(2016) 11 MP CK 0048

MADHYA PRADESH HIGH COURT (INDORE BENCH)

Case No: Writ Petition No. 7290 of 2016

Indore Development Authority	APPELLANT
Vs	
Arbitral Tribunal	RESPONDENT

Date of Decision: Nov. 22, 2016

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 12, Section 13, Section 14, Section 34
- Constitution of India, 1950 - Article 227

Citation: (2017) 1 MPLJ 700

Hon'ble Judges: Mr. S.C. Sharma and Rajeev Kumar Dubey, JJ.

Bench: Division Bench

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

1. The petitioner before this Court, Indore Development Authority has filed this present writ petition being aggrieved by the order passed by the learned Special Judge under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015, dated 17/10/2016 by which the application preferred u/S. 14 of the Arbitration and Conciliation Act, 1996 seeking revocation of mandate of the arbitrator and quashment of proceedings before the Arbitral Tribunal was sought.

2. Facts of the case reveal that a contract was awarded to M/s. Kalyan Toll Infrastructure Ltd., - respondent No.4 by the Indore Development Authority on 9/3/2012 for the work of design and construction of railway overbridge having viaduct including approaches and another work. A dispute arose between the parties and the respondent No.4 served a notice to the Indore Development Authority to refer the matter for arbitration in accordance with law the provision of The Arbitration and Conciliation Act, 1996 and to appoint Arbitral Tribunal. The Arbitral Tribunal was constituted and Hon''ble Shri Justice R. S. Garg (Former Chief

Justice of Gauhati High Court) was appointed as a third member of the Arbitral Tribunal. Contention of the petitioner - Indore Development Authority is that Hon''ble Shri Justice R. S. Garg is a very distant relation of the Managing Director of Kalyan Toll Infrastructure Ltd., and, therefore, a prayer was made by filing a Writ Petition ie., Writ Petition No. 5740/2016 for declaring the Arbitral Tribunal as illegal and contrary to the provisions as contained in Section 12(1) and 12(2) of the Act of 1996. Another relief was sought for restraining the Tribunal from proceeding ahead in the matter. Lastly it was prayed that the Arbitral Tribunal be directed to refer the matter to Madhyastham Adhikaran at Bhopal for adjudication of the dispute. The petition filed by the Indore Development Authority, as already stated, was registered as Writ Petition No. 5740/2016 and the Division Bench of this Court has passed an order on 24/8/2016. The Division Bench of this Court in paragraphs 16, 17, 18 and 19 has held as under :

16. The issues involved in the writ petition relating to private disputes between the parties under a contract and are not in the realm of public law. The first and second arbitrators have been appointed by the parties, following arbitration clause in the contract; the first and second arbitrators in turn appointed the learned third arbitrator as Presiding Arbitrator; that the writ petition has been filed against the decision of the arbitral Tribunal passed under Section 12 of the 1996 Act, which is a complete code in itself and it sets out the procedures to be followed; that Section 5 of the Act specifically prohibit interference by a court of law in matters governed by Part I of the Act except where so provided in the said part. Section 16 (5) of the Act specifically provides that where an arbitral tribunal takes a decision rejecting the plea it shall continue with the arbitral proceeding and make an arbitral award; that Section 16 (6) of the Act provides that a party aggrieved by such an arbitral award may make an application for setting aside the same under Section 34 of the Act. Section 37 (2) of the Act, which provides for appeals against orders does not provide for an appeal against an order rejecting a plea under Section 16 of the Act, hence, the writ petition, challenging the order passed by the arbitral tribunal under Section 12 is not at all maintainable; that arbitration clause is available in the agreement between the parties, hence, respondent No.2 has appointed its arbitrator, thereafter, the petitioner had participated in the appointment process, appointed an arbitrator and they appointed learned Presiding Arbitrator and at that time he had not raised any objection, thus, the petitioner submitted to the jurisdiction of the arbitral tribunal and that when once arbitral tribunal takes a decision rejecting the plea on 23.04.2016 that the provision of M.P. Madhyastham Adhikaran Adhiniyam, 1983 would not apply, the arbitral tribunal continue, thereafter, application under Section 12 has been rejected by the impugned order, no appeal against the said decisions under Section 37 is available and the only remedy is to challenge the final award under Section 34 of the Act.

17. As per the scheme of Arbitration and Conciliation Act, 1996, the arbitration matter has to proceed without any hindrance or obstructions from the Courts,

particularly so by writ petition. In no uncertain terms it is clearly stipulated that for sections falling under Part I no judicial authority shall interfere except where so specifically provided in that part. The scheme evolved by Sections 12, 13 and 16 of the Act is of the clear view that spokes should not be put in passing the arbitral award. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. Under Section 34, the aggrieved party has an avenue for ventilating its 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. The object of minimizing judicial intervention while the matter is in the process of being adjudicated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution of India against every orders made by the arbitral tribunal.

18. As per law laid down by the Constitution Bench of the Apex Court in the case of SPB and Company(supra), the writ petition is not maintainable.

19. The order passed on 12/08/2016 in the case of **Indore Municipal Corporation v. M/s Simplex Infrastructure Ltd.(in W.P. No.2581/2014)** shall apply mutatis mutandis in the present writ petition also and, therefore, we dismiss the writ petition on the ground of its maintainability.

3. The Division Bench of this Court after taking into account the judgment delivered in the case of **SBP and Company v. M/s. Patel Engineering and another reported in 2005 (8) SCC 618** has held that a Writ Petition challenging the order passed by the Arbitral Tribunal u/S. 12 is not at all maintainable. Not only this, the Division Bench has also observed that in the light of the Act of 1996 the petitioner shall certainly be having a remedy to challenge the arbitral award.

4. Sections 12, 13 and 14 of the Arbitration and Conciliation Act, 1996 reads as under :

12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in subsection (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. 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 subsection (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 agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed 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 an 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.

14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator,

it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

5. The aforesaid statutory provision of law makes it very clear that the party challenging the arbitrator may make an application for setting aside an arbitral award in accordance with Section 34. It also provides that if a challenge under any procedure agreed upon the parties is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an award.

6. In the present case, the Division Bench has rejected the prayer made by the Indore Development Authority for setting aside the artirbal tribunal and this Court is of the considered opinion that the remedy available to the petitioner was to challenge the order passed by the Division Bench before Hon''ble the Supreme Court. However, the petitioner - Indore Development Authority has filed an application u/S. 14 of the Arbitration and Conciliation Act, 1996 and a similar prayer was made before the learned Special Judge which was made before the Division Bench of this Court, meaning thereby, to quash the appointment of Hon''ble Shri Justice R. S. Garg and to quash the proceedings which took place before the Arbitrator.

7. Learned Special Judge has dismissed the application by passing a detailed and reasoned order as there is a remedy available to the present petitioner to challenge the award after it is passed by the Arbitration Tribunal. Against the order passed by the learned Special Judge, the present Writ Petition has been filed.

8. This Court is of the considered opinion that the present Writ Petition is nothing but a second attempt by the petitioner before this Court for quashment of the arbitration Tribunal. In the earlier attempt the Indore Development Authority has not succeeded before this Court and now a second petition has been filed before this Court. This Court is of the considered opinion that the Division Bench of this Court has considered all the aspects of the case in the earlier order and the learned Special Judge was justified in passing the impugned order. Learned counsel for the petitioner has argued before this Court and as reflected from the cause title, the present Writ Petition is a Writ Petition under Article 227 of the Constitution of India, this Court is of the considered opinion that there is no perversity / illegality in the order passed by the learned Special Judge nor the order can be said to be an order passed without jurisdiction.

9. The Apex Court in the case of **Shalini Shyam Shetty v. Rajendra Shankar Patil reported in 2010 (8) SCC 329** in paragraph No.49 has held as under:-

"49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court''s jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, ''within the bounds of their authority''.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court''s power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of **L. Chandra Kumar v. Union of India and others, reported in (1997) 3 SCC 261** and therefore abridgement by a

Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court''s power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court''s jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

10. In the light of the aforesaid judgment delivered by the apex Court, this Court is of the considered opinion that the order of the learned Special Judge does not suffers from any patent illegality nor any jurisdictional error has been committed by the Court below.

11. Accordingly, the admission is declined.