HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD
*** * * ***

WP No.29440 of 2021

Between:
UNION OF INDIA, REP. BY MINISTRY OF RAILWAYS,
RAILWAY BOARD, NEW DELHI

...Petitioner

&

KRISHNAPATNAM RAILWAY COMPANY LIMITED

...Respondent

DATE OF JUDGMENT PRONOUNCED: 22-02-2022

SUBMITTED FOR APPROVAL:

1. Whether Reporters of local newspapers may be allowed to see the Judgment?

Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals

Yes/No

3. Whether Your Lordships wish to see the fair copy of the Judgment?

Yes/No

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A. RAJASHEKER REDDY, J

***THE HON'BLE THE CHIEF JUSTICE SATISH CHANDRA SHARMA**
&
***THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY**

+ WP No.29440 of 2021

% 22-02-2021

UNION OF INDIA, REP. BY MINISTRY OF RAILWAYS
...Petitioner

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...Respondent

< GIST:

> HEAD NOTE:

! **Counsel for Petitioner: Ms.Madhavi Divan, Addl. Solicitor General for Union of India, Ministry of Railways**
^Counsel for Respondent : Sri Avinash Desai

? Cases referred

1. (2011) 5 SCC 532
2. (2022) 1 SCC 75
3. (2005) 8 SCC 618
4. (2019) SCC Online SC 1602
5. (1984) 4 SCC 679
6. 2021 SCC Online SC 766
7. AIR 1982 SC 149

HON'BLE THE CHIEF JUSTICE SATISH CHANDRA SHARMA
&
HION'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.29440 of 2021

ORDER :: (per Hon'ble Sri Justice A. Rajasheker Reddy, J)

Writ petition has been filed by the Ministry of Railways to set aside the orders dated 18-06-2020 and 29-04-2021 passed by the learned Arbitral Tribunal on the grounds of patent lack of inherent jurisdiction; violation of public policy, as also to declare the dispute raised by the respondent-Krishnapatnam Railway Company Limited as inarbitrable and not capable of settlement by Arbitration and further order to remove the privileged documents from the record, which includes sensitive Governmental file notings concerning the subject matter.

2. Brief facts of the case, in nutshell, as emerged from the pleadings are:- In December 2002, the Ministry of Railways launched National Rail Vikas Yojna to improve rail transport facility capacity and port connectivity by upgrading railway infrastructure. In the backdrop of this initiative, the Railways sanctioned Project Railway on

22-03-2006 for construction and implementation of broad-gauge rail link connectivity between Obulavaripalle at Km 0.000 and Krishnapatnam at Km 111.129.

3. The petitioner and the respondent entered into Concession Agreement in year 2007 in respect thereof wherein the respondent was required to complete the project within a period of 5 years among other things. The Concession Agreement *inter-alia* included performance and execution of all activities related to the development, financing, design, construction, operation and maintenance of the Project Railway by the respondent. During the course of execution of the Project Railway work, in year 2012 the respondent made a representation seeking for apportionment of various charges including "Terminal Costs" and "Apportioned Earnings for the length of the PKPK Siding" and it is entitled to get an amount of Rs.500 crores from November, 2008 to March, 2017, which the Ministry of Railways refused initially by issuing Circular dated 02-08-2016 wherein it said that there was no such provision in the Concession Agreement to give a cause to the respondent to make such extra contractual

demands. However, it has come on record that after receiving similar representations from SPVs of other Zonal Railways, the matter was considered afresh and the petitioner conceded to such claims and accordingly issued two Circulars dated 10-08-2017 and 15-11-2017 wherein the claims, as the one made by the respondent and all other SPVs was allowed for payment from the date of issuance of the two Circulars prospectively, not retrospectively thereby the claim of the respondent for payment of Terminal Costs and Apportioned Earnings for the length of the PKPK Siding was considered prospectively. This gave rise to invocation of the Arbitration Clause enshrined in the Concession Agreement and Arbitral Tribunal was formed.

4. Pursuant to the constitution of the Arbitral Tribunal, the respondent filed its Statement of Claim as also amended claim. During the pendency of the Arbitral proceedings, the Ministry of Railways (petitioner) has filed an application under Section 16 of the Arbitration and Conciliation Act, 1996, (in short, "the Act") wherein the jurisdiction of the Arbitral Tribunal to entertain and commence the Arbitration proceedings was challenged, was considered and rejected

by order dated 18-06-2020. The respondent also filed two applications for discovery and production of documents wherein a reply was filed by the petitioner and by order dated 29-04-2021, they were allowed and directed the petitioner for production of documents, which reads as under:-

> *"Conclusion:19. The application is allowed in respect of Requests (1), (2) and (3) and production as per paras 8, 12, and 14 above shall be as under:*
>
> *(i) The Respondent shall produce true legible photocopy of the file notings relating to the Claimant, as sought in Request (1), within 15 days and furnish a copy to the Claimant.*
>
> *(ii) The Respondent shall, within three weeks, permit inspection of the files sought as per Requests (2) and (3) by the Claimant's representative and Counsel on a date mutually agreed between the counsel, at the office of the respondent.*
>
> *(iii) On inspection, the Claimant shall furnish to the Respondent, a list of the required documents in the said files referred in Requests (2) and (3).*
>
> *(iv) The Respondent shall produce the said documents (certified photocopies) required by the Claimant, and furnish copies to the Claimant, within 10 days of the claimant furnishing the list of the required documents."*

Both the orders dated 18-06-2020 and 29-04-2021 are impugned in this writ petition.

5. Ms.Madhavi Divan, learned Additional Solicitor General appearing for the Ministry of Railways (petitioner herein) argued that

the learned Arbitral Tribunal has overstepped its jurisdiction and has permitted adjudication of issues applicable to all SPVs concerned and failed to appreciate that the dispute initiated by the respondent involves *rights in-rem* cannot be subject to private dispute resolution by way of Arbitration and, as such, the Arbitral Tribunal lacks inherent jurisdiction. It is stated that issues pertaining to sharing of the revenue for the Siding/Lines constructed outside the Project Railway and Concession Agreement does not provide for such claims, any award passed for payment of Terminal Costs and Apportionment Revenues retrospectively, would override the Policy Circulars of the Ministry of Railways and lead to mushrooming of claims by other SPVs. It is also argued that the respondent is not seeking for resolution of his claims in *personam* but has disguised its challenge against the decision envisaged in the Policy Circulars as a contractual dispute under the Concession Agreement. It is also argued that the documents required to be produced are privileged documents and there would be serious breach of confidentiality they being privileged documents. It is stated that the respondent overlooked the mandatory

pre-arbitral step of good faith negotiations and conciliation as provided under the Concession Agreement which was defined with sufficient clarity and specificity.

6. Sri Avinash Desai, learned counsel for the respondent, on the other hand, submits that the petitioner having submitted to the jurisdiction of the Arbitral Tribunal by nominating an Arbitrator and also having made a counter claim, cannot challenge the jurisdiction thereof which itself goes to show that the Arbitral Tribunal does not suffer from patent lack of jurisdiction. Learned counsel contended that no appeal has been provided against an order dismissing an application filed under Section 16 of the Act or an interlocutory order directing production of documents, as such the petitioner ought to have waited till the passing of the final award and challenge the same if aggrieved, as no rights of the parties are decided on merits at this stage.

7. Having heard learned counsel on both side, the core issue that arise for consideration in the instant petition is:-

Whether the impugned order rejecting the objection raised by the petitioner that the adjudicatory effect of the Arbitral Tribunal on Policy

issues would be a judgment in-rem, and such disputes is to be decided by Courts/Tribunals and not by the Arbitral Tribunal as it is a forum agreed by the parties, and the order refusing to expunge certain file notings from the record, in the facts and circumstances of the case, is sustainable in law ?

8. The petitioner sought to challenge the order passed in an application under Section 16 of the Act on the ground that the Arbitral Tribunal failed to appreciate that the respondent is challenging the Policy Circulars issued by the petitioner in the guise of a contractual dispute and the dispute involves *rights-in-rem* as such cannot be adjudicated through Arbitration. The impugned order is also traversed on the ground that as per the terms of the agreement, the claim sought in relation to the PKPK Siding fall outside the scope of Concession Agreement and thus not amenable to the Arbitration. Decision in ***BOOZ ALLEN & HAMILTON INC vs. SBI HOME FINANCE LTD.***[1] is relied for the proposition that there can be no arbitration for enforcement of rights *in rem.*

[1] (2011) 5 SCC 532

9. It is settled position of law that in order to maintain a *writ* under Article 226 of the Constitution of India against the interlocutory order passed by the Arbitral Tribunal, such an order meet the standard of exceptional rarity. Interference by the High Court with the arbitral proceedings and the orders passed in interlocutory applications cannot be resorted to and interject the arbitral proceedings, moreso at the stage where no rights of the parties are decided; unless they make the standard of exceptional rarity. Section 5 of the Act specifically provides that notwithstanding anything contained in any other law for the time being in force, no judicial authority shall intervene except where specifically provided. Section 16 of the Act is self explanatory which speaks of the competence of the Arbitral Tribunal to rule on its jurisdiction.

10. Section 37 of the Act specifically provides for the orders which are appealable, and no appeal has been provided against an order dismissing an application under Section 16 of the Act or even interlocutory order directing production. The purpose of not making such order appealable is to avoid judicial interference with arbitral

proceedings and to ensure that the parties raise all challenges to such orders under section 34 of the Act only after the arbitral award is passed. (***see BHAVEN CONSTRUCTION THRU AUTHORISED SIGNATORY PREMJIBHAI K. SHAH vs. EXECUTIVE ENGINEER SARDAR SAROVAR NARMADA NIGAM LTD.***)[2]

11. In ***BHAVEN CONSTRUCTION'S*** case *(2 supra),* Hon'ble Supreme Court while considering the limitations of Articles 226 and 227 in the context of a challenge to an order under Section 16 of the Act, as no appeal lies against such order, at paragraph 18 held as under:-

> "*18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."*

12. The following view taken by the Hon'ble Supreme Court in ***SBP COMPANY vs. PATEL ENGINEERING***[3], in our view, clinches the issue which reads as under:-

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[2] (2022) 1 SCC 75
[3] (2005) 8 SCC 618

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

13. In ***DEEP INDUSTRIES LTD. vs. OIL AND NATURAL GAS CORPORATION LIMITED***[4] in similar fact situation the Supreme Court observed thus: -

"22....The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may

[4] (2019) SCC Online SC 1602

be raised under Section 34.... Even otherwise, entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected..."

14. In ***RENUSAGAR POWER COMPANY LIMITED vs. GENERAL ELECTRIC COMPNAY,***[5] the Supreme Court while holding that the test is whether recourse to the contract would be necessary for the purpose of determining whether the Tribunal has jurisdiction or not held thus:-

"*25.... Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.*"

15. A perusal of the order passed by the learned Arbitral Tribunal goes to show that it had noted that the objection raised by the petitioner that the claims being made by the respondent are outside the scope of the Concession Agreement, go to the merits of the dispute and not to the jurisdiction of the Arbitral Tribunal. By way of application under Section 16 of the Act, the petitioner wanted the

[5] (1984) 4 SCC 679

tribunal to examine at the threshold, the correspondence between the parties and decide the issue as the claim may lead to a judgment *in rem.* All claims of the respondent are based on and arising out of the Concession Agreement and if the claim now made by the respondent is outside such an agreement, the petitioner will have the liberty to raise its objection to those claims in its defence as such seeking enforcement of a right under a contract is enforcement of right *in personam* and not right *in rem* and the decision in ***BOOZ ALLEN'***s case is not applicable to the facts of the case. Curiously it is to be seen that the petitioner is not altogether refusing the claims made by the respondent, which according to it fall outside the scope of the arbitration agreement between them, but only contend that the claims cannot be granted under the terms of the Concession Agreement. It is well within the Arbitral Tribunal's jurisdiction to determine whether the claims of Terminal Costs and Apportioned Earnings for the PKPK Siding are payable under the terms of the Concession Agreement or outside thereof. As no appeal is provided against an order refusing the relief in an interlocutory application, by way of this writ petition

under Article 226 of the Constitution of India, the petitioner cannot seek this Court to traverse into the merits of the claims raised by the respondent in the arbitral proceedings in this writ proceedings, moreso when the Arbitral Tribunal seized of the matter and the petitioner has also made counter claim. Inasmuch as the arbitration has commenced, the petitioner ought to have waited till the award is pronounced unless, of course, a right of appeal is available to it under Section 37 of the Act even, at an earlier stage.

16. A foray to the writ Court from Section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse, that the only possible conclusion is that there is a patent lack in inherent jurisdiction and it must be the perversity of the order that must stare one in the face. (see ***PUNJAB STATE POWER CORPORATION LTD. vs. EMTA COAL LTD***[6].) As a matter principle and rule, all civil and commercial disputes arising out of a contract are capable of being decided through arbitration unless they are specifically excluded. A dispute would fall within the category of 'rights *in rem*' only if the action brought before the Arbitral Tribunal is

[6] (2021) SCC Online SC 766

against the world at large and not against a specific individual. The Circulars dated 10-08-2017 and 15-11-2017 even if have universal application to all SPVs and are in the nature of Policy decisions, whether the respondent's claim arise out the terms of the Concession Agreement and its entitlement or otherwise to the Terminal Costs and Apportioned Earnings for the PKPK Siding, in accordance with the IRFA Rules (Rules of Inter-Railway Apportionment of Earnings) as provided under Clause 4 (2) (f) of the Concession Agreement, will have to be necessarily decided in accordance with the arbitration clause in the Concession Agreement.

17. The writ petition was heard elaborately and under the guise of challenge to the impugned order on the ground of perversity the petitioner cannot seek for a roving enquiry into the matter. No ground is either shown or pointed out to show that the learned Arbitral Tribunal lacks jurisdiction in view of the nature of claims being an individual claims. The objections taken by the petitioner in the application filed under Section 16 of the Act *viz.,* i) arbitration proceedings commenced prematurely without complying the pre-

arbitral step of resolving the issue, ii) subject matter is not arbitrable as it relates to rights *in rem*; iii) claims made by the claimant are beyond the scope of the arbitration agreement and iv) that the concession agreement is insufficiently stamped are answered by the Arbitral Tribunal point wise and we find no perversity in the conclusion arrived therein. Further, this Court is not sitting in appeal over the order of the Arbitral Tribunal and in exercise of power of judicial review, only examines the decision making process and not the decision itself. Considering the need and to upkeep the growing financial promises in contractual matters and in view of the objects sought to be achieved under the scheme of the Act, the Legislature itself did not provide for appeal remedy against the dismissal of the interlocutory applications filed under Section 16 of the Act and any venture to appraise the matter on merits will defeat the purpose, scheme and the object for which the Act is brought in.

18. The proposition put forth by the learned Addl. Solicitor General that the respondent's claim for entitlement to Terminal Costs and Apportioned Earnings also concerns the other SPVs and in the event

of allowing its claim may give rise to similarly placed SPVs raise such claims, therefore it is a dispute *in-rem* cannot be appreciated for the simple reason as going by the petitioner's own interpretation, if the nature of present claim is considered as *in-rem* dispute, that would mean that any decision taken by the Ministry of Railways even if it is with respect to contractual rights of parties, cannot be subjected to adjudication by arbitration though they affect contractual matters.

19. Coming to the objection for production of note filings, it has come on record that the petitioner, while filing its statement of defense before the Arbitral Tribunal, had itself heavily relied on the notings of the File No.2012/Infra/18/5 of Infrastructure Directorate. Seemingly the need for the respondent to file such applications for production of documents arose as the petitioner sought to selectively rely on file notings, the respondent sought production of the entire file notings in order to facilitate a complete and fair adjudication. Even documents produced by the petitioner would only be with respect to the claims of the respondent. In this connection, the learned Tribunal recording as under:-

"*Admittedly, Respondent has not furnished all the notings relating to the Claimant or the notings which led to the entering of the Concession Agreement with the Claimant. As what is sought are only the file notings relating to only the Claimant, the question of any of those notings containing commercially sensitive information does not arise."*

20. The principle of protecting disclosure of documents relating to the "affairs of the State" under Section 123 of the Indian Evidence Act, 1872, do not apply to the present case as the petitioner prima facie failed to show how the documents in question related to the affairs of the State, and its production for perusal would be against to public interest and the petitioner cannot claim class privilege merely because the documents are internal file notings. (*see* ***S.P Gupta vs. Union of India***[7]*)*

21. The contention that the Arbitral Tribunal overlooked the mandatory pre-arbitral step of good faith negotiations and conciliation as provided under the Concession Agreement cannot also be appreciated for the reason as rightly observed in the impugned order,

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[7] *AIR 1982 SC 149*

nothing prevented the parties parallelly to make an endeavor to sort out their disputes by way of negotiations and settle any or all the disputes between them, as it would save the costs and expedite the dispute resolution.

22. The scope of this Court in exercise of our jurisdiction in proceedings for issuance of Writ of Certiorari as observed by the Supreme Court in ***SYED YAKOOB vs. K.S.RADHA KRISHNAN,*** (1964) 5 SCR 64) observed that a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals: these are cases where orders are passed by inferior courts or Tribunals without jurisdiction, or is in excess of it or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order or where the procedure adopted in dealing with the dispute is opposed to principles of Natural Justice. None of the circumstances stated above are appearing in the impugned order nor there are any compelling

reasons calling for our inference with the impugned order passed by the learned Arbitral Tribunal.

23. On the above analysis of the matter, inasmuch as the challenges raised by the petitioner do not go to the jurisdiction of the Arbitral Tribunal, but rather, to the merits of the claim made by the respondent, the writ petition is devoid of merits deserves to be dismissed and it is accordingly dismissed. Miscellaneous applications, if any pending, stand disposed of. There shall no order as to costs.

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SATISH CHANDRA SHARMA,CJ

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A.RAJASHEKER REDDY,J

DATED: 22 —02—2022
NRG

THE HON'BLE THE CHIEF JUSTICE SATISH CHANDRA SHARMA
&
HION'BLE SRI JUSTICE A.RAJASHEKER REDDY

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