Patitapaban Mohapatra Vs. S.E. Eastern Circle and ors.

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Court : Orissa

Decided On : Jan-17-2008

Reported in : AIR2008Ori80; 2008(3)ARBLR136(Orissa); 105(2008)CLT636

Judge : A.K. Ganguly, C.J. and; I. Mahanty, J.

Appellant : Patitapaban Mohapatra

Respondent : S.E. Eastern Circle and ors.

Judgement :

A.K. Ganguly, C.J.

1. In all these cases, applications under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act') have been filed for appointment of Arbitrator. All these cases were heard together as it was contended by the Learned Counsel for the Opposite Parties that there is no Arbitration Clause whereas Learned Counsel for the Petitioners contended that there is an Arbitration Clause.

2. This batch of applications under Section 11 were taken up by the Bench of Chief Justice, but the Learned Counsel for the Opposite Parties in support of his contention placed reliance on a Judgment of this Court rendered in the case of Smt. Banalata Sahoo v. State of Orissa and Ors. reported in 92 (2001) C.L.T. 136 and contended that in the said Judgment Clause 11 of F2 Agreement, which is claimed to be the arbitration clause in these petitions, was interpreted in Banalata

Sahoo and it was held that the same is not an Arbitration Clause.

3. In view of the aforesaid Single Bench Judgment of this Court, the Bench of the Chief Justice wanted that the matter should be considered by a Division Bench since there are some Judgments taking a different view. Thereafter, these matters were placed before the Division Bench and all the matters were heard together. Even though these matters were heard together in the aforesaid group of cases, the Clause, which is claimed to be the Arbitration Clause, has not been worded similarly in all the cases.

4. Basically the Clause, which is claimed to be an Arbitration Clause by the Petitioners in this batch of cases, is of two categories. In ARBP Nos. 14, 15, 16 and 17 of 2003 the Arbitration Clause is the same, which is as follows:.Provided always that if the contractor shall commence work or incur any expenditure in regard thereof before the rates shall have been determined as lastly hereinbefore mentioned, in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rates as aforesaid according to such rate or the decision of the Superintending Engineer of the Circle will be final.

But in ARBP Nos. 41 and 47 of 2003, ARBP Nos. 22 and 49 of 2004, ARBP Nos. 2 and 36 of 2005, ARBP No. 30 of 2006 and ARBP Nos. 11, 12, 15, 31 & 32 of 2007 there is some difference in the concluding part of the Arbitration Clause, which is as follows:.Provided always that if the contractor shall commence work or incur any expenditure in regard thereof before the rates shall have been determined as lastly hereinbefore mentioned, in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rates as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the Circle/Range will be final.

5. The Clause, which came up for consideration in Banalata Sahoo's case, was also similarly worded like the Clause which occurs in ARBP Nos. 41 and 47 of 2003, ARBP Nos. 22 and 49 of 2004, ARBP Nos. 2 and 36 of 2005, ARBP No. 30 of 2006 and ARBP Nos. 11, 12, 15, 31 & 32 of 2007. The Learned Judge held that

the aforesaid Clause is not an Arbitration Clause. In support of his finding the Learned Judge gave his reasons in paragraph-6 of the Judgment. Going through paragraph-6, this Court finds that the Learned Judge held that the aforesaid Clause is not an Arbitration Clause in view of the fact that Clause-23 of the agreement which was an Arbitration Clause has been specifically deleted. Therefore, the Learned Judge held that by deletion of Clause-23 the intention of the parties is clear that there can be no Arbitration. But unfortunately the question whether Clause-II which has been set out above is an Arbitration Clause or not has not been decided. The Learned Judge while giving his reasoning in Banalata Sahoo appears to have proceeded on the line that since Clause-23 has been deleted, intention behind the said deletion per se demonstrates that Clause-II does not contain any Arbitration Clause. The other reasoning of the Learned Judge is that the entire agreement has to be read together for the purpose of finding out whether Arbitration Clause is incorporated. Therefore, the Learned Judge held that on a comprehensive reading of the agreement the deletion of Clause-23 automatically shows that Clause-II does not contain an Arbitration Clause.

6. In paragraph-7 of the Judgment the Learned Judge, relying on a Judgment of the Supreme Court in the case of Wellington Associates Ltd. v. Kirit Mehta reported in : AIR 2000 SC1379 held that despite the provision of Section 16 of the said Act, if the Chief Justice or his designate is asked to appoint an Arbitrator under Section 11 of the said Act and if in that proceeding a question arises whether or not there is any Arbitration Clause in the agreement between the parties, the Chief Justice or his designate should decide that question. The Learned Judge held that such exercise has to be made by the Chief Justice or his designate even if it is held that the power of the Chief Justice or his designate under Section 11 of the said Act is an administrative power.

7. Now of course the nature of power, of the Chief Justice or his designate under Section 11 of the said Act has been construed to be a judicial power by the Constitution Bench of the Supreme Court in Patel Engineering case reported in (2005) 8 SCC 618. Therefore, it can no longer be disputed that if a question is raised about existence of Arbitration Clause at the stage of Section 11, the Chief Justice or his designate has to decide whether an Arbitration Clause actually

exists in the agreement between the parties. This Division Bench is in agreement with the conclusion recorded in paragraph-7 in Banalata.

8. But the basic question is whether the reasoning in paragraph-6 of the said Judgment is correct or not.

9. This Division Bench, with respect to the Learned Judge deciding the case in Banalata Sahoo, is constrained to hold that it cannot accept the reasoning of the Learned Judge given in paragraph-6. It appears that Learned Judge while giving his reasoning in paragraph-6 has not considered Section-7 of the said Act. Nor has it considered in detail the ratio of the various Judgments cited before him which have been noted in paragraph-5 in Banalata.

10. Section 2(b) of the said Act provides that 'Arbitration Agreement' means an agreement referred to in Section 7.

Section 7 of the said Act runs as under:

7.(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

11. If we look at the aforesaid definition of 'Arbitration Agreement' under the said Act it will be clear that the definition has been deliberately given in wide terms.

12. On a perusal of the aforesaid Section, it is clear that an Arbitration agreement must be in writing but no special form of such agreement has been prescribed. Sufficient flexibility has been kept in the legislation in this regard. An arbitration agreement can be in one document or it can be gathered from several documents. It can also be gathered from the correspondence consisting of a number of letters, fax messages, telegrams or even telex messages. Under sub-Section (4) of Section 7 it is provided that an arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties; or

(b) in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

13. Sub-Section (5) of Section 7 further provides that the reference in a contract to a document containing an Arbitration Clause also constitutes an arbitration agreement provided the contract is in writing and the reference is such as to make that arbitration Clause part of the contract.

14. Unfortunately the width of the statutory definition of arbitration agreement has not been considered in its proper perspective by the Learned Judge while delivering the Judgment in Banalata.

15. As early as 1947 in the case of Governor-General in Council v. Simla Banking and Industrial Co. Ltd. reported in AIR 1947 Lahore 215 the correct approach on the interpretation of the arbitration Clause was indicated. In paragraph-4 at page

216 Justice Abdur Rahman speaking for the Division Bench held that even though words 'arbitration', 'arbitrator' or 'arbitration agreement' do not appear in the Clause but that, in the opinion of the Learned Judge, was immaterial as long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection and whose decision was to be final, conclusive and binding on the parties. Therefore, the construction of an arbitration clause even under the 1940 Act was very wide much before any statutory recognition of the same under the new Act of 1996.

16. Reference in this connection may also be made to the subsequent Full Bench Judgment of Punjab High Court in the case of M/s. Ram Lal Jagan Nath v. Punjab State through Collector, Hissar and Anr. reported in . Justice Dua speaking for the Full Bench referred to the above decision of the Lahore High Court with approval in paragraph-5 at page 440 of the report. Learned Judge summarized the principle as follows:

An agreement to arbitrate, apart from what the Arbitration Act (X of 1940) prescribes, is not required to be stated in any particular form or wording and the use of technical or formal words is not required. A valid arbitration agreement may be contained in a clause quite collateral to the main purpose of an agreement. Such an agreement may even arise by incorporation of one document containing an arbitration clause in another under which the dispute arises. The essential requirement is that the parties should intend to make a reference or submission to arbitration and should be ad idem in this respect.

Indeed, it seems indisputable that mere use of the terms 'arbitrator' or 'arbitration' in an agreement does not necessarily make it an agreement of arbitration; and similarly, mere absence of the use of the terms like 'arbitrator' or 'arbitration' cannot in law necessarily have the effect of taking an agreement out of the category of arbitration agreement, if otherwise the intention of the parties to agree to arbitrate is clear. No particular form appears to me to have been laid down as universal for framing an arbitration agreement; the only certain thing being that the words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility. It is in this connection

worth remembering that there is nothing peculiar or extraordinary about arbitration agreements and the same rules of construction and interpretation apply to such agreements as apply to agreements generally....

17. Reference in this connection be made to the Judgment of the Supreme Court in the case of Smt. Rukmanibai Gupta v. The Collector, Jabalpur and Ors. reported in : AIR 1981 SC479 , wherein Justice Desai speaking for the Bench laid down virtually similar principles. His Lordship held what is required to be ascertained in an arbitration agreement is whether the parties have agreed that in the event of disputes between them in respect of the subject matter of contract those shall be referred to arbitration and the decision taken by the body to whom it is referred to is final. Going by the aforesaid principle, the Learned Judges in Smt. Rukmanibai Gupta held that reference to the Governor about the mining disputes in the facts of that case was a reference to arbitration and not a reference to departmental appeal. Relying on the said Judgment in Smt. Rukmanibai, Justice R.N. Misra, Chief Justice of Orissa High Court (as His Lordship then was) also laid down, in the case of M/s. Praharaj Partners v. State of Orissa and Anr. reported in : AIR1981 Ori104 , similar tests for deciding whether a Clause is an arbitration Clause or not. In coming to the said finding the Learned Chief Justice held that where a contract contemplates parties, disputes and a reference of a dispute of parties and where the parties agreed that the said decision of the authority to whom dispute is referred is final, the same are essential ingredients in an arbitration clause.

18. Similar principles have been laid down by another Learned Judge of this Court in the case of Vice Chairman, Bhubaneswar Development Authority and Anr. v. Pyari Mohan Mohanty and Anr. reported in 63 (1987) C.L.T. 402. The Learned Judge of this Court held that the essentials of an arbitration agreement are:-(1) there should be an agreement, (2) the agreement must be in writing and, (3) that the agreement should be, to refer either a present or future dispute for arbitration. In fact the Learned Judge has considered virtually a similar Clause which is same as the Clause marked 'B' which has been set out above, namely, the Clause in ARBP Nos. 41 and 47 of 2003, ARBP Nos. 22 and 49 of 2004, ARBP Nos.2 and 36 of 2005, ARBP No. 30 of 2006 and ARBP Nos. 11, 12, 15, 31 & 32 of 2007,

and construed the same to be an arbitration clause. Unfortunately in Banalata, the Learned Judge failed to note the earlier Judgment in the case of Vice Chairman, Bhubaneswar Development Authority and came to an erroneous decision.

19. In a subsequent decision of this Court in the case of The Managing Director, Orissa State Cashewnut Development Co. Ltd v. Ramesh Chandra Swain and Ors. reported in 1991 (II) OLR 218, Hon'ble Justice A. Pasayat (as His Lordship then was) held that arbitration agreement means a written agreement. His Lordship also relied on the decision of the Supreme Court in the case of Smt. Rukmanibai Gupta v. Collector and the decision of this High Court in the case of M/s. Praharaj Partners (supra) and held that in order to ascertain whether a clause is an arbitration clause or not it has to be seen whether the relevant clause contemplates of parties, disputes and finality. There is no requirement of the words 'arbitrator' or 'arbitration' (see paragraph-6 of the report) being mentioned in that clause.

20. A Division Bench of the Calcutta High Court has also taken a similar view in the case of State of West Bengal and Ors. v. Haripada Santra reported in : AIR1990 Cal83 . In paragraph 6 of the said Judgment the Learned Judges came to the conclusion that in the award it is not necessary to be mentioned as arbitration award. Since some disputes are referred to the Superintending Engineer, who has to decide the matter on a reference, he has to act judicially and there is an arbitration clause. The said Clause 13 which is quoted in paragraph 1 of the Judgment is almost similar to the Clause marked 'B'. The Learned Judges of the Calcutta High Court relied on the decision of the Supreme Court in the case of Rukmanibai Gupta (supra). Some recent decisions of the Supreme Court have also been cited before us, namely the one in Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) Pvt. Ltd. reported in : AIR 2003 SC3688 . The Learned Judges formulated the following principles in that case in order to find out whether the clause is an arbitration clause or not. The Learned Judges held that the essential elements of an arbitration clause are:

(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private Tribunal.

(3) The parties must agree in writing to be bound by the decision of such Tribunal.

(4) The parties must be ad idem.

The Learned Judges also held that the expression 'arbitration agreement' is not required to be specifically mentioned. Here also the Hon'ble Supreme Court has relied on its own decision in the case of Rukmanibai Gupta (supra).

21. Another Judgment has been cited by the Learned Counsel for the Petitioner in order to explain what is 'arbitration clause' and for this purpose reliance was placed on a Judgment of the Supreme Court in the case of Mallikarjun v. Gulbarga University reported in AIR 2004 SC 716. In paragraph 7 of the said Judgment, the Learned Judges have reiterated the principles in the case of Bihar State Mineral Development Corporation (supra) in order to find out as to what is meant by an 'arbitration clause'.

22. In order to meet these arguments, Learned Counsel for the Opposite Parties has relied on a decision of the Supreme Count in the case of State of Orissa and Anr. v. Sri Damodar Das reported in : AIR 1996 SC942 . In that case, the clause which came up for consideration is quoted in paragraph 9 at page 945 of the report. The said clause is set out below:

25. Decision of Public Health Engineer to be final-Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to the contracts, drawings specifications estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of

the contract.' From a perusal of the said clause, it is clear that the said clause does not authorize the Public Health Engineer to decide any dispute. The Learned Judges in Damodar Das's case (supra) held that a clause in the contract cannot be split into two parts, but it should be read as a whole and when it is read as a whole in that case the same cannot be called an arbitration clause. Under the said clause, the decision of the Public Health Engineer may be a decision of the Expert Body on the questions referred to in the clause. It has been held by the authorities that when something is referred for a decision of an Expert and the Expert gives a decision that does not become an arbitration clause. In other words, the clause whereby the Expert is empowered to give such a decision, the same is not an arbitration clause. The word 'dispute' is singularly absent in Clause 25 which was considered in the case of Damodar Das. Therefore, the said decision in Damodar Das does not help the case of the Opposite Parties. The clause considered in Damodar Das is almost similar to Clause 'A'. Accordingly, we hold that Clause 'A' is not an arbitration clause.

23. Reliance was next placed on a decision of the Kerala High Court in the case of State of Kerala and Anr. v. N.E. Thomas reported in : AIR1997 Ker126 . In the said Judgment, both the clauses, namely clauses 3 and 24 were struck off. Since both the clauses were deleted, the Court came to the conclusion that there is no arbitration clause. In the instant case, even though Clause 23 has been deleted, Clause 11 as quoted above, namely, Clause 'B' has not been deleted and in consideration of Clause 11 the Court has to come to a conclusion that the same is an arbitration clause. In any event the said Judgment is not a Judgment considering the arbitration clause under Section 2(a) read with Section 7 of the said Act of 1996. The said decision is one under 1940 Act. Therefore it is clearly distinguishable.

24. Reliance was also placed by the Learned Counsel for the Opposite Parties on the decision in the case of K.K. Modi v. K.N. Modi and Ors. reported in : [1998]1SCR601 . In that case, the Learned Judges of the Supreme Court held that where it is decided on the basis of a memorandum of understanding between the two groups of family for referring certain differences in the family concern to the Chairman of the Financial Corporation, which had lent money to the said concern,

the same is not an arbitration agreement nor the decision of the Chairman is an award. The relevant clause which has been considered by the Learned Judges of the Supreme Court to come to the aforesaid decision is set out below: 'Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups.'

25. The Learned Judges after relying on various authorities have drawn a line of demarcation between the Expert Determination and an Arbitration. It was held that in a case of Expert Determination, the proceeding is not judicial whereas in a case of Arbitration the proceeding is judicial. The Learned Judges held that the reference of the dispute to the Chairman of the Financial Corporation which had lent the money to the concern is not an arbitration agreement, but it has been sent to him for an Expert Determination and the procedure for such determination is ministerial and not judicial in nature

26. In the instant case, the arbitration clause, namely, Clause 'B' which has been referred to above cannot be called a reference for Expert Determination. Therefore, the decision in the case of K.K. Modi (supra) does not apply to the facts of the present case.

27. For the same reason, the Supreme Court in the case of Bharat Bhushan-Bansal v. U.P. Small Industries Corporation Ltd. Kanpur reported in : [1999]1SCR181 also does not help the Opposite Parties. From a perusal of the facts considered in the said Judgment, it appears that Clauses 23 and 24 of the agreement were considered by the Learned Judges. The said Clauses 23 and 24 are set out below:

Clause 23: Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings,

specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contract.

Decision of the M.D. of the U.P.S.I.C. on all other matters shall be final.

Clause 24: Except as provided in Clause 23 hereof the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other mater arising out of this contract and not specifically mentioned herein.

28. From a perusal of both the Clauses, it is clear that the Managing Director is in the position of an Expert and the same cannot be called an arbitration agreement. In coming to the said decision in Bharat Bhushan Bansal, the Learned Judges of the Supreme Court relied on its previous decision in the case of K.K. Modi.

29. Going by the aforesaid parameters, this Court holds that Clause 'A' which is quoted above does not contain an arbitration clause. Clause 'A' does not talk of resolution of any dispute. The word 'dispute' is not mentioned at all. But Clause 'B' which talks of the decision of a dispute obviously contains an arbitration clause. Therefore, the decision of the Learned Single Judge in Banalata's case (supra) by construing a clause similar to 'B' and holding the same to be not an arbitration clause is not a decision which we can approve.

30. In out view, the said Clause 'B' is an arbitration clause since the same satisfies the ingredients of an arbitration clause as indicated in the Judgment of the Apex Court in Smt. Rukmanibai Gupta (supra) and also in the recent decisions of the Apex Court in Bihar State Mineral Development Corporation and in Mallikarjun where the ratio in Bihar State Mineral Development Corporation has been reiterated. Therefore, the Judgment in Banalata's case (supra) is overruled to the extent indicated above. The question which has been referred to the Division Bench is thus answered.

31. All these applications filed under Section 11 of the Act may now be listed before the appropriate Bench for decision in terms of the aforesaid finding.

I. Mahanty, J.

32. I agree.