

(2002) 12 PAT CK 0096
In the Patna High Court
Case No : C.W.J.C. No. 8850 of 2001

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

APPELLANT

Vs

Ashiana Land Developments and Projects Private Limited and
Others

RESPONDENT

Date of Decision : 03-12-2002

Acts Referred:

Citation : (2002) 12 PAT CK 0096

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.—Heard learned Counsel for the Petitioners, learned Counsel for Respondent No. 1 and learned Counsel for Respondent No. 3 at the stage of admission.

2. Petitioners have prayed for issuance of a writ in the nature of certiorari or any other appropriate writ to quash an order dated 1.3.2001 passed by me in Request Case No. 5 of 1998 while acting as a nominee of the Chief Justice in terms of the Appointment of Arbitrators Scheme by the Chief Justice of Patna High Court framed under Sub-section (1) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"). It may be indicated here that the matter has been listed before me pursuant to order dated 26.9.2002 passed in this case by Hon"ble Justice Aftab Alam which is self explanatory. But for that order passed with consent of the contesting parties I would have had reservations in hearing this matter.

3. The relevant facts borne out by the record or admitted by the parties first be noticed in brief. There is a registered development agreement dated 30.12.1987 between the owners of the concerned land consisting of the three Petitioners and their family members Respondent Nos. 2 and 3 on the one side and M/s. Ashiana Land Developments and Projects Private Limited through its Director, Sri Indrajeet Singh, on the other, who is the contesting party, Respondent No. 1. Clause 26 of the said agreement which is Annexure-B to the counter affidavit of

Respondent No. 1 contains arbitration clause providing for decision of any dispute between the owners and developers by arbitration in accordance with relevant provisions of Indian Arbitration Act only at Patna. Request Case No. 5 of 1998 was filed on 22.4.1998 by Respondent No. 1 invoking the power of Hon"ble the Chief Justice of this Court under Sub-section (6) of Section 11 of the 1996 Act. All the five owners were made opposite parties to the said application showing them to be residents of an address in the town of Patna as given in the development agreement. On 5.11.1999 notices were ordered to be issued on the opposite parties both by ordinary process as well as by registered post with A/d. On 7.12.2000 notices were ordered to be issued upon the opposite parties by publication in a prominent English daily newspaper from Patna at the cost of the applicant. After publication of notice in the Hindustan Times on 27.12.2000, the request case was heard on 1.3.2001 leading to the impugned order contained in Annexure-1 and on 15.3.2001 the name of Mr. Justice Uday Sinha, a retired Judge of this Court living at Patna, was finalised as the arbitrator who was requested to proceed with the arbitration after he had given his consent. Nobody appeared on behalf of opposite parties either on 1.3.2001 or on 16.3.2001.

4. A preliminary objection was raised on behalf of Respondent No. 1 regarding maintainability of the writ petition and by referring to some judgments it was submitted that judicial interference under writ jurisdiction was made in all those cases only when the nominee of the Chief Justice had declined to appoint an arbitrator but in none of the reported cases any interference was made with the order allowing the request for appointment of an arbitrator. To support this contention strongest reliance was placed upon judgment of the Supreme Court in the case of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., Paragraph 4 of the said judgment, no doubt, highlights various provisions of the 1996 Act to emphasise that all contentious issues should be avoided at the stage of appointment of arbitrator on request because the arbitrator has been vested with the power to decide contentious issues with regard to qualification, independence and impartiality of the arbitrator as well as in respect of its jurisdiction. However, the said judgment ultimately decided only the issue whether an order refusing to appoint an arbitrator will be amenable to jurisdiction of the Supreme Court under Article 136 of the Constitution or not. It was held that such order would not be amenable to jurisdiction under Article 136 but since the order would be administrative in nature, it could be challenged by making a prayer for mandamus. The said judgment was affirmed by a judgment of five Judges Bench in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., In this judgment it was held that the order of the Chief Justice or his designate u/s 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a Tribunal. Such an order cannot properly be made the subject of a petition under Article 136 of the Constitution of India. In this judgment also there is nothing to treat it as an, authority that no writ petition is maintainable against an order u/s 11 of the 1996 Act by which request for appointment of arbitrator has been allowed. No

doubt, the said judgments give sufficient guidelines and indications that in most of the contentious matters including issues relating to jurisdiction and on any objections with respect to existence or validity of the arbitration agreement, the Arbitral Tribunal has the authority to decide and such contentious issues should not be decided at the stage of Section 11. But such guidelines and indications are of use in deciding the writ petitions on merits. This cannot be stretched to hold, that in no case a writ petition is maintainable once a request for appointment of arbitrator has been allowed. There can be many unforeseen situations requiring exercise of writ jurisdiction even in such cases for example it may be apparent on the face of the record or admitted that the dispute itself has already been decided by a competent authority under law. Thus, this Court does not find merit in the preliminary objection raised on behalf of Respondent No. 1.

5. Coming to the merits of the writ petition it is noticed that the contentions raised on behalf of the Petitioners are- (i) the prayer made in the request case should not have been allowed because the 1996 Act cannot apply as the agreement was made when the Arbitration Act, 1940 was effective and arbitration clause refers to the said Act; (ii) the cause of action for the request case was barred by limitation of three years provided by Article 137 of the Limitation Act and the said period should be treated to have started running when Respondent No. 1 wrote a letter dated 6.4.1992 contained in Annexure 3 and (iii) principle of audi alteram partem has been violated because allegedly Petitioners were residing at Masoorie and could not know of the newspaper publication at Patna and also because notice by newspaper publication was improper. In the alternative it was submitted that in case none of the aforesaid grounds found favour then also in the interest of justice the impugned order be quashed to give to the Petitioners a chance to suggest another arbitrator for themselves.

6. On behalf of the Respondent No. 1 a counter affidavit has been filed and all the aforesaid Contentions have been strongly refuted. The main contention advanced on behalf of Respondent No. 1 is that contentious issues have been raised only to delay the arbitration proceeding and such issues should not be decided in this writ proceeding in view of several judgments of the Apex Court including those already noticed which emphasise that contentious issues should not be decided for turning down a request for appointment of arbitrator u/s 11 of the 1996 Act. It has also been highlighted that notice to appoint arbitrator was given by Respondent No. 1 to the owners on 10.8.1996 and limitation at best would start running from the date of that notice which was Annexure-6 to the request case, and hence, there is no merit in the issue of limitation raised by the Petitioners. It was further submitted that u/s 85 of the 1996 Act it is clearly provided that this Act shall apply in relation to arbitral proceedings which commenced on or after this Act came into force and as per Section 21 of the 1996 Act the arbitral proceeding in respect of a particular dispute would commence on the date when a request for referring that dispute for arbitration is received by the Respondent. It was further submitted that the letters contained

in Annexure-3 series do not contain any request for referring a particular dispute to arbitrator and no request was made by the Respondent No. 1 to the owners for appointment of an arbitrator prior to notice dated 10.8.1996. Hence, it has been submitted that request case was rightly filed under the 1996 Act because the Arbitration and Conciliation Ordinance had already come into force prior to that.

7. On the issue of defect in the notice by newspaper publication it was submitted on behalf of the Respondent No. 1 that address of the Petitioners was same as given by them in the development agreement and the same address had been given in a Miscellaneous case No. 114 of 1996 which was filed before the civil court for initiating arbitral proceeding in exercise of power u/s 8 of the 1996 Act. The Petitioners appeared in that case on receipt of notices and contested the said prayer. The civil court found prayer for initiating arbitration proceeding u/s 8 to be unacceptable and against that order Respondent No. 1 preferred Civil Revision No. 606 of 1997 before this Court. In that Civil Revision application as the records show notices were accepted to have been validly served only on newspaper publication in a Patna daily newspaper Aryavarta. Although nobody appeared in that case on behalf of the Petitioners but the said revision application was dismissed as in fructuous on 23.4.1999 by recording that the revision petition had become in fructuous as already a request petition had been filed before Hon"ble the Chief Justice for appointment of an arbitrator. It was further submitted that even according to Petitioners the son of Petitioner No. 1, Respondent No. 3 in this case lives at Patna but he also did not chose to appear. It has further been explained that the arbitrator chose to send notice to Petitioners at a Massorie address because such address was supplied by Respondent No. 3 after he appeared before the arbitrator and it has wrongly been submitted on behalf of the Petitioners that Massorie address was known to Respondent No. 1 but it was deliberately suppressed.

8. On behalf of Respondent No. 3 all the arguments advanced on behalf of the Petitioners were adopted and it was further submitted that once Respondent No. 1 elected to file an application for arbitration before the civil court u/s 8 of the 1996 Act, it must be held that he exercised to eject between two alternative remedies available u/s 8 and Section 11 of the 1996 Act and since the civil court rejected his prayer u/s 8, he could not have maintained an application before the Chief Justice u/s 11 of the 1996 Act. To this, learned Counsel for the Respondent No. 1 has replied by submitting that proceeding in the miscellaneous case u/s 8 was misconceived and on realising the same on proper legal advice, the revision application was not pressed and the fact was disclosed in the application filed by Respondent No. 1 u/s 11 of the 1996 Act. It has further been submitted that the principle of choosing between two alternative remedies is not applicable in this case because the provision of Section 8 and Section 11 are not alternative to each other, which would also be clear 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.

9. Having considered the entire submissions and on going through all the relevant materials including the records of Request Case No. 5 of 1998 and of Civil Revision No. 606 of 1997, this Court finds no merit in this application. The Petitioners have not succeeded in showing any legal infirmity in the notice to them in the request case through newspaper publication at Patna which was their known address. The other contentious issues also are not found fit to be decided at the stage of Section 11 of the 1996 Act which is found to be prima facie applicable in this case. All the contentious issues as per judgment of five Judges Bench in the case of Konkan Railway Corporation Limited v. Rani Construction Private Limited (supra) may be, if so advised, raised before the arbitrator. The alternative submission advanced on behalf of the Petitioners is also misconceived and cannot be accepted as that will also require quashing of orders passed in the request case for which this Court finds no good ground. This Court is constrained to observe on the basis of all the materials that the writ petition appears to be lacking in bonafide and appears to have been filed with a view to delay the arbitral proceedings. It is made clear that one of the main grounds mentioned in this writ petition for challenging the order and which has also been recorded in order dated 26.9.2002 the plea that the applicant in the request case was not competent to represent the company as its director, was not at all raised before this Court in course of arguments.

10. For all the aforesaid reasons, the writ petition is dismissed.