



2023/KER/58762

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE MURALI PURUSHOTHAMAN

TUESDAY, THE 3RD DAY OF OCTOBER 2023 / 11TH ASWINA, 1945

WP(C) NO. 29228 OF 2023

PETITIONER/S:

M/S PUNARNAVA AYURVEDA HOSPITAL PVT LTD
EDAPPALLY NORTH VILLAGE, ERNAKULAM 682024 REPRESENTED BY ITS

BY ADVS.
M.K.SUMOD
VIDYA M.K.
RAJ CAROLIN V.
THUSHARA.K

RESPONDENTS:

- 1 THE ARBITRATOR FOR NH 66 & DISTRICT COLLECTOR
COLLECTORATE, CIVIL STATION, ERNAKULAM, PIN - 682030
- 2 THE SPECIAL DEPUTY COLLECTOR (LA)
N H 66, ERNAKULAM, NALANDA CITY CENTRE, 2ND FLOOR, NEAR PWD REST
HOUSE, NORTH PARAVUR, ERNAKULAM, PIN - 683513
- 3 THE PROJECT DIRECTOR
NATIONAL HIGHWAY AUTHORITY OF INDIA, MAVELIPURAM, KAKKANAD,
KOCHI, ERNAKULAM, PIN - 682030
BY ADVS.
P.MOHANDAS(ERNAKULAM) P.
K.SUDHINKUMAR(K/572/2014)
SABU PULLAN(K/35/2001)
GOKUL D. SUDHAKARAN(K/000886/2016)
R.BHASKARA KRISHNAN(K/000891/2016)
BHARATH MOHAN(K/1392/2020)
K.P.SATHEESAN (SR.)(S-242)
E.C.KURIAKOSE
B.G.BIDAN CHANDRAN(K/470/1991)
LEJO JOSEPH GEORGE(K/357-C/2017)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29.09.2023, THE
COURT ON 3.10.2023, DELIVERED THE FOLLOWING:

**"CR"****JUDGMENT**

The property of the petitioner was acquired for the purpose of widening National Highway No.66. The Special Deputy Collector (LA), the 2nd respondent, the competent authority under the National Highways Act, 1956 (hereinafter referred to as the 'N.H. Act') determined the compensation payable to the petitioner and passed Ext. P1 award. Dissatisfied with the amount determined by the competent authority, the petitioner filed Ext.P2 arbitration application dated 24.08.2022 under Section 3G (5) of the N.H. Act before the 1st respondent Arbitrator. Aggrieved by the delay in disposal of Ext. P2 arbitration application, the petitioner approached this Court by filing W. P. (C) No. 9997 of 2023 and this Court, by judgment dated 12.04.2023, disposed of the writ petition directing the



Arbitrator to dispose of Ext. P2 arbitration application within two months from the date of receipt of the copy of the judgment after hearing the parties.

2. Pending Ext. P2 arbitration application, the petitioner filed Ext.P4 application dated 04.07.2023 for appointment of an Advocate Commissioner with a Surveyor and Technical person to conduct inspection of the properties and to file a report with sketch plan showing the lie, nature, commercial importance, appurtenance to National Highway and other aspects. The 2nd respondent filed Ext. P5 objection dated 25.07.2023 to Ext. P4 application. Ext.P4 application for appointment of Advocate Commissioner was rejected by the Arbitrator by Ext.P6 order upholding the contention of the 2nd respondent, the competent authority that the valuation of the land and structures has already been done after site inspection and



observing all the legal formalities and pointing out the time frame fixed by this Court for disposal of Ext. P2 arbitration application.

3. Ext.P6 order is impugned in the writ petition contending that when the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') are applicable to Ext. P2 proceedings, the Arbitrator is having jurisdiction under Section 26 of the Arbitration Act to appoint an Advocate Commissioner with Surveyor and Technical person and to report to the Arbitrator for adjudication of the dispute and rejection of the application amounts to jurisdictional error.

4. Heard Sri. M.K. Sumod, the learned counsel for the petitioner, Sri. B.G. Bidan Chandran, the learned standing counsel for the National Highway Authority of India and Sri. Bimal K. Nath, the learned Senior



Government Pleader for respondents 1 and 2. Sri. Bidan Chandran has also placed on record an argument note.

5. Sri. Bidan Chandran contends that Ext. P4 application of the petitioner for appointment of an Advocate Commissioner has to be construed as one filed under Section 27 of the Arbitration Act and not under Section 26 as contended by the petitioner and in either case, the remedy of the petitioner is to challenge the final award invoking the provisions of Section 34 of the Arbitration Act and the writ petition filed under Article 226 of the Constitution against Ext. P6 order is not maintainable. Sri. Bidan Chandran has relied on the decision of the Hon'ble Supreme Court in **SBP and Co v. Patel Engineering Ltd and another** [(2005) 8 SCC 618: AIR 2006 SC 450: 2005 KHC 1909] and the decision of the Division Bench of this



Court in **National Highway Authority of India v. Jabeena Beevi and others** [2021 KHC 594: ILR 2021 (4) Ker. 495] to contend that the writ petition is not maintainable.

6. Sri. Sumod, on the other hand, would rely on the decision of the Hon'ble Supreme Court in **Harbanslal Sahnia and another v. Indian Oil Corporation Ltd and others** [(2003) 2 SCC 107] wherein it was held that the rule of exclusion of writ jurisdiction by availability of alternative remedy by way of recourse to arbitration clause is a rule of discretion and not one of compulsion and where there is violation of fundamental rights or failure to follow principles of natural justice, the High Court can exercise writ jurisdiction. Sri. Sumod also relied on the decision of this Court in **Unnikrishnan v. Arbitrator (District Collector), Collectorate**



Thrissur [2023 (4) KHC 521] wherein this Court held that, since the jurisdiction of the Court to set aside arbitral award under Section 34 is very limited, an application under Sections 26 and 27 of the Arbitration Act shall be considered on its merit by the Arbitrator.

7. Section 3A of the N.H Act deals with the power of the Central Government to acquire land. Section 3G deals with determination of amount payable as compensation and sub sections 1, 5, 6 and 7 thereof, relevant for the purpose of this writ petition, are extracted hereunder:

“3G. Determination of amount payable as compensation.--(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

xxx xxx xxx

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount



shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government--

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section(1) or sub-section(5), as the case may be, shall take into consideration--

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.

(underlying supplied)

Section 3G (5) of the N.H. Act thus provides that, if there is a dispute regarding the amount of



compensation determined by the competent authority, it shall be resolved by the Arbitrator and the provisions of the Arbitration Act shall apply to such arbitration.

8. Section 26 of the Arbitration Act deals with appointment of expert by the arbitral tribunal and reads thus:

“26. Expert appointed by arbitral tribunal. - (1)

Unless otherwise agreed by the parties, the arbitral tribunal may -

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it



necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.”

Section 26 of the Arbitration Act thus empowers the Arbitrator to appoint one or more experts to report on specific issues to be determined by the arbitral tribunal.

9. Section 27 of the Arbitration Act deals with Court's assistance in taking evidence and reads as follows:

“27. Court assistance in taking evidence. - (1)
The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.



(2) The application shall specify -

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular, -

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject - matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making an order under subsection (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression "Processes" includes



summonses and commissions for the examination of witnesses and summonses to produce documents.”

In the nature of the limited powers conferred on the arbitral tribunal for summoning of witnesses and production of documents, the arbitral tribunal on its own motion, or a party to the arbitration proceedings with the approval of the tribunal, may invoke the provisions under Section 27 of the Arbitration Act to request the Court for its assistance in taking evidence from witnesses required to be examined in relation to issues to be determined by the arbitral tribunal, or persons who are in possession of documents, the production of which would be necessary for adjudication.

10. Ext.P4 application is filed by the petitioner for appointment of an Advocate Commissioner with a Surveyor and Technical person to conduct inspection



of the property. Section 26 of the Arbitration Act empowers the Arbitrator to appoint experts to report on specific issues to be determined by the arbitral tribunal. The said provision cannot be invoked for appointment of an Advocate Commissioner unless the concerned advocate is an expert in relation to any specific issue to be determined by the arbitral tribunal. The provisions under Section 27 of the Arbitration Act can be invoked to request the Court for its assistance in taking evidence like issuance of Commission for recording evidence of witnesses beyond the competence of the arbitral tribunal, but cannot be invoked for appointment of an Advocate Commissioner to conduct inspection of the property to ascertain the market value of the land. Therefore, Ext. P4 application for appointment of an Advocate Commissioner cannot be entertained by the Arbitrator



either under Section 26 or Section 27 of the Arbitration Act.

11. That apart, the extent of judicial intervention in arbitration proceedings is limited by the *non obstante* clause of Section 5 of the Arbitration Act.

Section 5 of the Arbitration Act reads as follows:

“5. 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.”

In **SBP and Co v. Patel Engineering Ltd** (supra), the Constitution Bench of the Hon'ble Supreme Court considered the issue as to whether the order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. The Court held thus:

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral



Tribunal during arbitration, would be capable of being challenged under Art.226 or 227 of the Constitution. We see no warrant for such an approach. S.37 makes certain orders of the Arbitral Tribunal appealable. Under S.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 S.16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under S.37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Art.226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Art.227 or under Art.226 of the



Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under S.37 of the Act even at an earlier stage.”

In the light of the dictum laid down by the Constitution Bench of the Hon'ble Supreme Court and in view of my finding that an application for appointment of an Advocate Commissioner cannot be entertained by the Arbitrator under Section 26 or Section 27 of the Arbitration Act, I dismiss the writ petition without prejudice to the right of the petitioner to seek any other remedy as may be available as per the statutory scheme.

Sd/-

**MURALI PURUSHOTHAMAN
JUDGE**

AL/-+.



APPENDIX OF WP(C) 29228/2023

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE AWARD WITH REF NO. 234/2021/EDPY- 1699/2022 DATED 11/04/2022 ISSUED BY THE 2ND RESPONDENT HEREIN TO THE PETITIONER
- Exhibit P2 TRUE COPY OF THE APPLICATION NO. C7/553617/22/TDCEKM DATED 24/08/2022 AND IS PENDING BEFORE THE 1ST RESPONDENT BY THE PETITIONER
- Exhibit P3 TRUE COPY OF THE STATEMENT DATED 28/03/2023 SUBMITTED BY THE 2ND RESPONDENT BEFORE THE 1ST RESPONDENT IN CASE NO. C7/553617 /22/TDCEKM (325)
- Exhibit P4 TRUE COPY OF THE AFFIDAVIT AND PETITION DATED 04/07/2023 FOR THE APPOINTMENT OF A COMMISSION BEFORE THE 1ST RESPONDENT BY THE PETITIONER
- Exhibit P5 TRUE COPY OF THE COUNTER STATEMENT BY THE 2ND RESPONDENT DATED 25/07/2023 TO THE EXHIBIT P4 PETITION
- Exhibit P6 TRUE COPY OF THE ORDER NO. C7-553617/2022/TDC EKM (325) DATED 26/07/2023 PASSED BY THE 1ST RESPONDENT