Bhaven Construction vs Exe Engineer Sardar Sarovar Narmada ... on 6 January, 2021

Equivalent citations: AIRONLINE 2021 SC 6

Author: N.V. Ramana

Bench: Hrishikesh Roy, Surya Kant, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 14665 OF 2015

BHAVEN CONSTRUCTION THROUGH … APPELLANT
AUTHORISED SIGNATORY PREMJIBHAI K. SHAH

VERSUS

EXECUTIVE ENGINEER SARDAR … RESPONDENTS
SAROVAR NARMADA NIGAM LTD.& ANR.

JUDGMENT

N.V. RAMANA, J.

1. This Civil Appeal raises an important question of law concerning arbitration law in India and special enactments enacted by States concerning public works contract.

2. A brief reference to facts in this case is necessary for the disposal of the case. On 13.02.1991, Respondent No. 1 entered into a contract with the Appellant to manufacture and supply bricks. The aforesaid contract had an arbitration clause. As some dispute arose regarding payment in furtherance of Date: 2021.01.06 15:59:16 IST Reason:

> manufacturing and supplying of bricks, the Appellant issued a notice dated 13.11.1998, seeking appointment of sole arbitrator in terms of the agreement. Clause 38 of the agreement provide for arbitration as under:
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> Clause 38 – Arbitration All disputes or differences in respect of which the decision has not been settled, shall be referred for arbitration to a sole arbitrator appointed as

follows:

> Within thirty days of receipt of notice from the Contractor of his intention to refer the dispute to arbitration the Chief Engineer shall send to the Contractor a list of three officers from the list of arbitrator appointment by the Government. The Contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of the person from the list who shall then be appointed as the sole arbitrator. If Contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer, shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days, as stipulated, the contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select one officer form the list and appoint him as the sole arbitrator within fifteen days. If the Chief Engineer fails to do so the contractor shall communicate to the Chief Engineer the name of one Officer from the list, who shall then be the sole arbitrator.
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> The arbitration shall be conducted in accordance with the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The Arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.
>
> Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.
>
> All awards shall be in writing and in case of awards amounting to Rs. 1.00 lakh and above, such awards, shall state reasons for the amounts awards.
>
> Neither party is entitled to bring a claim to arbitration if the Arbitrator has not been appointed before the expiration of thirty days after defect liability period.
>
> (emphasis supplied)

3. Respondent No. 1, by replies dated 23.11.1998 and 04.01.1999, did not agree to the Appellant's request on two main grounds:

> a. That the arbitration was agreed to be conducted in accordance with the provision of the Indian Arbitration Act and any statutory modification thereof. Accordingly, the State of Gujarat had passed the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (hereinafter referred to as "the Gujarat Act"). Therefore, the disputes between the parties were to be adjudicated in accordance with the aforesaid statute. b. That the arbitration was time barred, as Clause 38 mandated that neither party was entitled to claim if the arbitrator has not been appointed before the expiration of thirty days after the defect liability period.

4. In any case, the Appellant appointed Respondent No. 2 to act as a sole arbitrator for adjudication of the disputes.

Respondent No. 1 preferred an application under Section 16 of the Arbitration and Conciliation Act of 1996 (hereinafter referred to as "the Arbitration Act") disputing the jurisdiction of the sole arbitrator. On 20.10.2001, the sole arbitrator rejected the application of the Respondent No. 1 and held that the sole arbitrator had jurisdiction to adjudicate the dispute.

5. Aggrieved by the order of the sole arbitrator, Respondent No. 1 preferred Special Civil Application No. 400 of 2002, under Articles 226 and 227 of the Constitution of India before the High Court of Gujarat. The Single Judge, while dismissing the Special Civil Application, held as under:

> ".....At this stage, the judgment of the Hon'ble Supreme Court in the case of Konkan Railway Corporation Limited v. Mehul Construction Company, (2000) 7 SCC 201 is also required to be considered along with the judgment of the Hon'ble Supreme Court in the case of SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. Considering the aforesaid two judgments of the Hon'ble Supreme Court and the order passed by the learned sole arbitrator passed under Section 16(4) of the Act dismissing the application submitted by the petitioner challenging the jurisdiction of respondent no. 2 as a sole arbitrator and challenging his appointment as a sole arbitrator, it is to be held that the petition under Articles 226 and 227 of the Constitution of India against the said order is not maintainable and/or the same is not required to entertained and the only remedy available to the petitioner is to wait till the award is passed by the learned Sole Arbitrator and to challenge the same under Section 34 of the Act..."

6. Aggrieved by the order of the Single Judge, Respondent No. 1 preferred Letters Patent Appeal No. 182 of 2006 in Special Civil Application No. 400 of 2002. The High Court of Gujarat, by the impugned order dated 17.09.2012, allowed the appeal and observed the following:

> "11. As discussed hereinabove, 'the contract' is a "works Contract" and a dispute is raised by the petitioner at the earliest available opportunity about the 'forum' in which the dispute be adjudicated. It was as early as on 23.11.1998, the appellant denied that in view of Clause-38, wherein it is provided that, 'provision of Indian Arbitration Act, 1940 and any statutory modification thereof will be applicable', the respondent cannot appoint a sole arbitrator and thereafter cannot contend that now that the Arbitrator is already appointed and he (the arbitrator) has already exercised power under the provisions of the Arbitration and Conciliation Act, 1996, the petitioner has to wait till the arbitration award is passed, to challenge the same under Section 34 and Section 37 of the 1996 Act."

7. Aggrieved, the Appellant filed this appeal by way of special leave petition.

8. Counsel for the Appellant argued that the Division Bench of the High Court erred in interfering with the order of the Single Judge under Articles 226 and 227 of the Constitution. The fact that the final award has been passed by the sole Arbitrator and is now challenged under Section 34 of the Arbitration Act clearly shows the attempt of Respondent No. 1 to bypass the framework laid down under the Arbitration Act. He points out that Section 16(2) of the Arbitration Act mandates that the sole arbitrator had the jurisdiction to adjudicate the preliminary issue of jurisdiction, which can only be challenged under Section 34 of the Arbitration Act.

9. On the other hand, learned counsel for Respondent No. 1 contended that since the enactment of the Gujarat Act, the Arbitration Act was substituted with respect to the disputes arising out of the works contract. It was contended that under Articles 226 and 227 of the Constitution, it was always open for Respondent No. 1 to invoke the writ jurisdiction of the High Court to set aside an arbitration which was a nullity as it was in conflict with the State enactment.

10. Having heard both parties and perusing the material available on record, the question which needs to be answered is whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?

11. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

12. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

13. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of the Arbitration Act.

Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

14. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11

of the Arbitration Act.

15. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No. 1 mounting a judicial challenge at that stage. Respondent No. 1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as 'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-

section (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

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, (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 quasi-

judicial 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.

(emphasis supplied) 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.

18. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2019) SCC Online SC 1602, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

> "15. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)
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> 16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

19. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

20. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modeled on the 'principle of unbreakability'. This Court in P. Radha Bai v. P. Ashok Kumar, (2019) 13 SCC 445, observed:

> 36.3. Third, Section 34(3) reflects the principle of unbreakability. Dr Peter Binder in International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2nd Edn., observed:
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> "An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Article 33 does the time-limit of three months begin after the tribunal has disposed of

> the request. This exception from the three-month time-limit was subject to criticism in the working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time-limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of Article 33".

According to this "unbreakability" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-

month time-limit has expired cannot be raised.

37. Extending Section 17 of the Limitation Act would go contrary to the principle of "unbreakability" enshrined under Section 34(3) of the Arbitration Act.

(emphasis supplied) If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished.

21. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any mala fides.

22. Respondent No. 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, the Respondent No. 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and the Respondent No. 1 has already preferred a challenge under Section 34 to the same. Respondent No. 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.

23. The Division Bench further opined that the contract between the parties was in the nature of a works contract as it held that the manufacturing of bricks, as required under the contract, was only an ancillary obligation while the primary obligation on the Appellant was to supply the bricks. The Division Bench therefore held that the Gujarat Act holds the field, and not the Arbitration Act.

24. The Gujarat Act was enacted in 1992 with the object to provide for the constitution of a tribunal to arbitrate disputes particularly arising from works contract to which the State Government or a public undertaking is a party. A works contract is defined under Section 2(k) of the Gujarat Act. The definition includes within itself a contract for supply of goods relating to the execution of any of the works specified under the section. However, a plain reading of the contract between the parties

indicates that it was for both manufacturing as well as supply of bricks. Importantly, a contract for manufacture simpliciter is not a works contract under the definition provided under Section 2(k). The pertinent question therefore is whether the present contract, which is composite in nature, falls within the ambit of a works contract under Section 2(k) of the Gujarat Act. This is a question that requires contractual interpretation, and is a matter of evidence, especially when both parties have taken contradictory stands regarding this issue. It is a settled law that the interpretation of contracts in such cases shall generally not be done in the writ jurisdiction. Further, the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain the plea of Respondent No. 1 to challenge the ruling of the arbitrator under Section 16 of the Arbitration Act.

25. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed as follows:

> "22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. 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 be raised under Section 34." (emphasis supplied)

26. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings.

.....J (N.V. RAMANA) .....J (SURYA KANT)
.....J (HRISHIKESH ROY) NEW DELHI;

JANUARY 06, 2021.