

(2003) 08 PAT CK 0081
In the Patna High Court
Case No : L.P.A. No. 19 of 2003

Shri Raj Kumar Raghawendra Prasad Narain Singh @
Radhvendra Prasad Narain Singh and Others

APPELLANT

Vs

Ashiana Land Developments and Projects Private Limited and
Others

RESPONDENT

Date of Decision : 21-08-2003

Acts Referred:

Citation : (2003) 08 PAT CK 0081

Final Decision : Dismissed

Judgement

R.N. Prasad, J.—The Letters Patent Appeal has been filed against the judgment and order dated 3-12-2002 passed in C.W.J.C. No. 8850/2001 whereby the writ petition filed for quashing the order dated 1-3-2001 passed in Request case No. 5/98 appointing Arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 (here-in-after referred to as the Act) by a nominee of Hon"ble Chief Justice, has been dismissed.

2. The facts of the case are that the appellants, respondent Nos. 2 and 3 the owners of the land and respondent No. 1 M/s. Ashiana Land Development Project Pvt. Ltd., through its Director, Sri Indrajeet Singh entered into an agreement on 30-12-1987, Annexure-B to the counter-affidavit filed in the writ petition. Clause 26 of the said agreement, Annexure-B, contains arbitration clause which says that in case of any dispute between the owners and the developers relating to this agreement or interpretation of these presents it shall be decided by arbitration in accordance with relevant provisions of the Indian Arbitration Act only at Patna. Respondent No. 1 filed a petition on 27-4-1998, which was registered as Request Case No. 5/98, invoking the power of Hon"ble Chief Justice of this Court under Sub-section (6) of Section 11 of the Act. The owners were opposite parties in the Request case with their addresses as mentioned in the agreement. The nominee of Hon"ble the Chief Justice on 5-11-1999 ordered for issuance of notice on the Opposite parties under ordinary process as well as registered post with A/D. On 7-12-2000 the case was listed with the office note

that the notices issued returned unserved and as such notices were ordered to be issued upon the Opposite parties by publication in prominent English daily newspaper published from Patna at the cost of respondent No. 1. Notices were published in the "Hindustan Times" on 27-12-2000 but the opposite parties did not appear. Request case was heard on 1-3-2001 and Mr. Justice Uday Sinha, a retired judge of this Court was appointed Arbitrator after obtaining his consent by order dated 16-3-2001.

3. The aforesaid order appointing arbitrator was challenged in the writ petition on the ground that Act, 1996 had no application as the agreement was executed on 30-12-1987 when the Arbitration Act 1940 was in force, the cause of action for Request case was barred by limitation, the period of three years should be reckoned to have started when respondent No. 1 wrote a letter on 6-4-1992, Annexure-3 to the writ petition, the principle of audi alteram partem has been violated as the appellants were residing at Masoorie and could not know about the newspaper publication at Patna and also notice by publication in newspaper was illegal and improper and also on the ground of doctrine of res judicata as the Misc. Case No. 114/96 filed before the Civil Court for appointment of Arbitrator u/s 8 of Act, 1996 was dismissed, the revision against the said order filed by respondent No. 1 bearing Civil Revision No. 606/97 was subsequently withdrawn by respondent No. 1.

4. On behalf of the respondent No. 1 counter-affidavit was filed in the writ petition raising question of maintainability of writ petition on the ground that the contentious issues were raised only to delay the arbitration proceeding and such issues are not required to be decided in the writ jurisdiction in view of the judgments of the Apex Court. The notice to appoint arbitrator was given by respondent No. 1 to the owners on 10-8-1996 and the limitation at best would run from the aforesaid date of notice, Annexure-6 to the Request case and as such the question of limitation does not arise. The Act 1996 fully applies in the case in view of Section 85 of the Act which provides that the provisions of the Arbitration Act, 1940 shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act came into force. Section 21 of the Act, 1996 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The letters, Annexure-3 series, do not contain any request for referring a particular dispute to the arbitrator and no request was made by respondent No. 1 to the owners for appointment of Arbitrator prior to notice dated 10-8-1996.

5. A Bench of this Court, nominee of Hon'ble the Chief Justice heard the writ petition and held that writ petition is maintainable. The appellants have not succeeded in showing any legal infirmity in the notice to them in Request case through newspaper publication which was their known address as mentioned in

the agreement. However, dismissed the writ petition saying that other contentious issues are not required to be decided in view of the judgment of the Apex Court. The appellants, if so advised, may raise before the Arbitrator. The judgment in the writ petition has been challenged in this Latters Patent Appeal.

6. Before advertng to the questions raised by the learned counsel for the appellants, it would be pertinent to mention herein that before coming into force of the Arbitration and Conciliation Act, 1996, the Arbitration Act, 1940 was in force, providing domestic arbitration in the matter of dispute. The Arbitration Act, 1940 has been replaced by the Arbitration and Conciliation Act, 1996. The intention of the legislature in framing the Act, 1996 was to provide speedy solution of commercial disputes and to limit the intervention of the Court in arbitral process. It was not an intention of the legislature that each and every order passed by the authority under the Act, 1996 would be subject matter of judicial scrutiny by the Court of law. The aforesaid aspect has been considered by the Apex Court in the case of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., . The Apex Court while considering the aforesaid aspect of the matters has noticed the relevant provisions of the Act, 1996 and held that the Court must not ignore the object and purpose of inactment of the Act, 1996. The Act, 1996 unequivocally indicates the limits of intervention of the Court with arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of the Court of law. Under the new law the grounds on which award of an arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of Arbitrator or of arbitral proceedings. The powers of the arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection, it will not be allowed to do so. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process. The Act provides the Chief Justice of the High Court or nominee of the Chief Justice in cases of domestic arbitration to be the authority to perform the function of the appointment of Arbitrator. When the matter is placed before the Chief Justice or his nominee u/s 11 of the Act, 1996 it is imperative for the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentions issues are left to be raised before the Arbitral Tribunal itself. At that state it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. The appointment of Arbitrator by the Chief Justice or his nominee under Sub-section (6) of Section 11 of the Act, 1996 cannot be held to be judicial function. The

judgment in the aforesaid case was also taken into consideration by a bench of five judges of the Apex Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., and the judgment of the aforesaid case was affirmed.

7. Learned counsel for the appellants, however, contended that the Act, 1996 has no application in the facts and circumstances of the case as the agreement was entered into between the parties on 30-12-1987 when the Arbitration Act, 1940 was in force. The claim of arbitration was barred by limitation after three years as provided under Article 137 of the Limitation Act. The period of limitation would start with effect from 6-4-1992 when respondent No. 1 wrote letter to the appellants. The doctrine of audi alteram partem has been breached as the appellants were residing at Masoorie and no notice on the address at Masoorie was issued, the publication of notice in the newspaper published from Patna, in such a situation, was also improper. The order passed in Request case was hit by doctrine of res judicata as the Misc. Case No. 114/96 filed by respondent No. 1 before the Civil Court was dismissed and Civil Revision No. 606/97 against the said order was also dismissed as infructuous.

8. Learned counsel for respondent No. 1, however, contended that the contentious issues have been raised on behalf of the appellants only with a view to delay the arbitration proceeding. Such issues must not be decided either in the writ petition or in appeal in view of the judgments of the Apex Court as indicated above. The notice was issued to the appellants, respondent Nos. 2 and 3 on the addresses mentioned in the agreement. Subsequently, notice was published in the newspaper on the addresses mentioned in the agreement. There was no intimation with respect to change of address of the appellants. Admittedly respondent No. 3, who is relation of the appellants, was residing at Patna but he also did not choose to appear. The arbitrator issued notice at Masoorie address as respondent No. 3 furnished such address before the Arbitrator. It was wrong to say that Masoorie address was known to respondent No. 1. Moreover, Section 34 of the Act, 1996 deals with application for setting aside arbitral award. Sub-section (2) of Section 34 of the Act, 1996 deals with the grounds for setting aside the award. Sub-section (iii) of Section 34(2) is one of the grounds for setting aside the award which says that an arbitral award may be set aside if the party making the application furnished proof that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. Learned Single Judge held that the appellants have not succeeded in showing any legal infirmity in the notice to them in the Request case through newspaper published at Patna "on their addresses mentioned in the agreement.

9. Learned counsel for respondent No. 1 also contended that the letters of 1992, Annexure-3 series to the writ petition do not contain any request for referring a particular dispute to the arbitrator and no request was made by respondent No. 1. He pointed out that notice to appoint arbitrator was given by respondent No. 1

to the owners on 10-8-1996 and the limitation at best would start running from the date of that notice, Annexure-6 to the Request case. Learned counsel also pointed out Sections 85 and 21 of the Act, 1996 in support of his contention. He also pointed out that the Arbitration Act, 1996 was repealed by the Act, 1996 and the petition for appointment of arbitrator was filed when the Act, 1996 was in force.

10. Learned counsel for respondent No. 1 next contended that Misc. Case No. 114/96 u/s 8 of the Act, 1996 was filed under wrong advice as it would appear from Sub-section (3) of Section 8 which provides that notwithstanding pendency of an application under Sub-section (1), an arbitration may be commenced or continued and an arbitral award made, realising the same and on proper legal advice Request case was filed. He also pointed out that the Misc. Case was not decided on merit rather on procedural defect and as such there is no question of res judicata. The question of resjudicata arises when the issues are decided on merit.

11. It appears from the submissions made on behalf of the parties that appellants have raised contentious issues which are not required to be decided in view of the judgments of the Apex Court in Konkan Railway Corporation Ltd. and others (supra). The learned Judge also followed the decision of the Supreme Court and restrained to give any findings on the contentious issues raised by the teamed counsel for the appellants and allowed the appellants to raise all those issues before the Arbitrator if so advised.

12. Thus on consideration, as discussed above, I do not find any thing wrong in the order under appeal to interfere with. Accordingly, this Letters Patent Appeal is dismissed but without cost.

M.L. Visa, J.

13. I agree.