

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.1435 of 2023
(Through Hybrid mode)s

Santosh Kumr Acharya

Petitioner

-versus-

Ratnakar Swain

Opposite Party

Advocates appeared in this case:

For petitioner : Mr. S. K. Mishra, Advocate

For opposite parties : Mr. S. S. Panda, Advocate
Mr. Sanjit Mohanty, Senior Advocate
(Amicus Curiae)

CORAM: JUSTICE ARINDAM SINHA

Dates of hearing: 13.03.2023, 26.04.2023 and 08.05.2023

Date of judgment : 08.05.2023

1. Mr. Mishra, learned advocate appears on behalf of petitioner and submits, impugned is order dated 23rd December, 2022 made by the arbitral Tribunal in directing on provision in section 26, Arbitration and Conciliation Act, 1996, at instance of opposite party-claimant in the reference. He submits, the direction for appointment of expert evaluator

was allowed, with consequential direction upon parties to suggest names.

2. He draws attention to claim made by opposite party and his client's counter claim, as respondent in the reference. He demonstrates therefrom, the claim and counter claim are simply money claims. As such, expanding scope of the reference, by including evaluation of assets, would expose his client to risk of an award being made beyond four corners of the reference.

3. Mr. Mishra, submits, the Supreme Court by its judgment in **Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited**, reported in (2022) 1 SCC 75 said, inter alia, interference is possible in rarest of rare case. This is one such as it will be an un-obtrusive expansion of scope of the reference, to his client's prejudice.

4. He relies on view taken by a learned single Judge in **Odisha State Road Transport Corporation, Bhubaneswar vs. ARSS Bus Terminal Pvt. Ltd., BBSR**, reported in 2023 (I) ILR -CUT- 253 paragraph 7. It is reproduced below.

"7. This Court after going through the view expressed by the Hon'ble Apex Court in the aforementioned cases, finds that though intervention of this Court with regard to the order passed under the Act is very limited, but there is not a clear bar for such intervention by this Court in exercise of its power under Article 227 of the Constitution of India. Therefore, this Court placing reliance on the

decisions of the Hon'ble Apex Court as cited supra held the writ petition as maintainable before this Court."

(emphasis supplied)

5. He then relies on **order dated 8th March, 2022**, made by this Bench in **WP(C) no.20908 of 2020 (Odisha Hydro Power Corporation Ltd. vs. Traftgar House Construction (T), (TSSJV)**, paragraph 9, reproduced below.

"9. The position on declaration of law by the Supreme Court regarding interference in writ jurisdiction appears to be as has been submitted by Mr. Mohanty. This is a case where there has been demonstration, of the substituted tribunal having exercised discretion not provided by relevant provision in the statute. As such it appears to be a case where the exercise of discretion was lacking in inherent jurisdiction, as not sourced from the power to exercise discretion given or conferred by sub-sections (3) and (4) in section 15. The case consequently qualifies as an exceptionally rare case since challenge to the award that may ultimately be passed, under section 34, cannot include a ground that may arise on the working of section 15."

6. Mr. Panda, learned advocate appearing on behalf of opposite party, relies on judgment of the Supreme Court in **SBP & Co. v. Patel Engineering Ltd.**, reported in **(2005) 8 SCC 618**, paragraph 45 (SCC Online print). Last sentence in the paragraph is reproduced below.

*“xx xx xx 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 Article 226 or 227 of the Constitution.** Such an intervention by the High Courts is not permissible.”*

(emphasis supplied)

He submits, even if there is patent illegality in impugned order, no interference is possible at this stage, by operation of provision under section 5. This is because alleged patent illegality will continue to making of the award, which can then be challenged under section 34. He reiterates, patent illegality is a ground of challenge under section 34. In this context he submits further, challenge to an award can ‘only’ be made under section 34. By foray to the writ Court, there cannot be expansion of scope of the challenge as to be made ‘only’ under section 34. Furthermore, petitioner won’t suffer any prejudice. On the contrary, inventory of the assets will be available for execution in likelihood of award in favour of his client.

7. He submits, a learned single Judge of the High Court of Delhi considered the declarations of law made by the Supreme Court and took a view. He relies on **order dated 25th July, 2022** made in, inter alia, **CM (M) 707/2022 (Easy Trip Planners Ltd. vs. One97 Communications Ltd.)**. Paragraphs 10 and 11, are reproduced below.

“10. To my mind, the *raison d’etre* being paras 45 and 46 of **SBP**’ is not Section 34 but Section 5⁴ of the 1996 Act, which specifically disapproves interference, judicially, with the arbitral process.

11. Para 45 of **SBP**’, when read, leaves no manner of doubt that the philosophy behind the decision is that, in order to minimize interference with the arbitral process, the party would have to be relegated to his remedy against the final or interim arbitral award, under Section 34 of the 1996 Act.”

He submits, the writ petition be dismissed.

8. Mr. Mohanty, learned senior advocate appointed Amicus Curiae submits, **Patel Engineering Ltd** (supra) was in the context of parties to a reference, particularly respondents, invoking section 16 and thereupon seeking interference of Court to obstruct proceeding in the reference thereafter. It is such factual scenario that was being addressed by the Supreme Court in **Patel Engineering Ltd** (supra). Subsequent thereto, questions arose before the Supreme Court and there was declaration of law that there could be interference by the writ Court. This was done by **Deep Industries Limited vs. Oil and Natural Gas Corporation Limited**, reported in (2020) 15 SCC 706. Pursuant thereto, another Bench consisting of the learned judge, who had authored it, made order dated 18th September, 2020 in **Punjab State Power Corporation Limited vs.**

EMTA Coal Limited, reported in (2020) 17 SCC 93. Thereby, a further ground of interference by the writ Court to matters arbitration was added.

He submits, the grounds of interference are:-

- (a) rarity;
- (b) remediless;
- (c) bad faith;
- (d) exceptional circumstances and
- (e) perversity.

Mr. Mohanty goes on to submit, thereafter the Supreme Court in **Bhaven Construction Limited** (supra) considered, inter alia, **Deep Industries Limited** (supra) and **EMTA Coal Limited** (supra) to declare that interference was possible in rarest of rare cases.

9. He submits, section 26 enables the arbitral Tribunal to appoint one or more experts, to report to it on specific issues to be determined by the Tribunal. It does not appear from impugned order issues were framed, or referred to, for purpose of appointment of expert for report thereon. He points out further, petitioner appears to have objected to the application for appointment of expert by saying the proceeding was at argument stage. Evidence was over. The omission, therefore, all the more glaring, regarding not framing of issue arisen on hearing arguments, for the

Tribunal to feel necessity to appoint expert. Mr. Panda in reply submits, issues stood framed in the reference. On query from Court he submits, evidence stood closed in the reference.

10. Court finds substance in submission made on behalf of petitioner that where claims and counter claims are simply money claims, expanding scope of the reference by including evaluation of assets would expose petitioner to risk of an award being made beyond four corners of the reference. Section 26 does not provide for remedy, for challenge against an order made, by way of a ground to be taken, under section 34.

11. Sub-clause (iv) under clause (a) in sub-section (2) of section 34 is reproduced below.

“(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or”

The clause provides for a ground of challenge on the arbitral award dealing with a dispute not contemplated by or not falling within the terms of the

submission to arbitration or it contains decision on matters beyond the scope of submission to arbitration. The clause has a proviso on separation. Applying the clause to the controversy at hand it is to be seen whether there is expansion of money claim by direction to evaluate assets of one party. A simple money claim needs to be established by award or decree, before claimant/plaintiff can even claim to restrain the other party. To obtain an order of attachment before judgment, there has to be a finding, at least on affidavits, that the party seeking the relief, prima facie, appears to be entitled to a fixed sum of money and the potential judgment debtor is in the process of liquidating his assets to avoid execution of a decree that may be passed. Impugned order not only suffers from the omission of the issues, on which the Tribunal needs expert opinion but also a finding that there is real danger apprehended by claimant that respondent in the reference is dealing or likely to deal with the assets for purpose of avoiding execution on the award that is likely to be passed.

12. Furthermore, in event there is expansion on the scope of reference by the Tribunal itself, there not being a provision in section 26 to add it as a ground of challenge under section 34, a party subjected to compliance may not find remedy by challenge to the award yet to be passed, under section 34. A disputed expansion of the scope, particularly at the instance

of a Tribunal, on working of the provisions for adjudication on reference may not be an expansion covered under sub-clause (iv) in clause (a), sub-section (2) of section 34.

13. In the circumstances, and accepting submissions made by Amicus Curiae, petitioner appears to have the grounds of being remediless, exceptional circumstances and perversity, for inviting interference. The case qualifies as rarest of the rare. Impugned order is set aside and quashed.

14. Learned advocates for the parties have done well to argue and Court records deep appreciation for erudite assistance rendered by Amicus Curiae.

15. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant Ku. Sahoo

PRASANT KUMAR SAHOO
Digitally signed
by PRASANT
KUMAR SAHOO
Date: 2023.05.10
13:58:02 +05'30'