

IN THE HIGH COURT OF TELANGANA AT HYDERABAD**W.P. No. 20964 of 2023****Between:**

M/s TEJA-GEW (JV) Engineering Contractors

... Petitioner

And

The Union of India and others

... Respondents

JUDGMENT PRONOUNCED ON: 30.10.2023**THE HON'BLE MRS JUSTICE SUREPALLI NANDA**

1. Whether Reporters of Local newspapers : Yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes
see the fair copy of the Judgment?

SUREPALLI NANDA, J

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

W.P. No. 20964 of 2023

% 30.10.2023

Between:

M/s TEJA-GEW (JV) Engineering Contractors
..... Petitioner

And

\$ The Union of India and others
... Respondents

< Gist:

> Head Note:

! Counsel for the Petitioner : Mr K.Sai Krishna Mohan Rao

^ counsel for Respondents 1 to 4: Mr G.Praveen Kumar

? Cases Referred:

1. (2022) 4 SCC 463
2. (2011) 14 SCC 337

THE HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P. NO. 20964 OF 2023****ORDER :**

Heard the Learned Counsel appearing on behalf of the Petitioner Mr. K. Sai Krishna Mohan Rao and Learned Deputy Solicitor General of India Mr. Gadi Praveen Kumar appearing on behalf of the Respondents 1 to 4.

2. This writ petition is filed to issue an appropriate writ, order or direction more particularly one in the nature of Writ of Mandamus declaring the constitution of Arbitration Tribunal under Lr.No.W.148/GNT/TEJA-GEW(JV)/Agt.No.03, dated 07.12.2022 as illegal, arbitrary and against the Articles 14 and 21 of the Constitution of India and consequently set aside the order passed by the impugned Arbitral Tribunal Lr.No.PAN/ARB/TEJA, dated 22.07.2023.

3. The case of the petitioner, in brief, is as follows:

a) The Arbitral Tribunal was constituted by the 1st respondent without jurisdiction and in violation of Clause 10 of the conditions of the contract agreement.

b) The petitioner firm established a very good reputation in its filed of activities. The petitioner entered into an agreement vide its Ir No.03/Dy.CE/Br.Lines/HQ/SC/2017 dated 27.11.2017 in pursuance of the letter of acceptance vide its No.W.71/BR/tenders/RUB's/GNT, dated 27.07.2017 for a value of Rs.39,14,20,386.93ps with a completion period of 12 months from the date of LOA.

c) During execution there were certain disputes arose and there exists an Arbitration clause in the agreement. The 1st respondent who is the competent authority to constitute an Arbitral Tribunal without verifying whether the claims of the petitioner are arbitrable or non-arbitrable constituted Arbitral Tribunal consisting of respondents 4 to 6.

d) The petitioner submitted claim statement as per the terms of the reference , but raised preliminary objection as to arbitrability of the claims and the jurisdiction of the Arbitral Tribunal as the claim of the petitioner was Rs.28,73,15,8340/-, which was beyond 20% of the contract value.

e) Clause 10 of the contract agreement specifically provides that Clause 63 and 64 of GCC will be applicable only for settlement of claims, disputes for value less than or equal

to 20% of the original value of the contract or 20% of the actual value of the contract or 20% of the actual value of the work done under the contract whichever is less. The value of the original agreement is admittedly, Rs.39,14,20,386.93ps. 20% of the original agreement value shall be Rs.7,82,84,077/-. The claims referred to arbitration is admittedly more than Rs.33,99,00,101/-, which is more than 20% of the agreement value. Or executed value whichever was less.

f) The claims of the petitioner are not arbitrable and the arbitration is not the remedy for resolution of the disputes. Therefore, the petitioner or the respondent is to file civil suit for recovery of damages and losses before the competent civil court. Hence, this writ petition.

PERUSED THE RECORD

4. The impugned proceedings No.PAN/ARB/TEJA dated 22.07.2023 of the presiding Arbitrator for Arbitral Tribunal, reads as under :

“Respondent was asked to submit remarks against Claimant application dated 17.06.2023 and reminded further to submit on or before

20.07.2023, but nothing is received. Arbitral Tribunal has examined the content of the Memorandum dated 17.6.2023 cited vide reference ii) above, submitted by the claimant and is discussed item wise as follows:

1. Regarding the objection raised by the claimant that Tribunal has no jurisdiction as the claims are beyond 20 % of agreement value, it is noted –

i) that Claimant, having full knowledge of this provision, sought Arbitration vide letter dated 15.06.2022 addressed to GM/SC Railway with copy to DRM,ADRM/GNT and have not raised this issue therein. Further Tribunal also observes that this issue has not been challenged by Claimant before any appropriate court /the Hon. High Court of Telangana.

ii) that Respondent Railway have accepted the request for Arbitration and appointed this Tribunal which Claimant had also accepted and submitted the Statement of Claims (SOC). Respondents have also submitted their Statement of Defense (SOD).

iii) Thereafter three hearings were held and during 4th hearing while presenting oral submission Claimant raised this objection (orally) for the first time.

Hence raising the objection regarding jurisdiction of Arbitral Tribunal at this stage of the proceedings cannot be admitted under the relevant provisions of the Arbitration & Conciliation Act, 1996, and therefore objection raised by Claimant is rejected.

2. It is to be noted that arguments of Claimant on the objection during hearing on 17.06.2023 was

heard by the Tribunal and Respondent was directed to furnish remarks by 18.06.2023 which was also accepted by the respondents. Tribunal directed Claimant to proceed with the oral arguments. But Claimant insisted on immediate orders of the Tribunal on the objection. Further tone and conduct of the Claimant during the proceedings were not conducive for further conduct of the proceedings. Hence the Tribunal was forced to adjourn the proceedings and decided to cancel the hearing fixed on 18.06.2023 and not to hold any hearings further (kindly connect letter dated 18.06.2023 cited vide reference iii) above)

It may be noted that the tribunal has already given the necessary declarations required under the Arbitration and Conciliation Act to prove their independence. The allegation of unlawful actions, unilateral biased attitude of Tribunal and decision to terminate the mandate of Tribunal, asking refund of amount by Claimant is emotional, baseless, without any substantiation and is purely due to the reason that Tribunal has not given immediate orders on objections for which Claimant was insistent with unconducive tone and conduct. Therefore Tribunal rejects all allegations.

3. Due to non-conductive behaviour and conduct of Claimant, it is decided by the Tribunal not to hold any further hearings and to go ahead with the Proceedings based on the statement of Claims and Statement of Defense and other materials furnished by both the claimant and respondent. Kind attention is invited to the Tribunal directives vide reference iii) cited above for furnishing their further Defense/ documents additional submissions in support of their respective claims by 05.7.2023 for which no additional documents have been received till date.

Tribunal will proceed further as envisaged in section 25(C) of the Arbitration and Conciliation Act 1996.

This is issued with the approval of the members of Arbitral Tribunal

5. I.R.S. General Conditions of Contract entered into between the Petitioner and South Central Railways, Secunderabad. Condition No.10 reads as under :

10. Modification to Clause 63 & 64 of GCC :

- a) The provision of clause 63 and 64 of the General Conditions of Contract will be applicable only for settlement of claims, disputes, for valuses less than or equal to 20 % of the original value (excluding the cost of materials supplied free**

by Railway) of the contract or 20% of the actual value of the work done (excluding the value of the work rejected) under the contract, whichever is less.

- b) When claims/disputes are of value more than 20% of the value of the original contract or 20% of the value of the actual work done under the contract, whichever is less, the contractor will not be entitled to seek such disputes/claims for reference to arbitration and the provisions of clause No.63 & 64 of the General Conditions of Contract will not be applicable for referring the disputes to be settled through arbitration.**
- c) The contractor shall furnish his monthly statement of claims as per clause 43(1) of General Conditions of Contract.**
- d) The contractor can seek reference to arbitration to settle the disputes only once.**

6. Referring to Clause 10(a) (b) of the Contract Agreement entered into between the Petitioner and South Central Railway, Secunderabad, the Claimant/Petitioner herein raised a preliminary objection as to jurisdiction of the Tribunal in the Memorandum of Application dated 17.06.2023 raising specific objection as to jurisdiction of the Tribunal in

the matter of Arbitration arising out of Agreement bearing No.03/DY.CE/BR.Lines/HQ/SC/2017, dated 27.11.2017 and the relevant portion reads as under :

“II. It is further submitted that, though the claimant filed claim statement with all relevant documents appended in support of the claims before the this Hon'ble Tribunal, the claimant raised preliminary objection as to jurisdiction of this present Hon'ble tribunal In view of above said clause of the agreement which is fundamental and go to the root of the Issue of constitution of the present Hon'ble Tribunal and its jurisdiction. Therefore the counsel for the claimant prayed before the Hon'ble Tribunal to pass orders on such preliminary objections raised by the claimant during the proceedings as to the jurisdiction of the Hon'ble tribunal to adjudicate the disputes under the subject matter which was under question. The said contention and view of the claimant was agreed to by one of the member of the Hon'ble Tribunal by name Dr B. Srinivasan, Retd. FA&CAO/Sothern Railway. However the Hon'ble tribunal (Majority members by name Sri N. Pancham and Sri G.Venugopal Reddy) without cognizance to the clause in the agreement mentioned above and also the objection raised by the claimant before the Hon'ble Tribunal, the

Hon'ble tribunal forced and compelled the claimant to proceed with the matter pending objections raised with the claimant, otherwise the tribunal threatened the claimant that in the event claimant do not proceed with the matter, the tribunal will pass ex-parte orders. Therefore the claimant aggrieved with unlawful actions, decisions and unilateral biased attitude of the Hon'ble tribunal decided to terminate the mandate of the tribunal as it lacks jurisdiction to adjudicate the matter under dispute in view of the said agreement clause above mentioned and decided to file civil suit for damages before the competent civil Court, which was the remedy available to the claimant under the provision of law.

DISCUSSION AND CONCLUSION :

DISCUSSION :

7. It is the specific case of the Petitioner that as per Clause 10 of the Contract Agreement entered into between the Petitioner and South Central Railway, Secunderabad, Arbitration cannot be the remedy if the value of the disputes and claims is more than 20 % of the original contract value or executed value whichever

is less. It is further the case of the Petitioner that the claims of the Petitioner are admittedly more than 20 % of the original contract value or executed value whichever is less and therefore Arbitration is not the remedy available to the parties and the constitution of the Tribunal by the Respondent No.1 vide its order dated 07.12.2022 is in violation of the Clause 10 of the Contract Agreement and hence it is illegal. It is further the case of the Petitioner that in view of the fact that the Constitution of Arbitration Tribunal vide order dated 07.12.2022 is itself without jurisdiction, being illegal, the Petitioner seeks setting aside of the said order and also the consequential order passed by the Tribunal vide Letter No.PAN/ARB/TEJA dated 22.07.2023.

8. A bare perusal of the contents of the letter dated 22.07.2023 of the Presiding Arbitrator for Arbitral Tribunal (referred to and extracted above) indicates that it is at the instance of the Petitioner herein who vide his letter dated 15.06.2022 addressed to G.M./SC Railway sought Arbitration, having full knowledge of the fact that the Tribunal has no jurisdiction in respect

of claims beyond 20 % of agreement value and in the present case admittedly the claims are beyond 20 % of agreement value, and that the Arbitration Tribunal had been constituted vide Lr.No.W.148/GNT/ TEJA-GEW(JV)/Agt. No.03, dated 07.12.2022. Further the said letter dated 22.07.2023 of the Presiding Arbitrator for Arbitral Tribunal indicates that the Petitioner participated in 3 hearings held by the Arbitral Tribunal and during the 4th hearing while presenting oral submissions the Petitioner raised this objection orally for the first time and further the Arbitral Tribunal rejected the objection raised by the Petitioner observing that raising the objection regarding jurisdiction of Arbitral Tribunal at this stage of the proceedings cannot be admitted under the relevant provisions of the Arbitration and Conciliation Act, 1996. It is further indicated in the said proceedings dated 22.07.2023 that due to non-conducive behaviour and conduct of the Petitioner herein it is decided by the Tribunal not to hold any further hearings and to go ahead with the proceedings based on the statement of

claims and statement of defence and other materials furnished by both the claimant and the respondent thereunder and further it is declared by the Arbitral Tribunal that the said Tribunal will proceed further as envisaged in Sec.25(c) of the Arbitration & Conciliation Act, 1996.

9. Section 16 of Arbitration & Conciliation Act, 1996

reads as under :

CHAPTER IV - Jurisdiction of Arbitral Tribunals :

16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

CONCLUSION :

10. A bare perusal of Section 16(2) clearly indicates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an Arbitrator. A bare perusal of the Memorandum of Application dated 17.06.2023 raising specific objection as to jurisdiction of the Tribunal in the matter of Arbitration arising out of Agreement bearing No.03/DY.CE/BR.Lines/HQ/SC/2017, dated 27.11.2017 filed by the

Petitioner/Claimant before the Arbitral Tribunal (referred to and extracted above) clearly indicates that a specific pleading in writing as borne on record has been raised with regard to jurisdiction of the Arbitral Tribunal on 17.06.2023 itself and therefore this Court opines that the observation of the Arbitral Tribunal in its letter dated 22.07.2023 that the Petitioner raised this objection orally for the first time and further holding that at this stage of the proceedings, the said plea regarding jurisdiction of Arbitral Tribunal cannot be admitted under the relevant provisions of the Arbitration and Conciliation Act, 1996 and further rejecting the objection raised by the Petitioner mechanically without assigning any reasons on the ground that Petitioner sought for Arbitration vide its letter dated 15.06.2022 having full knowledge that the Tribunal has no jurisdiction as the claims are beyond 20 % of the Agreement value and further observing that the Petitioner participated in 3 hearings earlier is contrary to Section 16(1)(2)(3) and (4) of the Arbitration and Conciliation Act, 1996, which clearly

provides that the Arbitral Tribunal may rule on its own jurisdiction. Admittedly this Court opines that the proceedings dated 22.07.2023 rejecting Petitioner's objections mechanically without assigning any reasons is totally contrary to Sec.16 (1) (2) (3) and (4) of the Arbitration & Conciliation Act, 1996.

11. The Apex Court in the judgment reported in (2022) 4 SCC 463 in Indian Oil Corporation Limited through its Senior Manager, Vs. Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite at paras 43 and 44 observed as under :

Para 43 : An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

Para 44 : However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a

contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

12. The learned counsel appearing on behalf of the Respondents placed reliance on para 17 of the judgment of the Apex Court in Civil Appeal No.14665 of 2015 in Bhaven Construction Through Authorized Signatory Premjibhai K. Shah Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd., & Another, dated 06.01.2021, it is observed in para 17 of the judgment as under :

Para 17 : In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, reported in (2011) 14 SCC 337, this Court referred to several judgments and held:

“11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature

of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasijudicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

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.

13. The learned counsel appearing on behalf of the Respondents placing reliance on the above said judgment contends that the present writ petition should not be entertained and submits that the Petitioner has to await the passing of final award and avail the remedy U/s.34.

14. This Court opines that the Petitioner duly followed the procedure as stipulated U/s.16 (1) & (2) of the Arbitration and Conciliation Act, 1996 and filed Memorandum of Application dated 17.06.2023 raising objection as to jurisdiction of the Tribunal in the matter of Arbitration arising out of Agreement bearing No.03/DY.CE/BR.Lines/HQ/SC/2017, dated 27.11.2017 (referred to and extracted above) and in particular 2nd last paragraph of the said memorandum explained the said plea in detail, but the Arbitral Tribunal however did not consider the same in accordance to law and rejected the same mechanically without assigning any reasons and further passed the impugned order against the Petitioner dated 22.07.2023 contrary to Section 16 of Arbitration & Conciliation Act, 1996, observing that

the Tribunal decided not to hold any further hearings and decided to go ahead with the proceedings on the statement of claims, statement of defence and other materials furnished by both the Claimant and the Respondent thereunder and to proceed further in the matter as envisaged in Sec.25(c) of the Arbitration & Conciliation Act, 1996. This Court opines that the Arbitral Tribunal cannot act arbitrarily, irrationally, and independently of the contract ignoring the law which would tantamount to malafide action.

15. This Court opines that Arbitrator is the creature of the contract between the parties and therefore if the Arbitral Tribunal ignores the specific terms of the contract entered into between the parties it would be a question of jurisdictional error and it is important that the points of contract must be examined in detail for arriving at a conclusion in deciding the jurisdiction issue.

16. Taking into consideration of the above said facts and circumstances of the case and the law laid down by

the Apex Court in (1) Nivedita Sharma v Cellular Operators Association of India reported in (2011) 14 SCC 337, (2) the judgment reported in (2022) 4 SCC 463 in Indian Oil Corporation Limited through its Senior Manager, v Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite, and also (3) the judgment of the Apex Court in Civil Appeal No.14665 of 2015 in Bhaven Construction through Authorized Signatory Premjibhai K.Shah v Executive Engineer Sardar Sarovar Narmada Nigam Ltd. And another, the Writ Petition is allowed setting aside the proceedings No.PAN/ARB/TEJA, dated 22.07.2023 of the Arbitral Tribunal in relation to Arbitration in the matter of disputes arising out of Agreement No.CA.03/DYCE/BR Lines/HQ/SC/2017, dated 27.11.2017 and the Arbitral Tribunal constituted vide Lr.No. W.148/GNT/TEJA-GEW (JV)/Agt. No.03, dated 07.12.2022 is directed to reconsider the whole issue i.e. the objection filed by the Petitioner vide Memorandum of Application dated 17.06.2023 raising specific objection as to jurisdiction of the Tribunal in

the matter of Arbitration arising of Agreement No.CA.03/DYCE/BR Lines/HQ/SC/2017, dated 27.11.2017 as mandated U/s.16(1) (2) (3) (4) of the Arbitration & Conciliation Act, 1996 and pass appropriate reasoned orders deciding on the competence of Arbitral Tribunal to rule on its own jurisdiction in the present case in accordance to law, duly considering the terms of contract entered into between the Petitioner and South Central Railway, Secunderabad, in conformity with principles of natural justice by giving reasonable opportunity to the Petitioner and also the South Central Railway, Secunderabad and duly communicate the decision to the Petitioner, within a period of four weeks from the date of receipt of the copy of the order. However, there shall be no order as to costs.

Miscellaneous petitions, if any, pending shall stand closed.

SUREPALLI NANDA, J

Date: 30.10.2023

Note: L.R.Copy to be marked.
b/o kvrm