(2004) 12 JH CK 0016

Jharkhand High Court

Case No: W.P.C. No''s. 5257 and 5292 of 2004

State of Jharkhand		APPELLANT
	Vs	
R.K. Construction Pvt. Ltd. and Another		RESPONDENT

Date of Decision: Dec. 24, 2004

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 13, 16, 34, 5
- Constitution of India, 1950 - Article 226

Citation: (2005) 2 ARBLR 48 : (2005) 1 BLJR 403 : (2005) 1 JCR 335

Hon'ble Judges: M.Y. Eqbal, J

Bench: Single Bench

Advocate: Shamim Akhtar, SCI and Arvind Kr. Mehta, JC to SCI, for the Appellant; M.S. Mittal, Ashok Yadav and N.K. Pasari, for the Respondent

Final Decision: Dismissed

Judgement

M.Y. Eqbal, J.
Heard the counsel for the parties on the question of maintainability of this writ application.

2. In the instant writ application filed under Article 226 of the Constitution of India the petitioner-State of Jharkhand seeks issuance of a writ directing respondent No. 2 retired Chief Engineer, not to proceed with the arbitration proceeding referred to him by respondent No. 1 in respect of the alleged dispute arose out of an agreement dated 12.3.1986 and also for quashing the entire arbitration proceeding initiated by respondent No. 2.

3. The facts of the case lie in a narrow compass :

Petitioner''s case is that by virtue of an agreement being No. L.C. B/3/85-86 dated 12.3.1986 entered into between the petitioner and respondent No. 1, work order

was allotted to respondent No. 1 for excavation of Galudih Right Bank, Main Canal. The work was to be completed within 24 months i.e. by 13.3.1988. The period for completion of the work was time to time extended upto 30.6.1993. Petitioner''s further case is that the value of the work was Rs. 262.80 lacs and as against that, respondent No. 1 paid 318. 17 lacs but the work was not completed. Petitioner''s case is that inspite of several letters and reminders sent to the respondent-Contractor for execution of the work, the work was not completed. The Executive Engineer, therefore, made final measurement in June, 2003 and the agreement was closed. Thereafter, respondent No. 1 illegally ad arbitrarily invoked Clause 51 of the agreement by letter dated 13.4.2003 making excessive and inflated claim and by letter dated 20.5.2004 purported to appoint arbitrator for adjudicating the alleged dispute.

4. This Court on 4.10.2004, after hearing the counsel for the petitioner, passed'' the following order :

"Issue notice to respondents in the admission matter for which requisite etc. by registered post must be filed within one week failing which this application shall stand rejected without further reference to a Bench.

The question of maintainability of the writ the application shall be considered on the next date.

Pending hearing of this writ applications, respondent No. 2 shall not proceed with the matter."

5. Learned counsel appearing for respondent 1 argued at the length on the question of maintainability of the writ petition. Learned counsel drawn may attention to relevant provisions of the Arbitration and Conciliation Act, 1996 (in short the said Act) and submitted that neither the writ Court nor the Civil Court can be approached to challenge the jurisdiction of the arbitrator or arbitration proceeding. According to the learned counsel the petitioner can challenge the jurisdiction of the arbitrator only in the arbitration proceeding.

6. Mr. S. Akhtar, learned counsel appearing on behalf of the petitioner-State, on the other hand, submitted that the writ applications have been filed for restraining the arbitrator from proceeding with the ar bitration proceeding. According to the learned counsel the Arbitrator and the Arbitral Tribunal are the authorities under the Act and, therefore, writ petition under Article 226 of the Constitution is maintainable. Learned counsel relying upon a decision of the Supreme Court reported in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, submitted that bar under Article 226 of the Constitution is confined to the State authorities and the instrumentalities of the State Government, rather, writ can be issued to any person or authority performing public duty.

7. Section 5 of the said Act reads as under:

"Extent of judicial intervention.-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."

8. For the aforesaid provision, it is clear that the matters governed by this Part (Sections 7 to 43) no judicial authority shall interfere except the authority provided in this Part.

9. Section 13 of the said Act is also worth to be quoted herebelow :

"Challenge procedure.-(1) Subject to sub- section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agree to challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agree upon by the parties or under the procedure under sub-section (2), is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make and application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5) the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

10. Section 16 lays down the provisions with regard to competence of arbitral tribunal to Rule on the jurisdiction. The Section reads as under :

"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, either of the cases referred to in sub-sect-ion (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 proceeding 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."

11. From reading the aforesaid provisions and also other provisions of the said Act it is clear that the question with regard to jurisdiction of the arbitrator can be raised only before the arbitrator who decides the dispute in the manner provided in Part-I of the said Act. The said Act and the Scheme suggest that only after final award is made, the same can be challenged before Court u/s 34 on the ground mentioned in Section 34(2) or Section 13(5) of the Act and a party cannot be allowed to approach this Court under Articles 226 and 227 of the Constitution of India by-passing remedy under the Act. In my considered opinion, therefore, writ jurisdiction is not the appropriate remedy. This Court exercising writ jurisdiction cannot exercise power de hors the provisions of the said Act and restrain the arbitrator from proceeding with the arbitration proceeding.

12. For the reasons aforesaid, these writ petitions for the relief sought for, are not maintainable and are, accordingly, dismissed.