

(2016) 03 CHH CK 0010

In the Chhattisgarh High Court

Case No : ARBA Nos. 7, 1, 9, 8, 21, 15, 19, 16, 17, 29, 25, 30, 38, 37, 42, 41 and 43 of 2015

Lal Babu Singh and Others

APPELLANT

Vs

State of Chhattisgarh, Panchayat and Rural Development
Department, Chhattisgarh Rural Road Development Agency
and Others

RESPONDENT

Date of Decision : 22-03-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 11(6), Section 2 (3),
Section 2 (4), Section 37, Section 9
Civil Procedure Code, 1908 (CPC) — Section 2
Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992

Citation : (2016) 03 CHH CK 0010

Hon'ble Judges : Prashant Kumar Mishra, J.

Bench : Single Bench

Advocate : Kishore Bhaduri and Rahul Jha, Advocates, for the Appellant;
Shashank Thakur, GA, for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar Mishra, J.—1. The present batch of arbitration matters have been preferred by the contractors assailing the order passed by the District Judge refusing to entertain the application under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act" in short) or for appointment of arbitrator under Section 11(6) of the 1996 Act. While ARBA Nos. 37, 38, 41, 42 and 43 of 2015 are the appeals under Section 37 of the 1996 Act, the remaining cases in the batch are the applications under Section 11(6) of the 1996 Act. The appellants/applicants are the contractors who were awarded different contracts for construction, upgradation and maintenance of rural roads under the Pradhan Mantri Gram Sadak Yojna ("PMGSY", in short). Out of the five arbitration appeals preferred by Brij Mohan Agrawal, in three cases the contract has been executed whereas in remaining two appeals the contract has been terminated. Similarly, in

other cases which are applications under Section 11(6) of the 1996 Act, for appointment of Arbitrator, the contract has been terminated for one reason or the other.

2. In the three completed contract cases appellant Brij Mohan Agrawal had earlier preferred WPC Nos. 549, 550 and 551 of 2013. The said writ petitions were disposed of by the Division Bench of this Court on 26-4-14 with an observation that since the petitioner is a party to the contract which contains an arbitration clause, if the petitioner so desires, he may initiate proceedings under the 1996 Act. The Division Bench further observed that if the State proceeds to recover the amount, the appellant may make a prayer for stay on submission of security deposit. Appellant Brij Mohan Agrawal, thereafter, preferred application under Section 9 of the 1996 Act seeking interim order for staying the recovery proceedings. The District Judge has refused to interfere on the ground that in three cases wherein the writ petitions were preferred, the appellant had already obtained observations from the High Court which would serve the purpose. In other two cases the District Judge has held that the contract executed between the parties being "works contract", it is amenable to jurisdiction of the State Arbitration Tribunal, therefore, application under Section 9 of the 1996 Act is not maintainable. The District Judge, thus, concluded that it has no jurisdiction over the matter.

3. In the application under Section 11(6) the applicants averred that being successful tenderer they were awarded contract and the work order was also issued, however, because of several hindrances and impediments in execution of work due to naxal activities in the concerned area and for failure of the respondents in taking technical decisions in time, there was delay in execution of contract. Request for extension of time was made, however, the respondents terminated the contract without considering the application for extension of time. The applicants, thereafter, invoked arbitration clause as contained in clause 24 and 25 of the agreement by moving an application to claim a quantified amount, however, it remained undecided, therefore, applicants have moved an application under Section 11(6) of the 1996 Act for appointment of Arbitrator.

4. Shri Kishore Bhaduri, learned counsel appearing with Shri Rahul Jha, learned counsel for the applicants/appellants would argue that in view of the laid down by the Supreme Court in *Firm Ashok Traders and Another v. Gurumukh Das Saluja and Others*, (2004) 3 SCC 155 and *M.P. Rural Road Development Authority & Anr. v. M/s. L.G. Chaudhary Engineers & Cont.*, AIR 2012 SC 1228, in matters where the contract has been terminated the arbitration tribunal constituted under the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 ("the 1983 Adhiniyam", in short) would not have jurisdiction, therefore, there being an arbitration clause in the contract and a dispute having arisen, the application under Section 11(6) of the 1996 Act is maintainable. Learned counsel would further submit that the Project Implementation Unit ("PIU" in short) constituted by the State Government is a society for implementation of 100%

centrally funded scheme of the Central Government named as PMGSY, therefore, the said PIU not being a public undertaking or the instrumentality of the State, the contract in question would not amount to works contract, therefore, for this reason also the 1983 Adhiniyam would not apply.

5. Shri Bhaduri would next submit that in three appeals preferred by Birj Mohan Agrawal, this Court has passed an order in writ jurisdiction reserving liberty in favour of the appellant to proceed under the 1996 Act, therefore, the District Judge could not have rejected the application under Section 9 of the 1996 Act. Shri Bhaduri would lastly argue that the 1983 Adhiniyam is repugnant to the 1996 Act, therefore, if the contract contains arbitration clause and a dispute has arisen the same has to be processed under the 1996 Act hence, the applications under Section 9 as well as under Section 11(6) of the 1996 Act are maintainable.

6. Per contra, Shri Shashank Thakur learned Govt. Adv. appearing for the State would submit that in all the cases the contract was awarded and the agreements were executed by the State of Chhattisgarh, therefore, it satisfies the definition of "works contract" provided under Section 2 (1) (i) of the 1983 Adhiniyam. Shri Thakur would refer to the judgment rendered by the Supreme Court in *State of M.P. & Anr. v. Anshuman Shukla*, AIR 2008 SC 2454, to argue that whenever a contract satisfies the definition of works contract, 1983 Adhiniyam would apply, therefore, the applications under Section 9 or under Section 11(6) are not maintainable and the District Judge has not committed any error in dismissing the applications. Shri Thakur would refer to another judgment rendered by the High Court of Madhya Pradesh in *D.D. Sharma v. Madhya Pradesh Rural Roads Development Authority etc.*, AIR 2008 Madhya Pradesh 72.

Project Implementation Unit (PIU) under PMGSY whether a State instrumentality?

7. There is no dispute about the fact that the tender process in all the cases were processed in similar manner. The NITs were issued by the Government of Chhattisgarh, Panchayat and Rural Development Department, Chhattisgarh Rural Road Development Agency, Raipur. The letter of acceptance of tender filed as Annexure A-1 in ARBA No. 9 of 2015 would clearly mention that it has been issued by the Government of Chhattisgarh. Thus, even if the PMGSY scheme is 100% centrally funded scheme, the execution thereof has been entrusted to the State Government. The Central Government only provides required fund and issues the basic norms and guidelines within which the project will be implemented. The amount spent under the PMGSY scheme is disbursed by the Government treasury through the Chhattisgarh Rural Road Development Agency and the account thereof including the allotment of fund is made by the Panchayat and Rural Development Department of the Government of Chhattisgarh. Thus, there is absolutely no element of doubt that the Chhattisgarh Rural Road Development Agency is the instrumentality of the State, even though it is created as a Society under the provisions of the Chhattisgarh Societies Registration Adhiniyam, 1973 to function under the control of the Panchayat and Rural Development Department.

8. The term "public undertaking" and "works contract" have been defined under Section 2 (1) (g) and 2 (1) (i) in the following manner:--

"2(1)(g) "Public Undertaking" means a Government Company within the meaning of Section 617 of the Companies Act, 1956 (No.1 of 1956) and includes a Corporation or other statutory body by whatever name called in each case, wholly or substantially owned or controlled by the State Government;

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2(1)(i) "works-contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works."

9. On a plain reading of the definition of the term "public undertaking" and "works contract" as reproduced above would manifest that if there is an agreement in writing for the execution of any work relating to construction, repair or maintenance of road of the State Government or public undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government in relation to the execution of the said agreement, would be a works contract, therefore, if the Chhattisgarh Rural Road Development Agency is an instrumentality of the State being a society under the control of the State Government through the Department of Panchayat and Rural Development and the issuance of tender as well as award of contract has been issued by the State Government, the subject contract would be covered within the definition of "works contract".

Maintainability of application under Section 9 and/or 11(6) of the 1996 Act.

10. The 1983 Adhinyam has been enacted to provide for establishment of a Tribunal to arbitrate in disputes to which the State Government or a public undertaking wholly or substantially owned or controlled by the State Government, is a party, and for matters incidental thereto or connected therewith. The subject matter of the Adhinyam being a matter under Entry No. 13 of List III (Concurrent List) of the VII Schedule of the Constitution of India the assent of the President of India was required, which was received on 7-10-1983; it was published in the Madhya Pradesh Gazette on 12-10-1983 and the

Adhiniyam was notified for its commencement w.e.f. 1-3-1985. Section 2(1)(d) of the 1983 Adhiniyam defines the word "dispute" to mean claim of ascertained money value at Rupees Fifty Thousand or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof. The definition of the term "public undertaking" and "works contract" have already been extracted in preceding paragraphs. Section 3 provides for constitution of Tribunal whereas Section 4 provides for appointment of Chairman and Members of Tribunal and their qualifications.

11. Section 7 makes provision for reference to Tribunal. It reads thus:--

"7. Reference to Tribunal.-(1) Either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

(2) Such reference shall be drawn up in such form as may be prescribed and shall be supported by an affidavit verifying the averments.

(3) The reference shall be accompanied by such fee as may be prescribed.

(4) Every reference shall be accompanied by such documents or other evidence and by such other fees for service or execution of processes as may be prescribed.

(5) On receipt of the reference under sub-section (1), if the Tribunal is satisfied that the reference is a fit case for adjudication, it may admit the reference but where the Tribunal is not so satisfied it may summarily reject the reference after recording reasons therefor."

12. Section 7-B provides for limitation which reads thus:--

"7-B. Limitation--(1) The Tribunal shall not admit a reference petition unless-

(a) the dispute is first referred for the decision of the final authority under the terms of the works contract; and

(b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority:

Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the Tribunal shall be made within one year of the expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act or after such commencement but before the commencement of the Chhattisgarh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990, a reference petition shall be entertained within one year of the date of commencement of Chhattisgarh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement.

(2-A) Notwithstanding anything contained in sub-section (1), the Tribunal shall not admit a reference petition unless it is made within three years from the date on which the works contract is terminated, foreclosed, abandoned or comes to an end in any other manner or when a dispute arises during the pendency of the works contract:

Provided that if a reference petition is filed by the State Government, such period shall be thirty years."

13. The award passed by the Arbitration Tribunal has been attached finality under Section 17, subject to High Court's power of revision, whereas Section 20 creates bar of jurisdiction of civil court. Section 20 reads thus:--

"20. Bar of jurisdiction of civil Court.- (1) As from the date of the constitution of the Tribunal and notwithstanding anything contained in Arbitration Act, 1940 (No.10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act.

(1-A) Notwithstanding anything contained in sub-section (1), a Civil Court may entertain and decide any dispute of the nature specified in the said sub-section referred to it by a person in the capacity of indigent person.

Explanation.-for the purpose of this subsection "indigent person" shall have the meaning assigned to it in the Code of Civil Procedure, 1908 (No.5 of 1908).

(2) Nothing in sub-section (1) shall apply to any arbitration proceeding either pending before any arbitrator or umpire or before any court or authority under the provisions of Arbitration Act, or any other law relating to arbitration, and such proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force."

14. Appreciating the scope and application of the 1983 Adhinyam vis-?-vis the Arbitration Act, 1940 or the 1996 Act the Supreme Court in Anshuman Shukla (supra) while considering the issue of applicability of provisions contained in Section 5 of the Limitation Act to the revision applications under Section 19 of the 1983 Adhinyam observed thus in paras 12 & 22:

"12) The Act is a special Act, it provided for compulsory arbitration. It provides for a reference. The Tribunal has the power of rejecting the reference at the threshold.

It provides for a special limitation. It fixes a time limit for passing an Award. Section 14 of the Act provides that proceeding and the award can be challenged under special circumstances. Section 17, as noticed hereinbefore, provides for finality of the award, notwithstanding anything to the contrary contained in any other law relating to arbitration.

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22) The provisions of the Act referred to hereinbefore clearly postulate that the State of Madhya Pradesh has created a separate forum for the purpose of determination of disputes arising inter alia out of the works contract. The Tribunal is not one which can be said to be a Domestic Tribunal. The Members of the Tribunal are not nominated by the parties. The disputants do not have any control over their appointment. The Tribunal may reject a reference at the threshold. It has the power to summon records. It has the power to record evidence. Its functions are not limited to one Bench. The Chairman of the Tribunal can refer the disputes to another Bench. Its decision is final. It can award costs. It can award interests. The finality of the decision is fortified by a legal fiction created by making an Award a decree of a Civil Court. It is executable as a decree of a Civil Court. The Award of the Arbitral Tribunal is not subject to the provisions of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1944. The provisions of the said Acts have no application."

(Emphasis supplied)

15. Learned counsel for the appellants/applicants have referred to M.P. Rural Road Development Authority (*supra*) wherein Justice Gyan Sudha Mishra has held that a terminated contract would not come within the purview of the term "works contract" as defined under the 1983 Adhiniyam, therefore, in such cases an independent arbitrator can be appointed by the High Court under the 1996 Act, whereas, Justice Asok Kumar Ganguly held that the earlier judgment of the Supreme Court in *VA Tech Escher Wyass Flovel Limited v. Madhya Pradesh State Electricity Board and Another*, (2011) 13 SCC 261, holding that the 1983 Adhiniyam would only apply in cases where there is no arbitration clause and in other cases where the agreement contains an arbitration clause the 1996 Act would apply, is per incuriam. Justice Ganguly also referred to another judgment of the Supreme Court rendered in *Ravikant Bansal v. Madhya Pradesh Rural Road Development Authority And Another*, (2012) 3 SCC 513, wherein it is held that when the arbitration clause itself provides that arbitration would be by the Madhya Pradesh Arbitration Tribunal, the arbitration has to be held under the 1983 Adhiniyam. It was also held by referring to *Anshuman Shukla* (*supra*) that the provisions of the MP Act are saved under Section 2 (4) of the 1996 Act. There being divergence of views of the Judges constituting the Bench, the matter has been referred to larger Bench and is pending consideration.

16. This Court is now required to consider as to whether in view of the judgment of Supreme Court in *Anshuman Shukla* (*supra*), *M.P. Rural Road Development Authority* (*supra*) (referred to larger Bench) and *Ravikant Bansal* (*supra*), the appellants/applicants are entitled to invoke Section 9 or 11(6) of the 1996 Act.

17. In the cases at hand, the agreement contains clauses 24 (Dispute Redressal System) & 25 (Arbitration). The said clauses read thus:

"24. Dispute Redressal System

If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works thereunder, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

25. Arbitration

25.1 either party will have the right of appeal (sic application) against the decision of the competent authority, nominated under clause 24 to the Chhattisgarh Arbitration Tribunal constituted under Chhattisgarh Madhyastham Adhikaran Adhiniyam 1983 provided the amount of claim is more than Rs. 50,000."

18. In Ravikant Bansal (supra), the Supreme Court held thus:

"1) Heard the learned counsel for the petitioner.

2) This petition has been filed against the judgment and order dated 11-3-2011 passed by the High Court of Madhya Pradesh at Gwalior Bench in Ravikant Bansal v. M.P. Rural Road Development Authority (Arbitration Case No. 4 of 2010, order dated 11-3-2011 (MP). The learned counsel for the petitioner has relied on a decision of this Court in Va Tech Escher Wyass Flovel Ltd. v. M.P. SEB , (2011) 13 SCC 261 decided on 14-1-2010.

3) We are of the opinion that the aforesaid decision is distinguishable because in the present case the arbitration clause itself mentions that the arbitration will be by the Madhya Pradesh Arbitration Tribunal. Hence, in this case arbitration has to be done by the Tribunal.

4) The special leave petition is dismissed."

19. It would, thus, be apparent that the arbitration clause itself provides that against the decision rendered by the Department within the scope of Dispute Redressal System, the aggrieved party will have the right of appeal (sic application) to the Chhattisgarh Arbitration Tribunal constituted under the provisions of the 1983 Adhiniyam. Thus, applying the ratio in the matter of

Ravikant Bansal (supra), as also the judgment in Anshuman Shukla (supra), the present dispute can only be resolved by the Arbitration Tribunal constituted under the 1983 Adhinyam and not under the 1996 Act.

20. In *Sardar Construction Co. v. State of Gujarat*, (1999) 3 SCC 114, the Supreme Court had an occasion to consider the effect of enactment of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, which is an Act similar to the 1983 Adhinyam. Under the Gujarat Act, all pending arbitration proceedings under the Arbitration Act, 1940 in which one of the parties to the dispute was the State Government or its public undertaking, was required to be transferred to the Tribunal created under the Act. The Gujarat High Court upheld the order of transfer of such pending arbitrations under the Arbitration Act, 1940 to the newly created Arbitration Tribunal. The judgment of the Gujarat High Court was challenged by a contractor before the Supreme Court. Dismissing the SLP, the Supreme Court held thus:

"1) The award in the present case, though given prior to 1/1/1994 which is the date of commencement of the Gujarat Public Works Contracts Disputes Arbitration tribunal Act, 1992, had not attained finality at the time when the said Act came into force. Under Section 21 of the said Act, the provisions of the Arbitration Act shall, insofar as they are inconsistent with the provisions of the Act, cease to apply to any dispute arising from a works contract and all arbitration proceedings in relation to such dispute before an arbitrator, umpire, court or authority shall stand transferred to the tribunal. In the present case, the arbitration proceedings in relation to the dispute were pending before the court and hence the High court has rightly transferred these proceedings to the tribunal. Under Section 8 of the said Act on reference to the tribunal, the tribunal has to make an award which shall be deemed to be a decree within the meaning of Section 2 of Civil Procedure Code, 1908 and it shall be executed accordingly.

2) We, therefore, agree with the reasoning and conclusion of the High court. The SLP is dismissed."

21. Although the 1983 Adhinyam has no provision for transfer of pending arbitration matters to the Tribunal, yet Section 20 of the 1983 Adhinyam provides that as from the date of the constitution of the Tribunal and notwithstanding anything contained in Arbitration Act, 1940 or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under his Act.

22. By necessary implication, on and from the date of constitution of Tribunal, the jurisdiction of civil Court is barred, therefore, application under Section 9 which is presented before the Principal Civil Court of original jurisdiction i.e. District Judge, is barred. Similarly, clause 25 of the contract having provided that resolution of the dispute can only be by the Arbitration Tribunal under the 1983 Adhinyam, the parties to the contract have by mutual consent surrendered to

the jurisdiction to the Tribunal, therefore, the appellants/applicants are not entitled to proceed under any other law except the 1983 Adhiniyam.

23. In taking the above view, this Court is fortified by judgment rendered by the Privy Council in *Attorney General for Manitoba v. Kelly* (1922) 1 AC 268, wherein it has been held that jurisdiction of the arbitrator is solely derived from the arbitration agreement.

24. In the cases at hand, the arbitration agreement has chosen to refer the dispute for decision making to the Tribunal created under the 1983 Adhiniyam.

25. It also needs to be noticed that Section 2 (3) of the 1996 Act provides that this part of the Act (including Sections 9& 11) shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. Thus, the 1996 Act itself saves such State laws which provides separate forum for raising dispute on arbitration matters involving contract entered into by the State or by public undertakings. For this reason also the 1996 Act would have no effect on the applicability of the 1983 Adhiniyam for resolving a reference emanating from a works contract as defined under Section 2 (1) (i) of the 1983 Adhiniyam.

26. The submission of the appellants/applicants to the effect that the 1983 Adhiniyam is repugnant to the 1996 Act is not to be considered in absence of any challenge to the constitutional validity of the 1983 Adhiniyam. Even otherwise, the 1983 Adhiniyam has been enacted by drawing power under Entry No. 13 of List III (Concurrent List) of the VII Schedule of the Constitution of India. The 1983 Adhiniyam having already received the Presidential assent, the argument regarding repugnancy has no substance.

27. Applying the well settled principles of law to the facts of the present cases and for the reasons mentioned hereinabove, all the appeals preferred under Section 37 of the 1996 Act and all the applications preferred under Section 11(6) of the 1996 Act are liable to be and are hereby dismissed.

28. There shall be no order as to costs.