or Sub-section (3) of Section 16 or u/s 17 of the Act.

8. We have carefully gone through the section and found four cardinal words incorporated in Sub-section (1) and Sub-section (2) of Section 37 to make a difference in between themselves. Sub-section (1) categorically says that appeal shall lie to "the" Court from the following orders and from no others. On the other hand, Sub-section (2) speaks that an appeal shall also lie to "a" Court from an order of the arbitral Tribunal. We get definition of "Court" u/s 2(e) of the Act, as follows:

Court" means the principal civil court of original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of the suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes ;

9. Therefore, the application u/s 16 of the Act, would lie in a principal civil court of original jurisdiction in a district, which includes the High Court in exercise of its ordinary original civil jurisdiction if available in a State subject to territorial and pecuniary limits therein.

10. Recently In S.B.P. and Co. v. Patel Engineering Ltd. and Anr. 2005 (8) SCC 618 : 2006 (1) AWC 538 (SC), a seven Judges Bench of the Supreme Court per majority held that once a statute creates an authority, confers on it power to adjudicate, and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be purely administrative. An administrative order would be one which is directed to regulation or supervision of matters as distinguished from an order which decides rights of parties or confers or refuses to confer rights which are the subject of adjudication. Therefore, by virtue of such decision power to appoint an arbitrator by the Hon'ble Chief Justice becomes the judicial order.

11. According to Mr. Sharma, when a power originates from a court, that court alone has power to adjudicate any subsequent proceedings being original Jurisdiction by virtue of Section 42 of the Act. Therefore, once the Arbitrator is appointed by the Chief Justice of the High Court, it is obvious that all subsequent proceedings arising out of such appointment will have to be made in such High Court alone not in any court subordinate to it only on the plea that the High Court does not possess ordinary original civil jurisdiction.

12. According to us, there is a difference between "original jurisdiction" and "ordinary original civil jurisdiction". "Original jurisdiction" is creature of statute when "ordinary original civil jurisdiction" is residuary. But in this law "ordinary original civil jurisdiction" is creature of the statute in contradiction to the object.

The Arbitration and Conciliation Act, 1996 is promulgated to expedite the process of hearing of civil disputes following model law, i.e., United Nations Commission on International Trade Law (hereinafter called as U.N.C.I.T.R.A.L.). The very purpose of the promulgation of the Act is to expedite the process of hearing by a better forum avoiding long drawn and cumbersome procedure of civil suits. When jurisdiction of the civil courts are carved out and given to arbitral Tribunal in its entirety what is the necessity of adoption of concept of ordinary original civil Jurisdiction for the court is really unknown. An appointment by Chief Justice which was initiated in the High Court likely to be proceeded in the High Court subsequently for all practical purposes. Making difference between High Courts having ordinary original civil jurisdiction and the other High Courts are illusory in nature. Neither of the courts are discharging functions like original courts hearing civil suits or alike. It is needless to say application for interim measures, if heard by the High Courts would be much efficacious. Application for setting aside itself by nature is an appeal which is likely to be heard by the appeal courts and High Courts are in general appellate forum. Therefore, uniform plenary jurisdiction for each State is dire necessity for expeditious disposal. Either it is expressed or implied object of the promulgation of the Act. It is far more necessary when Court declared the power of the Chief Justice is judicial power. However, we cannot rewrite the law. We can only send a message to the Legislature to do the needful for getting appropriate subjective legal help for the sake of globalization effectively. It is also to be remembered that purpose of repealing the Arbitration Act, 1940 should not be reiterated.

13. So far as the existing position is concerned Mr. Pandey, learned standing counsel, cited a judgment in Pandey and Co. Builders Pvt. Ltd. Vs. State of Bihar and Another, There the Court held that an order passed by a Chief Justice or his nominee under Sub-section (6) of Section 11 of the 1996 Act may be a judicial order, as has been held by a Seven Judges Bench of the Supreme Court in S.B.P. and Co. v. Patel Engineering Ltd. and Anr. (supra), but the same does not take away the effect of the appellate Jurisdiction to be exercised by a Court under Sub-section (2) of Section 37 of the 1996 Act. Scope and ambit of Section 42 of 1996 Act was considered and the Court further held that such section refers to applications and not to appeals. In the observation it was also held that except the High Courts, which are governed under the ordinary original civil jurisdiction, others governed under the Bengal, Agra and Assam Civil Courts Act, 1887, thereby an appeal u/s 37(2) of the 1996 Act is not maintainable before such High Courts directly.

14. Upon going through the Section 31(4) of the Arbitration Act, 1940 and Section 42 of the Arbitration and Conciliation Act, 1996 we find that if any application is made in a Court," that Court alone shall have jurisdiction over the arbitral proceedings and" all subsequent applications arising out of the agreement and the arbitral proceedings shall be made in that Court. According to us, conjoint reading of the ratio of S.B.P. and Co. (supra) and Pandey and Co. Builders Pvt. Ltd. (supra) gives an indication in what way the present law is to be

read. Paragraph 47(vi) of the Judgment in S.B.P. and Co. (supra) is relevant for the purpose, which is quoted hereunder:

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

15. Power of the Chief Justice about appointment of arbitrator is a Judicial, power. Therefore, one has to understand what would be the Jurisdiction of the Court under which the Chief Justice will exercise such judicial power. From the interpretation of the aforesaid two Judgments it appears that the power of the Chief Justice is a power under original jurisdiction of the High Courts which is uniform in nature. Thus, the appointment of arbitrator by the Chief Justice cannot be said to be discharge of functions under ordinary original civil jurisdiction but original Jurisdiction. Such function will start only after appointment of Arbitrator by the Chief Justice. In such circumstances only the original Jurisdiction will evaporate and ordinary original Jurisdiction will take effect. Section 42 of the Act will follow from there but not from the original appointment of arbitrator by the Hon^{ble} Chief Justice by virtue of the judicial power unless the law is amended and simplified to that extent.

16. So far as the present case is concerned, basically controversy is not with regard to the following words under Sub-sections (1) and (2) of Section 37 of the Act, i.e., "the Court" and "and from no others" and "a Court" and "also". However, since "and from no others" employed under Sub-section (1) is bracketed, the interpretation is that no other appeals will be counted as an appeal under such sub-section, wherein the words "also" under Sub-section (2) means, that those proceedings are also to be called as appeal. Therefore, these two words being parts of the sentences are not making any difference hereunder. According to us, the real difference in the sub-sections is the words "the" and "a". As per Law Lexicon 1997 Edition, "The" is the word used before nouns, with a specifying or particularizing effect opposed to the indefinite or generalizing force of "a" and "an". Therefore, "the Court" under Sub-section (1) is specific but "a Court" under Sub-section (2) is not specific. Hence, it is clear that whenever any order is passed by any Court of competent jurisdiction, the forum for appeal is the High Court. Since there is no other court, the High Court is specified by the word "the". But so far as Sub-section (2) is concerned, since such order is arising out of the arbitral Tribunal, the same will be proceeded before the principal civil court of ordinary Jurisdiction in a district or before ordinary original civil Jurisdiction of a High Court. Therefore, the Court is generalized by using word "a" before it. Section 42 will be applied in a Court in respect of the subsequent proceeding means to say when arbitration proceeding will be initiated before appropriate jurisdiction to entertain, try and determine the arbitration proceedings. Import of Section 42 of the Act never speaks that the same is to be

applied de hors the jurisdiction, thereby the appointment of arbitrator by the High Court and proceedings before the arbitral Tribunal or the Court after such appointment are different stages.

17. Hence, taking into account all aspects of the matter we do not find any justification to hold that the present appeal is maintainable in the High Court. Mr. Sharma wanted to distinguish the ratio of Pandey and Co. Builders Pvt. Ltd. (supra) by saying that the same is factually distinguishable because in the case of the Supreme Court, the appeal arose from a dispute under Sections 14 and 15 of the Act when the dispute arose herein from Section 16 of the Act. We are of the view that such factual distinguishing feature cannot make any basic difference since the laying down principle of the Supreme Court becomes ratio decidendi

18. Therefore, the appeal is not maintainable so far as this Court is concerned and accordingly, the same is formally treated as dismissed. Let the appeal be returned with liberty to the appellant to proceed before the appropriate court of law, if so advised. Interim order, if any, in connection with any application stands vacated.

19. However, no order is passed as to costs.

Pankaj Mithal, J.

20. I agree.