

LUDHIANA IMPROVEMENT TRUST & ANOTHER
v.
M/S. TODAY HOMES AND INFRASTRUCTURE (PVT.)
LIMITED
(Civil Appeal No. 6104 of 2008)

OCTOBER 14, 2008

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Arbitration and Conciliation Act, 1996 – s. 11 (6) – Application for reference of dispute to arbitrator – Chief Justice of High Court relying on judgment passed by Supreme Court, in view of s. 16 of the Act referring the issue to arbitrator – On appeal, held: The decision whereupon High Court placed reliance, since was subsequently overruled by another decision of Supreme Court, matter to be decided in keeping with subsequent judgment – Hence matter remitted to High Court.

In an application u/s. 11 (6) of Arbitration and Conciliation Act, 1996, Chief Justice of High Court, relying on *Konkan Railway case held that in view of s. 16 of the Act, it was for the Arbitrator to decide the issue. Hence the present appeal.

Disposing of the appeal, and remitting the matter to High Court, the Court

HELD: High Court, relying on the earlier Constitution Bench decision of this Court in the *Konkan Railway case left it to the Arbitrator appointed by it, to decide the issues u/s. 16 of the 1996 Act. This was contrary to the directions given by the seven-Judge Bench of this Court in the **Patel Engineering case, which categorically overruled the decision in the Konkan Railway case. Therefore, the order of the Chief Justice is set aside and the matter is remitted for a fresh decision in keeping with the decision in Patel Engineering case. [Paras 17 and 18] [403 G-H, 404-A, 404-D]

A ****S.B.P. and Company vs. Patel Engineering Limited and Anr. 2005 (8) SCC 618 – followed.**

**Konkan Railway Corporation Limited and Anr. vs. Rani Construction Private Limited 2002 (2) SCC 388 – referred to.*

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CASE LAW REFERENCE

2005 (8) SCC 618 Followed. Para 17

2002 (2) SCC 388 Referred to. Para 17

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CIVILAPPELLATE JURISDICTION : Civil Appeal No. 6104 of 2008

From the final Judgment and Order dated 4.4.2008 of the High Court of Punjab and Haryana at Chandigarh in Arbitration Case No. 76 of 2007

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K.K. Venugopal, Ravi Shanker Prasad, Ajay Pal, Nikhil Jain, Ashish Chopra, Ankur Talwar and Rupa for the Appellants.

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Shanti Bhushan, Mukul Rohatagi, Vivek Sibal, Sumesh Dhawan, Jayashree Wad, Ashish Wad and Chirag S. Dave (for M/s. J.S. Wad & Co.) for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

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2. This appeal has been filed by the Ludhiana Improvement Trust, through its Administrator, and the State of Punjab, against the order passed by the Chief Justice of Punjab and Haryana High Court in a petition filed by the respondent herein under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') for the appointment of an Arbitrator. In the said application, which was numbered as Arbitration Case No.76 of 2007, the appellants herein were made respondents.

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3. The Ludhiana Improvement Trust (hereinafter referred to as "the Trust") was constituted under the Punjab Town Im-

4. Improvement Act, 1922 (hereinafter referred to as "the 1922 Act") for the planned development of the city of Ludhiana. For the purpose of construction of the City Centre in Ludhiana, the Trust, with the intention of entering into a joint-venture with developers in the private sector, invited bids by a Request of Proposal document dated 15.3.2005. Bids were filed by interested parties by 10.5.2005 and evaluation of the Technical bids was completed by 16.5.2005. In the final evaluation the respondent was found to be the highest bidder and a Letter of Intent was thereupon issued to him on 18.5.2005 for development of the City Centre, Ludhiana. The said Letter of Intent was alleged to have been approved by the Trust in its meeting held on 18.5.2005, which was attended by 7 out of its 10 members.

4. The records indicate that on being issued the Letter of Intent the respondent deposited an amount of Rs.3.72 crores with the Trust towards security for the purposes of the contract. According to the Agreement, the respondent would ultimately be required to pay to the Trust an amount of (Rs.371.12 crores). The records also reveal that possession of an area measuring 25.59 acres was handed over to the said respondent by the Trust on 24.5.2005. The Trust also appears to have entered into a part-time agreement with the respondent and the HDFC Bank limited whereby it was agreed that the entire proceeds received from bookings of the area to be sold would be deposited in an Escrow Account with the HDFC Bank, out of which 30% of the amount so deposited would be credited automatically to the account of the Trust and the balance 70% would be available to the respondent No.1 for the purpose of development of the City Centre. A Power of Attorney was also executed by the Trust in favour of the respondent No.1 empowering the said respondent to act as its lawful attorney for the development work and marketing of the City Centre.

5. During the continuance of the agreement certain disputes arose and certain allegations surfaced that under-hand dealings were being resorted to and up to 70% of the total amounts payable, by those who had booked space in the City

A Centre, were being received in cash and only 30% being received by means of cheques was being deposited in the Escrow account, resulting in huge losses to the Government of Punjab towards its share of revenue.

B 6. Accordingly, the Trust issued a letter to the respondent No.1 on 12.9.2006 seeking an explanation regarding the allegations to which a reply was sent by the respondent No.1 on the very next day denying the allegations and indicating that its accounts could be scrutinized, and, if the explanation was not found to be satisfactory, the dispute could be referred to arbitration.

C 7. The suggestion made by the respondent No.1 was rejected by the Trust by its letter dated 14th September, 2006, and in the said letter it was mentioned that an Arbitrator for auditing the accounts, would be appointed within the next two days. According to the respondent No.1, the said action of the petitioner was not in keeping with the terms and conditions of the Agreement and clause 17 of the Concession Agreement dated 24th May, 2005, and the petitioner ought to have invoked clause 17.1(a) and (b) of the said Agreement which provides for conciliation and settlement of disputes in an amicable manner. The respondent No.1 accordingly filed Arbitration Petition No. 263 of 2006 under Section 11(6) of the 1996 Act for appointment of an Arbitrator in accordance with clause 17 of the Concession Agreement. The said petition was contested by the petitioner on the ground that no cause of action had accrued to the respondent No.1 for making such application.

G 8. Subsequently, however, an application was moved on behalf of the respondent No.1 on 9th August, 2007, for withdrawal of the arbitration case. The same was allowed and the said case was dismissed as withdrawn on 22nd August, 2007, with liberty as was prayed for. Thereafter, various circumstances intervened. The Trust was dissolved by the Government on 14th September, 2006 and one of the major decisions taken was to revoke the Power of the Attorney granted in favour of the respondent No.1 from 5th October, 2006, upon the agreement that

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the sales and/or leases of the Ludhiana City Centre property, which had been effected till then, which was approximately 22% of the total saleable area, would go to the share of the petitioner herein which would have the effect of validating the sales and leases which had already taken place. A

9. It also appears that since the terms of the Memorandum of Settlement dated 6th October, 2006, provided for the execution of a supplementary agreement, and nothing further was done in that regard, the respondent No.1 wrote a letter to the Trust on 29th December, 2006, requesting such supplementary agreement to be executed. When nothing more was heard from the petitioners, the respondent No.1 again addressed a letter to the Trust on 8th June, 2007, that in the absence of the procedure under clause 17.1 (a) and (b) the dispute should be settled by way of an amicable settlement. Again on 30th June, 2007, another letter was written by the respondent No. 1 indicating the name of the Arbitrator from its side. The proposal was, however, rejected on the ground that in the absence of any dispute, merely on vague, false or motivated averments, arbitration could not be resorted to. It was in such circumstances, that the application under Section 11(6) of the Arbitration Act for appointment of an Arbitrator by the Court came to be filed. B
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10. In the proceedings under Section 11(6) of the 1996 Act, it was contended that the Trust had awarded the contract to the respondent No.1 herein in keeping with all the norms and procedures and after bids had been invited by way of public advertisement. It was submitted that after the Technical and Financial bids submitted by the bidders were opened, the contract was awarded to the respondent No.1 herein, as the highest bidder. Subsequently, disputes arose between the parties with regard to the working of the Agreement, which prompted the respondent No.1 to invoke the arbitration clause in the Agreement and on the failure of the appellant herein to appoint an Arbitrator, the respondent No.1 had applied to the Chief Justice of Punjab and Haryana under Section 11(6) of the Arbitration and Conciliation Act, 1996, for the appointment of an Arbitrator. F
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A 11. On behalf of the appellant herein, it has been contended
that the said Agreement itself was void having been entered
into in suspicious circumstances and by perpetrating fraud by
altering the terms of the advertisement inviting bids thereby
enlarging the eligibility criteria for participation in the bid, so
B that persons, who were otherwise ineligible, were given an entry
into the bidding process and ultimately the contract was
awarded to one of such persons. Various irregularities were
also pointed out by which it was claimed that the main Agreement
which contained the Arbitration Agreement was itself void
C and hence the Arbitration Agreement could not also survive.

12. After considering the submissions made on behalf of the
respective parties, by placing reliance upon the decision of this
Court in the Case of Konkan Railway Corporation Limited and
Anr. Vs. Rani Construction Private Limited, [2002 (2) SCC 388],
D which was followed in Hindustan Petroleum Corporation Ltd. vs.
Pinkcity Midway Petroleum [2003 (6) SCC 503], the Hon'ble the
Chief Justice took the view that having regard to Section 16 of the
Arbitration and Conciliation Act, 1996, it was for the Arbitrator and
not the Chief Justice to decide the question of jurisdiction.

E 13. Incidentally, no reference has been made in the order
of the Hon'ble Chief Justice to the later decision of the Bench of
Seven Judges in S.B.P. and Company vs. Patel Engineering
Ltd. and Anr. [2005 (8) SCC 618], wherein the views expressed
by the Constitution Bench in the Konkan Railway case (supra)
F were overruled and it was asserted that an order passed by the
Chief Justice or his delegatee Judge, on an application under
Section 11(6) of the aforesaid Act, would be a judicial order
and not an administrative order as had been held in the Konkan
Railway case(supra).

G 14. On the basis of his aforesaid finding, the Chief Justice
appointed a former Chief Justice of India as Sole Arbitrator to
adjudicate upon all the disputes between the parties, including
the disputes which had been indicated in the order which has
now been made before us in the instant appeal.
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15. On behalf of the appellant various submissions were made regarding the manner in which the contract had been awarded to the respondent company in violation of the provisions of Rule 94 of the Punjab Town Improvement Trust Rules, 1939. It was contended that since the main Agreement had been fraudulently obtained, even the Arbitration Agreement contained therein was void and unenforceable. The said contention was opposed by Mr. Shanti Bhushan, learned Senior Counsel appearing for the respondent-company, and it was urged that the High Court had quite correctly allowed the application filed by the Company under Section 11(6) of the Arbitration and Conciliation Act, 1996. Mr. Shanti Bhushan contended that the main Agreement and the Arbitration Agreement contained therein could not be equated as they were for different purposes. According to Mr. Shanti Bhushan, even if the main Agreement was held to be void, it did not affect the Arbitration Agreement which had been included in the main Agreement for the purpose of deciding such issue.

16. Mr. Shanti Bhushan, submitted that even if it is accepted that the High Court ought to have taken into consideration the later decision of the seven-Judge Bench in the Patel Engineering case (supra), such an omission could be rectified by this Court itself in these proceedings on the basis of the detailed submissions advanced on behalf of the parties.

17. We have considered the submissions of both the parties and have also considered Mr. Shanti Bhushan's submissions that the issues which had been left undecided by the High Court could be decided in these proceedings itself. However, in our view, such a course of action would have been justified if after considering the submissions of the respective parties the High Court had arrived at a finding regarding the dispute between the parties. Unfortunately, relying on the earlier Constitution Bench decision of this Court in the Konkan Railway case (supra), the High Court left it to the learned Arbitrator appointed by it to decide the said issues under Section 16 of the 1996 Act, which was contrary to the directions given by the seven-

- A Judge Bench of this Court in the Patel Engineering case (supra), which categorically overruled the decision of the Constitution Bench in the Konkan Railway case. In fact, in sub-paragraphs (10) and (12) of Paragraph 47 of the said judgment, the seven-Judge Bench specifically indicated that the orders which
- B had already been passed in applications under Section 11(6) of the 1996 Act, prior to the decision in the Patel Engineering case (supra), would be treated as valid, leaving all objections to be decided under Section 16 of the Act. It was also indicated that from the date of the judgment, however, the decision rendered in the Patel Engineering case (supra), would govern all
- C applications and even pending applications under Section 11(6) of the 1996 Act.

18. We have, therefore, no option but to set aside the order of the Chief Justice and remit the matter for a fresh decision in keeping with the decision of the seven-Judge Bench in S.B.P. & Company vs. Patel Engineering Limited and Another [2005 (8) SCC 618].
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19. The appeal is disposed of accordingly.

- E 20. There will be no order as to costs.

K.K.T.

Appeal disposed of.