Nageshwar Singh Swaraj And Ors Vs M/S Rukmani Buildtech Private Limited And Ors

Court: Patna High Court

Date of Decision: July 3, 2020

Acts Referred: Arbitration And Conciliation Act 1996 â€" Section 8, 11, 11(6), 16, 16(5), 20, 23, 23(2A) Limitation Act 1963 â€" Section 14

Hon'ble Judges: Sanjay Karol, CJ

Bench: Single Bench

Advocate: Saurabh Biswambhar, Niranjan Kumar, Sandeep Kumar, Ranjeet Kumar

Final Decision: Disposed Of

Judgement

1. In terms of the present Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, petitioners seek referral of disputes to an

arbitrator in terms of Clause 20 contained in the development agreement dated 26.7.2012.

2. The execution of the agreement inter se the parties, containing the arbitral clause is not in dispute. For ready reference, its translated version of

Clause 20 read under:

Ã¢â‚¬Å“That any dispute would be dealt by independent arbitrator under Arbitration and Conciliation Act, 1940 and Arbitration and Conciliation Act 1996

and the disputes would be resolved in the jurisdiction of Patna.Ã¢â‚¬â€‹

3. There are disputes, inter se the parties concerning the said agreement is evident from previous litigations.

4. The respondent, No.1 builder filed Cr.W.J.C. No. 1576 of 2018 titled as M/s Rukmani Buildtech Pvt. Limited, through its Managing Director, Sri

Ajeet Azad against the instant petitioners, which is yet pending before this Court, wherein he prayed for providing police assistance in the execution of

the work, the subject matter of agreement.

5. Petitioner No.1 filed a Complaint before the Real Estate Regulatory Authority, Patna constituted under the Real Estate (Regulation and

Development) Act, 2016 (hereinafter to be referred to as RERA), numbered Case No. Nil of 2019 titled as Sri Nageshwar Singh Swaraj vs. M/S

Rukmani Buildtech Pvt. Ltd. through its Managing Director Sri Ajit Azad & others.

6. Before the institution of the present Petition, petitioners sent a legal notice dated 16.7.2019 invoking the arbitration clause.

7. The first issue arising consideration, as argued by the Respondents, is the adjudicatibilty of the claims by the Arbitrator or only by a civil court. The

answer is simple. Parties intended to resolve disputes through the mechanism of Arbitration confining the jurisdiction at Patna. There is no other way

the said clause can be construed or read.

8. Significantly, despite the petitioners having adopted an obstructionist approach, respondent never invoked the jurisdiction of a civil court.

9. In opposition to the Petition, it stands alleged that solely on account of petitionersÃ¢â‚¬â„¢ illegal acts, respondents suffered huge monitory losses.

10. Dispute sought to be referred arise out of and not outside the agreement. Therefore, in the Court's consideration, under Section 23 (2-A) of the

Act, the respondent can also have his counterclaim adjudicated along with the petitioners' claim. To this effect, the decision of the Apex Court in State

of Goa v. Praveen Enterprises (2012) 12 SCC 581 is clear. Relevant portion thereof reads as under: -

Ã¢â‚¬Å“22. Section 23 relating to filing of statements of claim and defence reads thus:

23. Statements of claim and defence.- (1) Within the period of time agreed upon by the parties or determined by the Arbitral Tribunal, the claimant

shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of

these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other

evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings,

unless the Arbitral Tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(emphasis supplied)

24. In contrast, Section 20 of the old Act which provided for applications to file the arbitration agreement in Court, reads as under:

20. Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any

suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or

any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the

agreement be filed in Court. (2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties

interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by

all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring

them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the Arbitrator

appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by

the Court.

(5) Thereafter the Arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made

applicable."" (emphasis supplied)

11. The next issue which arises for consideration is whether the Petition is barred by limitation. Having given thoughtful consideration, in the attending

facts and applying the principles laid down by the Hon'ble Apex Court, it cannot so. Concerning the agreement dated 26.07.2012, disputes arose

between the parties. Amicable resolution is a farfetched solution. Parties are at loggerheads, having lost faith in each other. Litigation inter se is

pending adjudication. Notice dated 16.07.2019 seeking reference of disputes in terms of the agreement stands issued. Soon after that, the instant

Petition stands filed on 22.08.2019. Whether the cause of action for grant of relief, be it by way of claim or counterclaim is continuous or not is for the

Arbitrator to adjudge. Insofar as the instant application, certainly, the claim is not long dead, stale or not live.

12. The Constitution Bench (five Judges) of the HonÃ¢â‚¬â„¢ble Supreme Court in SBP & Co.- Vrs. Patel Engineering Ltd. (2005) 8 SCC 618 while

elaborately dealing with the scope of Sections 8 and 11 of the Arbitration Act categorically observed that: -

Ã¢â‚¬Å“39. Ã¢â‚¬Â¦Ã¢â‚¬Â¦.. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long- barred claim that was

sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by

receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the

purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral Tribunal on taking evidence, along with the

merits of the claims involved in the Arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an

arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of

affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this

procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of Arbitration, without

too many approaches to the Court at various stages of the proceedings before the Arbitral TribunalÃ¢â‚¬Â¦

... 47. We, therefore, sum up our conclusions as follows:

The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative

power. It is a judicial power.Ã¢â‚¬â€‹

(Emphasis supplied)

13. In any case, controversy on the point of limitation now stands put to rest in a recent decision of the HonÃ¢â‚¬â„¢ble Court in Uttarakhand Purv Sainik

Kalyan Nigam Limited vs. Northern Coal Field Limited (2020) 2 SCC 455. On facts, for agreement dated 21.12.2010, one of the parties alleging non-

payment, issued a legal notice dated 29.5.2013 and on 9.3.21016 invoked the arbitration clause seeking adjudication of disputes through Arbitration.

About the same, a reminder sent on 30.5.2016. Failure of action prompted the party to approach the Court by filing a petition under Section 11 of the

Arbitration Act on 20.09.2016. While rejecting the specific objection of limitation in the appointment of the Arbitrator, by taking note of Section 16 of

the Arbitration Act, the Court observed that:

In the present Case, the issue of limitation was raised by the RespondentÃ¢â‚¬"Company to oppose the appointment of the Arbitrator under Section 11

before the High Court. Limitation is a mixed question of fact and law. In ITW Signode (India) Ltd. v. CCE (2004) 3 SCC 48 a three-Judge Bench of

this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue.

Such a jurisdictional issue is to be determined having regard to the facts and the law. Reliance is also placed on the judgment of this Court in NTPC

Ltd. v. Siemens Atkeingesellschaft (2007) 4 SCC 451, wherein it was held that the arbitral Tribunal would deal with limitation under Section 16 of the

1996 Act. If the Tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the

merits of the claim. Under sub-section (5) of Section 16, the Tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral

proceedings would continue, and the Tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may

challenge the award under Section 34. In IFFCO Ltd. v. Bhadra Products (2018) 2 SCC 534 this Court held that the issue of limitation being a

jurisdictional issue, the same has to be decided by the Tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which

enshrines the Kompetenz principle.Ã¢â‚¬â€‹

14. To Similar effect are earlier decisions rendered in National Insurance Co. Ltd. Vrs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267, in State of

Orissa and Another Versus Damodar Das (1996) 2 SCC 216, in Union of India Versus Momin Construction Company (1997) 9 SCC 97, in Union of

India Versus Popular Construction Co. (2001) 8 SCC 470, in Panchu Gopal Bose Vrs. Board of Trustees for Port of Calcutta (1993) 4 SCC 338 by

the HonÃ¢â‚¬â„¢ble Apex Court.

15. Also, in considering the issue of limitation, the HonÃ¢â‚¬â„¢ble Apex Court in State of Goa Vrs. Western Builders (2006) 6 SCC 239 categorically held

Section 14 of the Limitation Act applicable to the Arbitration Act. To similar effect is the decision rendered in Indian Farmers Fertilizer Cooperative

Limited Vrs. Bhadra Products (2018) 2 SCC 534.

16. It is argued that considering the pendency of Criminal Writ Petition, the Court should refrain from exercising this statutory power. There is no bar

under the Act, preventing this Court to exercise such power. The judicial precedents are to the contrary. As such, in law or equity, the Court finds no

reason sufficient enough not to appoint the Arbitrator.

17. Beneficially, the Court takes note of the judicial precedents on the issue.

18. The Apex Court reported in A. Ayyasamy V. A. Paramasivam and Ors. (2016) 10 SCC 386 distinguished a serious allegation of

forgery/fabrication in support of the plea of fraud as opposed to an unadorned accusation of criminal act. The twin test laid down to read as follows: -

Ã¢â‚¬Å“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of

arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very

serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely

essential that such complex issues can be decided only by the civil Court on the appreciation of the voluminous evidence that needs to be produced,

the Court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in

those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against

the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those

cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration

clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se

and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to Arbitration. While dealing

with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court

has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory

Scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects

are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of

adjudication and settlement by Arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of

Arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz.

whether the nature of dispute is such that it cannot be referred to Arbitration, even if there is an arbitration agreement between the parties. When the

Case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous

inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it

would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to Arbitration, then alone such an application

under Section 8 should be rejected.

(Emphasis supplied)

19. Earlier also a similar view in the context of the Arbitration Act was taken by the HonÃ¢â‚¬â„¢ble Apex Court in Swiss Timing Limited Versus

Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677.

20. In the instant Request case, there is no allegation that the documents were forged or fabricated. The assertion being the petitioners adopting an

obstructionist approach, which this Court need not deliberate upon, save and except take note of the response filed by the authorities denying such

fact. It is not a severe allegation of forgery/fabrication in support of the plea of fraud as opposed to the unadorned accusation. In a similar

circumstance, where parties alleged fraud, the Hon'ble Apex Court in Rashid Raza versus Sadaf Akhtar (2019) 8 SCC 710 referred the disputes to be

adjudicated by an Arbitral Tribunal.

21. Hence, such contention stands rejected.

22. What further requires consideration is the factum of petitioner no.1 applying the authority constituted under the Real Estate (Regulation and

Development) Act, 2016. Is it a valid ground or reasons sufficient enough to reject the instant application?

23. The object and purpose of both the statutes are distinct and different, and there is nothing inconsistent or derogation therein. The Arbitration Act

was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral

awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Whereas the RERA Act was

enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment

or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real

estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from

the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or

incidental thereto.

24. Section 88 thereof provides the provisions of this Act explicitly to be in addition to and not in derogation of the provisions of any other law, with the

only limitation contained in Section 89 making it prevail over in any other consistent law. Reading of both the statutes do not make the Arbitration Act

to be inconsistent with the provisions of the RERA Act, more so when respondent no.1 himself disputes its applicability for want of the jurisdictional

issue.

25. In Management Committee of Montfort Senior Secondary School Vs. Vijay Kumar and Others (2005) 7 SCC 472, the HonÃ¢â‚¬â„¢ble Apex Court

dealt with the ambit and scope of the Delhi School Education Act, 1973 vis-Ãƒ -vis the provisions of the Arbitration and Conciliation Act, 1996. The

issue arose as to whether the Tribunal for the Arbitration Act can be said to be a judicial authority or not. Clarifying it not to be, the Court reiterated

that the plaintiff is dominus litis having dominion over his Case. He is the person who has carriage and control of the action. In Case of conflict of

jurisdiction, the choice ought to lie with him to choose the forum best suited unless there be the rule of law excluding access to a forum of his choice;

permitting recourse to a forum is opposed to public policy; or would be an abuse of process of law. The Court reiterated its earlier principle laid down

in Bank of India Vr. Lekhi Moni Das & Ors. (2000) 3 SCC 640 that as a general principle where two remedies are available under law, one of them

not to be taken as operating in derogation of the other.

26. In M.D. Frozen Foods Exports Private Limited and Others Vrs. Hero Fincorp Limited (2017)16 SCC 741 the HonÃ¢â‚¬â„¢ble Apex Court held that

proceedings both under the Arbitration Act and the SARFAESI Act could continue simultaneously.

27. For the aforesaid reason , it cannot be said that petitioners' right is foreclosed in light of RERA Act; they had an equally, alternative and

efficacious remedy of adjudication under the said Act; They waived of their right to invoke clause 20 for resolution of disputes through Arbitration; or

that they elected not to enforce their statutory rights under the Arbitration Act.

28. To contend that there is no determination and obligation to go in for arbitration given the principles enunciated in Jagdish Chander vs Ramesh

Chander & others (2007) 5 SCC 719, (paragraph 8) is not correct. To the contrary, it stands clarified that a clause and contract can be construed as

an ""arbitration agreement"" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clauses. The

Court culled out four principles which are as under:

Ã¢â‚¬Å“(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the

agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a

willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration

agreement, the words used should disclose a determination and obligation to go to Arbitration and not merely contemplate the possibility of going for

Arbitration. Where there is merely a possibility of the parties agreeing to Arbitration in future, as contrasted from an obligation to refer disputes to

Arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words Ã¢â‚¬Å“arbitrationÃ¢â‚¬ and Ã¢â‚¬Å“arbitral tribunal (or arbitrator)Ã¢â‚¬ are not used with reference to the process of settlement or with

reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the

clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing.

(b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal

should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their Case before it. (d)

The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration

agreement. Where there is a specific and direct expression of intent to have the disputes settled by Arbitration, it is not necessary to set out the

attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words

which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not

be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or

requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the

parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an

arbitration agreement.

(iv) But mere use of the word Ã¢â‚¬Å“arbitrationÃ¢â‚¬ or Ã¢â‚¬Å“arbitratorÃ¢â‚¬ in a clause will not make it an arbitration agreement, if it requires or contemplates

a further or fresh consent of the parties for reference to Arbitration. For example, use of words such as ""parties can, if they so desire, refer their

disputes to arbitration"" or ""in the event of any dispute, the parties may also agree to refer the same to arbitration"" or ""if any disputes arise between the

parties, they should consider settlement by arbitration"" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an

arbitration agreement. Similarly, a clause which states that ""if the parties so decide, the disputes shall be referred to arbitration"" or ""any disputes

between parties, if they so agree, shall be referred to arbitration"" is not an arbitration agreement. Such clauses merely indicate a desire or hope to

have the disputes settled by Arbitration, or a tentative arrangement to explore Arbitration as a mode of settlement if and when a dispute arises. Such

clauses require the parties to arrive at a further agreement to go to Arbitration, as and when the disputes arise. Any agreement or clause in an

agreement requiring or contemplating a further consent or consensus before a reference to Arbitration, is not an arbitration agreement, but an

agreement to enter into an arbitration agreement in future.

29. RespondentsÃ¢â‚¬â„¢ reliance on the precedent settled in Satluj Jal Vidyut Nigam Versus Raj Kumar Rajinder Singh (Dead) Through Legal

Representatives and others (2019) 14 SCC 449 is misplaced. Here, there is no fraud; abuse of process of law; nor any reopening, agitating or

relitigating of prior adjudicated issue.

30. Can it be said that the present Petition stands filed with the object of defeating the action initiated under the Recovery Act or with the objective of

delaying such proceedings? Well this Court, without any basis, cannot fathom such a situation. More so in the light of the absence of any specific

particulars thereof. How the present proceedings are an abuse of the process of law remains unexplained.

31. The principles culled out in SBP & Co (supra) and National Insurance Co. Ltd (supra) stood reiterated by the HonÃ¢â‚¬â„¢ble Apex Court in Booz

Allen & Hamilton Inc. Vrs. SBI Home Finance Ltd. (2011) 5 SCC 532, wherein also parameters of referring the disputes, to the arbitral Tribunal

were categorized. One of the two issues was as to whether a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by

a public forum, and not by an Arbitral Tribunal in terms of the agreement executed between the parties or not. In the given facts, the Court held that

such suit necessarily to be tried by the civil Court to more efficacious and conclusive than the Arbitral Tribunal. However, it stood clarified that

generally and traditionally all disputes relating to rights in personam are amenable to arbitration.

32. The validity of the arbitration agreement; the existence of the dispute; continuous litigation from the year 2015 onwards; and there being no

possibility of amicable resolution of the disputes, this Court, having given its thoughtful considerations deem it appropriate, just and fair to appoint

arbitrator in this matter.

33. Accordingly, HonÃ¢â‚¬â„¢ble Mr. Justice V. N. Sinha, a retired Judge of the High Court of the Judicature at Patna, is appointed as an Arbitrator to

adjudicate the dispute inter se the parties.

34. All disputes arising out of Agreement dated 26.07.2012 entered between the parties is referred to the learned Arbitrator for arbitration.

35. On the name of the learned Arbitrator, there can be no objection by either of the learned counsel for the parties.

36. Parties undertake to appear before the learned Arbitrator within one week through the mode of Video Conferencing and as permissible with the

lockdown period of current Pandemic Covid-19. Parties also undertake to fully cooperate and agree to request the learned Arbitrator to complete the

proceedings at the earliest, which request, this Court, trust would be favourably considered.

37. Learned Arbitrator shall be entitled to fees as per the Fourth Schedule of the Arbitration Act.

38. Learned Registrar General shall ensure that a copy of this order is made available to the learned Arbitrator positively through an electronic mode

on or before 8th of July, 2020.

39. Parties shall file their statement of claims before the learned Arbitrator on such date of hearing, which he may fix, as per mutual convenience.

40. In fact, even during the lockdown period, subject to the convenience, arbitral proceeding can commence and conclude through the use of video

conferencing/other electronic mode.

41. Learned counsel for the parties also undertake to apprise the learned Arbitrator of the passing of the order. This, they shall positively do so within

next two working days.

42. The learned Arbitrator shall hold the proceedings in the State of Bihar.

43. The Request Petition stands disposed of in the above terms.

44. No order as to costs.