

A RAMESHWAR DAS AGRAWAL AND ANR.
v.
KIRAN AGRAWAL AND ORS.

NOVEMBER 23, 2007

B [G.P. MATHUR AND P. SATHASIVAM, JJ.]

C *Arbitration and Conciliation Act, 1996—s. 11—Application under—Appointment of arbitrator by Chief Justice of High Court without passing reasoned order and without adverting to claim and objection of the parties—Sustainability of—Held: In the light of principles laid down in SBP & Co.'s case, order under s.11(6) is a judicial pronouncement—It is incumbent on part of Chief Justice or designated Judge to consider claim of both the parties and pass*
D *reasoned order—Hence, order of Chief Justice not sustainable and set aside—Matter remitted to High Court for consideration in the light of SBP & Co's case.*

E **Dispute arose between the parties. In terms of the agreement, first respondent filed application under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator. High Court issued notice to all the respondents, but most of them were not served. Appellant sought time to file counter affidavit and stated that no dispute remained for adjudication. The Chief Justice of the High Court rejected**
F **the request of the appellant and appointed a retired judge as an arbitrator. Hence the present appeal.**

Allowing the appeal and remitting the matter to High Court, the Court

G **HELD: 1. The impugned order passed by the Chief Justice of High Court is set aside and is remitted back to the High Court to pass fresh order in the light of the principles laid down in *SBP & Co. v. Patel Engineering Ltd. and Another's case*. [Para 10] [497-A]**

2.1. From a seven-judge Bench decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and Another*, it is clear that the power being exercised by the Chief Justice or the designated Judge under section 11 of the Arbitration and Conciliation Act, 1996 is not an administrative power but it is a judicial power. An appeal would lie against that order only under Article 136 of the Constitution to this Court. Though the decision in *Konkan Railway Corpn. Ltd.* has been overruled, the Bench clarified that appointment of arbitrators or Arbitral Tribunals therefore, made are to be treated as valid, all objections being left to be decided under section 16 of the Act. After the decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and Another* it is incumbent on the part of the Chief Justice or a designated Judge to consider the claim of both parties and pass a reasoned order. [Para 8] [494-B, C, D; 495-A, B]

2.2. Unfortunately, the decision in *SBP & Co. v. Patel Engineering Ltd. and Another's* case though decided earlier i.e. on 26.10.2005 was not brought to the notice of the Chief Justice, who passed an order, subsequent to the same i.e. on 09.12.2005. In view of the fact that an order passed under section 11(6) is a judicial order and in the light of the stand of the appellants, the impugned order appointing an Arbitrator without adverting to the claim and objection of both parties cannot be sustained. The order did not show any reason for appointing an Arbitrator. In spite of a request made for filing an affidavit opposing the application for appointment of an Arbitrator, the Chief Justice did not afford further time. Except respondent No.4, notice was not served on the other respondents and without hearing them an order was passed appointing an arbitrator. The order did not satisfy the requirement of law laid down by this Court in *SBP & Co. v. Patel Engineering Ltd. and Another's* case. [Para 8] [494-D, E, F; 495-A, B, C; 496-D, E]

SBP & Co. v. Patel Engineering Ltd. and Anr., [2005] 8 SCC 618, followed.

Konkan Railway Corporation Ltd. v. Rani Construction Private Limited, [2002] 2 SCC 388, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5366 of 2007.

A From the final Judgment and Order dated 9.12.2005 of the High Court of Judicature at Allahabad in A.A. No. 54 of 2003.

Manoj Swarup and Lalita Kohli (for M/s. Manoj Swarup & Co.) for the Appellants.

B Jay Savla, Reena Bagga, Gaurav Agrawal and Ashutosh Lohia for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. (1) Leave granted.

C (2) This appeal is directed against the order dated 09.12.2005 passed by the Hon'ble Chief Justice of the High Court of Judicature at Allahabad in Arbitration Application No. 54 of 2003 appointing Hon'ble Mr. Justice Giridhar Malviya, a retired Judge of the Allahabad High Court as Arbitrator in respect of the dispute between the parties.

D (3) Respondent Nos. 4 and 5 before the High Court are the appellants in this appeal. According to them, late Hari Prakash Agrawal (father of respondent No. 7) and Rameshwar Das Agrawal (appellant No.1 herein) were very close relatives and they decided to carry on business of electronics and electrical goods and other items. They executed a partnership deed on 15.05.1992 which contains an arbitration clause. Subsequently, a dispute arose between the members of their two families and by agreement dated 13.09.2002 signed by the partners, Shri Gopal Goel of Ravindrapuri, Varanasi was appointed as sole Arbitrator to decide all the disputes concerning the business. Since the entire disputes between the families were reconciled, fresh Deed of Partnership reconstituting the three partnership firms were executed on 13.09.2002 and signed by all the partners and witnessed by the sole Arbitrator - Shri Gopal Goel and one Shri Vinod Kumar Jindal, one of the advisors to the Arbitrator. This was intimated to the bank and sales-tax authorities. After retirement of Smt. Kiran Agrawal and her husband Shiv Kumar Agrawal on 13.09.2002, a fresh Partnership Deed was executed on 05.07.2003 which was also duly signed by the parties concerned. Thereafter, first respondent herein filed an application dated 07.07.2003 under Section 11 of the

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Arbitration and Conciliation Act, 1996 (in short the 'Act') for appointment A
of an Arbitrator based on clause 21 of the agreement dated 15.05.1992.
On 17.10.2003, the High Court issued notice to all the 8 respondents-
therein. Thereafter, the matter was listed on 09.12.2005 and as per the
office report, most of the respondents had not been served. Shri
Rameshwar Das Agrawal, appellant No.1-herein was represented in the B
High Court through his counsel and prayed time to file counter affidavit.
It was also stated that no dispute remained for adjudication. The High
Court, after rejecting the request of the first appellant-herein, by order
dated 09.12.2005, appointed Hon'ble Mr. Justice Giridhar Malviya as
an Arbitrator. Aggrieved by the said order, the appellants preferred this C
appeal.

(4) We heard Mr. Manoj Swarup, learned counsel for the appellants
and Mr. Jay Savla and Mr. Gaurav Agrawal, learned counsel for
respondent Nos. 1 and 7 respectively. Respondent Nos. 2 to 6 though D
duly served notice not chosen to contest the appeal.

(5) Mr. Manoj Swarup, learned counsel for the appellants placing
reliance on a Seven-Judge Bench decision of this Court in *SBP & Co. v.*
Patel Engineering Ltd. and Anr., [2005] 8 SCC 618, which was
pronounced on 26.10.2005, submitted that the decision on the application E
under Section 11 of the Act is a judicial pronouncement, the impugned
order of the Hon'ble Chief Justice which does not contain any reason
cannot be sustained and the same deserves to be set aside. He also
contended that the Hon'ble Chief Justice, who passed the impugned order, F
has not taken care to verify whether notice had been duly served on all
the respondents. He further contended that in any event, the High Court
ought to have granted reasonable time to file their objections. . On the
other hand, Mr. Jay Savla and Mr. Gaurav Agrawal, learned counsel for
the contesting respondents submitted that inasmuch as the appellants herein G
(respondents before the High Court) did not utilize the ample time provided
by the High Court for filing their objection, the ultimate order of the
Hon'ble Chief Justice cannot be faulted with. He also submitted that there
is no violation of the law as declared by this Court.

(7) We have carefully perused the relevant materials and considered H

A the rival submissions.

(8) Before analyzing the claim of both the parties, it is relevant to note that the Hon'ble Chief Justice of the Allahabad High Court passed the impugned order appointing a retired Judge of the High Court as an Arbitrator on 09.12.2005. On 26.10.2005, a Seven-Judge Bench of this Court in *SBP & Co. v. Patel Engineering Ltd. and Anr.*, (supra) reviewed the entire legal position and issued various directions in the matter of appointment of Arbitrator. The larger Bench has also overruled the earlier decision in *Konkan Railway Corporation Ltd. v. Rani Construction Private Limited*, [2002] 2 SCC 388. It is useful to refer to the conclusions arrived at by the larger Bench which read thus:

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

(i) 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.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could

only be that of the Chief Justice or the designated Judge. A

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act. B
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(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court. D

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act. E

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* 2 and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act. F
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(xi) Where District Judges had been designated by the Chief H

A Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

B (xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* is overruled.”

C From the above, it is clear that the power being exercised by the Chief Justice or the designated Judge under Section 11 is not an administrative power but it is a judicial power. It is also clear that an appeal would lie against that order only under Article 136 of the Constitution of India to this Court. Though the decision in *Konkan Railway Corpn. Ltd.* (supra) has been overruled, the Bench has clarified that appointment of arbitrators or Arbitral Tribunals therefore, made are to be treated as valid, all objections being left to be decided under Section 16 of the Act. D Unfortunately, the above decision in *SBP & Co. v. Patel Engineering Ltd. and Anr.* (supra) though decided earlier i.e. on 26.10.2005 has not been brought to the notice of the Chief Justice, who passed an order, E subsequent to the same i.e. on 09.12.2005. In view of the fact that an order passed under Section 11(6) is a judicial order and in the light of the stand of the contesting respondents before the High Court, the appellants in this Court, the impugned order appointing an Arbitrator without adverting to the claim and objection of both parties cannot be F sustained. The order of the High Court reads as under:

“Shri Vijay Kumar Singh has appeared for the respondent. The prayer for filing affidavit is turned down.

G For the purpose of acting as Arbitrator in this matter Hon’ble Giridhar Malviya of 26, Hamilton Road, a retired Judge of this High Court is hereby nominated.

Sd/-
Ajoy Nath Ray
C.J.”

As rightly pointed out by learned counsel for the appellants, the order does not show any reason for appointing an Arbitrator. As said earlier, after the decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and Anr.* (supra) it is incumbent on the part of the Chief Justice or a designated Judge to consider the claim of both parties and pass a reasoned order. A
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Apart from the above infirmity, learned counsel for the appellants has also brought to our notice that in spite of a request made for filing an affidavit opposing the application for appointment of an Arbitrator, the Chief Justice has not afforded further time. It is also pointed out that except respondent No.4-therein, notice had not been served on the other respondents and without hearing them an order has been passed appointing an Arbitrator. We verified the order sheet of the High Court (Annexure-P4) which is available at page 50 of the paper-book. The relevant details are reproduced hereunder:- C
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“ORDER SHEET

Arbitration case No. 54 of 2002

Xxxx xxxx xxxx E

14.07.05 Case

Shri Y.P. Singh Advocate and Ajay Kumar Singh have filed Vakalatnama on behalf of the respondent No.4

Notices issued to respondents fixing 17.12.2002 have been returned after service as under: F

Respondent No.7 Returned undelivered cover with report
“Not Known”.

Respondent No.6 Returned undelivered cover with report G
“Not Known”.

Respondent No.8 Returned undelivered cover with report
“Not Known”.

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- A Respondent No.1 Returned undelivered cover with report "Not Known".
- Respondent No.3 Returned undelivered cover with report "Not Known".
- B Respondent No.2 Notice has not returned after service Put up for Orders
- Sd/-
Section Officer
Copying (D) Department
C High Court, Allahabad."

As rightly pointed out that whether notice duly served on all the respondents was not verified before passing the order on 09.12.2005. In our opinion, the following conclusion would emerge:

- D (i) All the respondents therein except respondent No.4, notice was not served in the application for appointment of arbitrator.
- (ii) Even the served respondent was not afforded adequate opportunity to file his objection.
- E (iii) The order does not satisfy the requirement of law laid down by this Court in *SBP & Co. v. Patel Engineering Ltd. and Anr.* (supra)

(9) In view of the above, we have no other option except to set aside the impugned order and remit the same for passing fresh order. Since respondents 1 and 7 herein are represented by their counsel and notice had duly been served on the other respondents in this Court and none appeared for them, they are permitted to file their objections, if they so desire within a period of 4 weeks from the date of receipt of copy of this judgment. Considering the fact referred to above, we make it clear that no further notice need be issued by the High Court. We constrain to arrive at such conclusion since all of them (except Shivkumar Agrawal) are members of one family residing at No.20, Gurdas Colony, Varanasi and all of them were duly served notice in this Court.

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(10) We, therefore, set aside the impugned order dated 09.12.2005 A
passed by the Chief Justice of Allahabad High Court and remit the same
to the High Court to pass fresh order as early as possible as observed
above and in the light of the principles laid down in *SBP & Co. v. Patel*
Engineering Ltd. and Anr. (supra).

(11) The Civil Appeal is allowed to the extent mentioned above. No B
costs.

N.J.

Appeal allowed.