

The State Of Gujarat Through Chief ... vs Amber Builders on 8 January, 2020

Equivalent citations: AIR 2020 SUPREME COURT 454, 2020 (2) SCC 540, AIRONLINE 2020 SC 12, (2020) 1 ARBILR 227, (2020) 1 CURCC 131, (2020) 1 SCALE 618

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Bench: Aniruddha Bose, Deepak Gupta

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8307 OF 2019
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 36095 OF 2016)

STATE OF GUJARAT THROUGH
CHIEF SECRETARY & ANR.

...APPELLANT(S)

Versus

AMBER BUILDERS

...RESPONDENT(S)

With

CIVIL APPEAL NO. 8308 OF 2019
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 36096 OF 2016)

JUDGMENT

Deepak Gupta, J.

The main question which arises for decision in these appeals is whether the Gujarat Public Works Contract Disputes Arbitration Tribunal (hereinafter referred to as 'the Tribunal') constituted under

Section 3 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (hereinafter referred to as 'the Gujarat Act') has jurisdiction to make interim orders in terms of Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act').

2. At the outset, it may be noted that the Gujarat Act was enacted with a view to compulsorily refer all disputes arising out of "works contract" entered into by the State Government or the Public Sector Undertakings with any other person for those works defined as "works contract" in terms of Section 2 (k) of the Gujarat Act. As far as this case is concerned, it is not disputed that the contract entered into between the appellant State and the respondent Contractor was a "works contract". The contract order pertaining to the parties dated 31.07.2007 contained an arbitration clause, relevant portion of which reads as follows: "Clause : 30(1) Disputes to be referred to Tribunal : The dispute relating to this contract, so far as they relate to of the following matters, whether such disputes arise during the progress of the work of or after the completion or abandoned thereof, shall be referred to the Arbitration Tribunal, Gujarat State..."

3. It is not disputed that the Gujarat Act is applicable in the present cases. We are mainly concerned with Clause 43.A of the contract entered into between the parties, which reads as follows: "43.A Any sum of money due and payable to the Contractor (including the security deposit returnable to the contractor) executing any Government work or work of any District Panchayat wholly financed as grant-in-aid under this contract shall be appropriate by any District Panchayat/Government and shall be set off against any claim of the Government/District Panchayat of Gujarat state by the District Panchayat of Gujarat State/Government for the payment of a sum of money arising out or under any other contract made by the contractor with the Government/District Panchayat of Gujarat State for the work wholly financed as grant-in-aid by Government of Gujarat State. When no such amount for purpose of the recovery from the contractor against any claim of the Government/District Panchayat of Gujarat state is available, such a recovery shall be made from the contractor as arrears of land revenue."

4. In this judgment, we are only referring to the facts of Civil Appeal No.8307 of 2019 @ SLP(C) No.36095 of 2016. The respondent Contractor was awarded a contract for strengthening a section of National Highway under work order dated 31.07.2007. According to the contractor, he completed the work on 30.04.2008 and final bill was paid to the contractor. The road was damaged and, according to the contractor, this had occurred due to heavy rains. The State called upon the contractor to repair the damaged portion and, according to the contractor, this repair was completed after the rains stopped.

5. The case of the contractor is that in terms of the contract, the contractor was only liable to remove defects for a period of 3 years which period ended on 30.04.2011. On 10.09.2012, the contractor wrote a letter to the State to release the security amount. This amount was accordingly released vide letter dated 10.09.2012. The State issued letter dated 11.11.2014 calling upon the contractor to pay a sum of Rs.1,09,00,092/- This claim was based on the premise that the contractor had not carried out the road repair work in accordance with the contract. The appellant State threatened to withhold the payments from the security deposits and bills of other pending works. This notice was challenged by filing a writ petition in the High Court of Gujarat on the ground that the State was not

competent to withhold the amount payable to the contractor under other contracts or recover the amount from payments made under other contracts until the liability of the contractor was determined and quantified by a Court or forum of competent jurisdiction. The stand of the State was that since the work of the contractor was defective, the State had got the work done from another person at the risk of the contractor. In case, the contractor has any dispute, he can approach the Court and reliance was placed on Clause 43.A of the agreement quoted above.

6. The High Court relied upon the judgment of this Court in State of Karnataka vs. Shree Rameshwara Rice Mills, Thirthahalli¹ and the consistent view of the Gujarat High Court in various judgments referred to in the impugned judgment and held that without quantification or crystallization of the amount sought to be recovered, the employer or the contractor cannot unilaterally recover the said amounts from the ongoing contract work of the same contractor in connection with another contract. It was further directed that the State could not recover the amounts sought to be recovered from the payments due and payable to the contractor in other contracts. Liberty was, however, given to the State to seek recovery through other means as may be permissible under law. Accordingly vide judgment dated 18.02.2016 the petition was allowed and the communication dated 11.11.2014 was set aside.

7. This judgment has been challenged before us. Shri Preetesh Kapoor, learned senior counsel appearing for the State of Gujarat contends that the High Court has no jurisdiction to pass such an order. He submits that, in fact, the remedy, if any, of the respondent contractor was to approach the State Tribunal 1 (1987) 2 SCC 160 as constituted under the Gujarat Act and the writ court could not have granted such relief. On the other hand, Shri. K. G. Sukhwani, learned counsel appearing for the respondent submits that the Tribunal constituted under the Gujarat Act has no jurisdiction to grant such relief and he has placed reliance on an order of the State Tribunal dated 24.11.2005 wherein the Tribunal held that it can only exercise jurisdiction, powers and authority conferred on it by or under the Gujarat Act of which it is a creation. It was further held that if the Gujarat Act does not empower the Tribunal to grant injunction, and it cannot take recourse to the Code of Civil Procedure, 1908 for grant of interim relief. It also held that an order of interim injunction, as prayed for like in the present case, does not fall within the ambit of 'interim award'. The Tribunal held that there is no power to grant such injunction.

8. It appears to us that since then, in Gujarat, challenges to all communications/orders, whereby the State taking recourse to the provision of the contract akin to Clause 43.A seeks to recover amounts by setting it off against the claims of contractor in other contracts, are dealt with by the High Court.

9. We have extracted the main issue in the opening portion of the Judgment. Section 2(a) of the Gujarat Act defines an 'Arbitration Act' to mean Arbitration Act, 1940. It is not disputed by the parties that this will now read to mean the A&C Act.

10. We may also refer to certain provisions of the A&C Act. Section 2(e)(i) of the A&C Act defines 'Court' in the context of disputes other than the international commercial arbitration as follows:□
“(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary

original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;”

11. We may also refer to Section 2(2) & 2(4) of the A&C Act which read as follows:“(2) This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause

(a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.” xxx xxx xxx “(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.”

12. Section 9 of the A&C Act empowers the Court to grant interim measures. However, Section 9(3) clearly provides that once an arbitral tribunal is constituted, the Court shall not entertain an application under Section 9(1) unless the Court comes to the conclusion that such circumstances exist which would make the remedy under Section 17 not efficacious.

13. Section 17 of the A&C Act provides for interim measures to be granted by the arbitral tribunal. It reads as follows:“17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried,

which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

14. We may also refer to Section 31(6) of the A&C Act which reads as follows: □“31. Form and contents of arbitral award. □xxx xxx xxx (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.”

15. Part I of the A&C Act i.e. from Section 2 to Section 43 deals with Arbitration and Section 2(2) clearly states that the said Part would apply to all Arbitrations which take place in India. Section 2(4) makes it absolutely clear that other than Section 40(1), 41 and 43, Part I of the A&C Act shall apply to all arbitrations even if they are carried out under any other enactment as if the arbitrations were pursuant to an arbitration agreement except insofar as the provisions of Part I are inconsistent with the other enactment or any rules made thereunder. A plain reading would show that the provisions of Part I of the A&C Act would apply to all arbitrations where the place of arbitration is within India. Even statutory arbitrations under other Acts would be governed by Part I. The only exception is that if there is any departure from Part I in the special enactment then the special enactment will prevail and the A&C Act will give way to the special enactment.

16. It is in this context that we have to examine the Gujarat Act. We have already referred to certain provision of the Gujarat Act. Reference and procedure of the Tribunal is governed by Chapter 3 of the Gujarat Act. Section 8 provides that where any dispute within the meaning of the said Act, arises between the parties, the said dispute shall be referred to arbitration under the said Act whether the agreement in question contained an arbitration clause or not. Basically, the intention of the Stage Legislature was that all disputes relating to works contract between the State Government and the persons executing the works defined as works contract would be compulsorily referred to the Arbitral Tribunal constituted under Section 3 of the Gujarat Act. Section 8(3) clearly provides that where the Tribunal admits a reference under sub□section (2) it will make an award or an interim award giving its reasons thereof. This Section recognizes the power of the Tribunal to make interim awards. However, as pointed above, the Tribunal took a view that an interim award could not be in the nature of an injunction.

17. The practice and procedure of the Tribunal is governed by Section 9 of the Act. Section 12 of the Act vests revisional powers in the High Court of Gujarat where an award or any interim award can

be challenged on the grounds set out therein. The High Court also has suo motu powers in this regard. Section 13 which is relevant for our purpose reads as follows: □“13. Bar of jurisdiction of Courts. □(1) Save as otherwise provided by section 12, no Civil Court shall have jurisdiction to deal with or decide any question which the Tribunal is empowered to deal with and decide by or under this Act and no injunction shall be granted by any Civil Court in respect of any action taken or to be taken in pursuance of any power by or under this Act. (2) No award or interim award or order made or proceedings taken under this Act by the Tribunal shall be called in question in any Civil Court.” Section 13 specifically bars the jurisdiction of the Civil Courts. This clearly means that powers vested in a Civil Court under the A&C Act, such as the powers to grant interim relief in terms of Section 9 of the A&C Act and the powers for setting aside an award under Section 34 of the Act cannot be exercised by Civil Courts insofar as the awards made under the Gujarat Act are concerned. As far as Gujarat Act is concerned, the power to set aside/modify an award is vested in the High Court under Section

12. Section 21 of the Gujarat Act reads as follows: □“21. Arbitration Act to cease to apply. □The provisions of the Arbitration Act, shall in so far as they are inconsistent with the provisions of this Act, cease to apply to any dispute arising from a works contract and all arbitration proceedings in relation to such dispute before an arbitrator, umpire, court or authority shall stand transferred to the Tribunal.”

18. We are clearly of the view that the appropriate remedy for the contractor was to approach the arbitral tribunal constituted under the Gujarat Act since that would have jurisdiction to decide whether the notice issued by the Government was a legal notice and whether the Government was, in fact, entitled to recover any amount from the contractor. It would also be within the jurisdiction of the Tribunal to decide whether the contractor has made out a prima facie case for grant of interim relief. We are purposely not going into the merits of the case because once we hold that the Tribunal has the jurisdiction to entertain and adjudicate upon the dispute it would not be proper for us to make any comments on the merits.

19. Shri Sukhwani, learned counsel appearing for the respondents has placed reliance on a judgment of this Court in Gangotri Enterprises Limited vs. Union of India and Others² to submit that till the demand of the Government is crystallised or adjudicated upon, the Government cannot ² (2016) 11 SCC 720 withhold the money of the contractor. Since this case been specifically relied upon we are duty bound to go in the correctness of the view laid down in Gangotri Enterprises (supra). The judgment in Gangotri Enterprises (supra) is primarily based on the judgment of a two Judges’ Bench of this Court in Union of India vs. Raman Iron Foundry³ In this case, this Court held that the Government had no right to appropriate the amount claimed without getting it first adjudicated. The relevant portion of the judgment reads as follows:

“6... But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo moto, the damages claimed by it from

out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondent. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly

3 (1974) 2 SCC 231 within the power of the Court under Section 41 (b) because the claim for damages forms the subject matter of the arbitration proceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power under Section 41 (b) read with the Second Schedule.

xxx xxx xxx “11...We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.” The judgment in Raman Iron Foundry (supra), was specifically overruled on the issue in hand by a three Judge Bench of this Court in the case of H.M. Kamaluddin Ansari & Co. vs. Union of India⁴. In this case there was a general condition which entitled the Government to recover the damages claimed by appropriating any sum which may become due to the contractor under other pending bills. In this case, this Court disagreed with the findings in the Raman Iron Foundry (supra) and held as follows:

“21...With profound respect we find that the aforesaid observation is incongruous with the proposition of law laid down by this Court just

4 (1983) 4 SCC 417 before this observation. We find it difficult to agree with the observation of the Court that the impugned order in form and substance being the negative the respondent could refuse to pay such amounts if it thinks it has a valid defence, and if it chooses to do so there would be no breach of the injunction order.

22. It is true that the order of injunction in that case was in negative form. But if an order enjoined a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily means that the amount must be paid. If the amount is withheld there will be a defiance of the injunction order and that party could be hauled up for infringing the injunction order. It will be a contradiction in terms to say that a party is enjoined from withholding the amount and yet it can withhold the amount as of right. In any case if the injunction order is one which a party was not bound to comply with, the court would be loath and reluctant to pass such an ineffective injunction order. The court never passes an order for the fun of passing it. It is passed

only for the purpose of being carried out. Once this Court came to the conclusion that the court has power under Section 41 (b) read with Second Schedule to issue interim injunction but such interim injunction can only be for the purpose of and in relation to arbitration proceedings and further that the question whether any amounts were payable by the appellant to the respondent under other contracts, was not the subject matter of the arbitration proceedings and, therefore, the court obviously could not make any interim order which, though ostensibly in form an order of interim injunction, in substance amount to a direction to the appellant to pay the amounts due to the respondent under other contracts, and such an order would clearly be not for the purpose of and in relation to the arbitration proceedings; the subsequent observation of the Court that the order of injunction being negative in form and substance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, is manifestly inconsistent with the proposition of law laid down by this Court in the same case.

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31. We are clearly of the view that an injunction order restraining the respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor□appellant. Such an order was clearly beyond the purview of clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.”

20. In our opinion, the judgment rendered in Gangotri Enterprises Limited (supra) is per incuriam because it relies upon Raman Iron Foundry (supra) which has been specifically overruled by three Judge Bench in the case of H.M. Kamaluddin Ansari (supra).

21. On a conjoint reading and a careful analysis of the Acts together, we are of the view that insofar as the powers vested in the Arbitral Tribunal in terms of the Section 17 of the A&C Act are concerned, such powers can be exercised by the Tribunal constituted under the Gujarat Act because there is no inconsistency in these two Acts as far as the grant of interim relief is concerned. This power is already vested in the tribunal under the Gujarat Act and Section 17 of the A&C Act compliments these powers and therefore it cannot be said that the provisions of Section 17 of the A&C Act are inconsistent with the Gujarat Act.

22. In view of the above discussion, both the appeals filed by the State of Gujarat are allowed, and the judgments of the High Court of Gujarat are set aside. However, liberty is given to the contractor(s) to approach the Gujarat Public Works Contract Disputes Arbitration Tribunal and if the Tribunal is approached within 2 months from today, the tribunal shall not dismiss the claim on the issue of limitation. It shall decide the same on merits. Pending application(s), if any, shall stand(s) disposed of.

.....J. (Deepak Gupta)J. (Aniruddha Bose) New Delhi
January 8, 2020