

(2019) 01 OHC CK 0014

In the Orissa High Court

Case No : Writ petition (C) No. 2778 Of 2005

Pennar Aluminium Company Limited (Palco), Represented
Through Its (Shole) Whole Time Director P. Bhaskar Rao

APPELLANT

Vs

Chairman-Cum-Managing Director, National Aluminium Co.
Ltd.

RESPONDENT

Date of Decision : 16-01-2019

Acts Referred:

Arbitration And Conciliation Act, 1966 — Section 5, 11, 16, 17, 37, 37(2)
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 01 OHC CK 0014

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Advocate : B. Routray, P.R. Das, D.K. Mohapatra, D. Routray, D. Mohapatra, P.K. Sahu, B.N. Satpathy, S. Das and B.B. Routray, R.K. Rath

Judgement

Biswanath Rath, J

1. This writ petition involves a challenge to the order dated 29.4.2004 of the sole Arbitrator involving Arbitration Proceeding No. 3(N) of 2002 as well

as the order dated 15.10.2004 of the District Judge Khurde at Bhubaneswar in Arbitration Appeal No. 112 of 2004 appearing at Annexures-1 and 3 respectively.

2. Short background involved in the case is that pursuant to initiation of arbitration proceeding, petitioner filed an application for a direction to the opposite party therein to produce certain documents and information on the premises that the petitioner had no access to the same and further the same were also essential for just decision and proper adjudication of the dispute. Contesting the said claim, the opposite party vehemently resisting the move involving such application contended that there is relevancy involving such

document. Further, for the petitioner having responsibility to establish his case, petitioner cannot go on asking the opposite party to produce the document to answer his case. Hearing the rival contentions of the parties, the Arbitrator vide order dated 19.2.2002 while rejecting the application, however, kept consideration of the same open for being considered if the Arbitrator in course of hearing deems it to be called for at appropriate stage. In the meantime on the demise of the Arbitrator, the proceeding was transferred to a fresh Arbitrator. On commencement of the proceeding, the Director of the Company and the Senior Vice-President (Operation) were examined and cross-examined. On 24.1.2004, before commencement of hearing, the petitioner filed another application praying for a direction to the opposite party to produce the records and information as per the schedule in the said petition. The application was again vehemently objected by the opposite party. Considering the rival contentions of the parties, the Arbitrator vide its order dated 29.4.2004 once again rejected the move of the petitioner in the matter of calling for documents, found place at Annexure-1. Being aggrieved by the said order of the Arbitrator, the petitioner filed an appeal under Section 37(2) of the Arbitration and Conciliation Act, 1966 before the District Judge, Khurda at Bhubaneswar. The opposite party appearing therein objected the same on two folds: firstly on the maintainability of the appeal and secondly on merit of the application. This application being heard by the District Judge, was rejected by his order dated 15.10.2004, as appearing at Annexure-3 giving rise to the present writ petition.

3. Sri. B. Routray, learned senior counsel appearing for the petitioner taking this Court to the provisions contained in Section 17 as well as Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act, 1996") and also taking this Court to the initial order of rejection of the Arbitrator dated 19.2.2002 contended that not only the appeal was maintainable but also the petitioner had also a right to approach the Arbitrator for calling for document for his observation in previous disposal of such an application. For the specific observation of the earlier Arbitrator in the order dated 19.2.2002, Sri. Routray further taking to the plea taken in the application contended that the documents as sought to be called for were essential at least for an effective adjudication of the arbitration proceeding.

4. In his opposition, Sri. R.K. Rath, learned senior counsel appearing for the

opposite party taking this Court to the provision at Section 17 of the Act, 1996 contended that there was no scope for bringing in the provision of Section 17 of the Act, 1996, Sri. Rath, learned senior counsel further taking this Court to the provision at Section 5 of the Act contended that for the provision contained therein, there should not be any judicial intervention except as provided in Part-1 of the Act, 1996. Sri. Rath, learned senior counsel further taking this Court to the provision at Section 37 of the Act, 1996 contended that there was no scope for such appeal and therefore, Sri. Rath contended that the district Judge has rightly dismissed the appeal after observing that the appeal was not maintainable. Sri. Rath, learned senior counsel further taking this Court to the to the decisions rendered in the cases of CDC Financial Services (Mauritius) Ltd .v. BPL Communications Ltd., 2005 (Suppl.) Arb. LR 558 (SC)/(2003) 12 SCC 140S, .B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 : AIR 2006 Supreme Court 450, and lastly in the case of L alitkumar V. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghav iv. Dharamdas V. Sanghavi, (2014) 7 SCC 255 and taking this Court to the relevant portions involving the aforesaid judgments submitted that for the decision of the Hon'ble Apex Court including this Court indicated hereinabove, the appeal was not maintainable. Sri. Rath also contended that in any event the writ petition involving the situation is even also not maintainable. Sri. Rath also contended that for the clear provision under Section 5 of the Act, 1996 and for the decision indicated hereinabove, the scope of interference of the writ court also is very limited. In the above premises, Sri. Rath, learned senior counsel papering for the opposite party submitted that there being no infirmity in the impugned orders, the writ petition ought to be dismissed.

5. Considering the rival contentions of the parties and going through the initial order of rejection of the Arbitrator dated 19.2.2002, this Court finds the

Arbitrator observed as follows:â?

â??However, I want to make it clear that the present order passed by me today could not stand in the way of my calling for any documents or giving a direction for furnishing any information (including any of the documents/information mentioned in the petition presently rejected) from any of the parties, if I consider such course is necessary in the interest of justice to come to just decision of any of the issues arising out of the disputes between

the parties.â??

6. Reading of the aforesaid observation, it appears that it was for the Arbitrator to take a call for some documents subject to his satisfaction at

appropriate time. At this stage, therefore, this Court finds the contention of Sri. Routray, learned senior counsel that he had the liberty to approach

again involving the matter for calling for records was per se wrong. Further, looking to the pleading of the petitioner itself in paragraph-9 of the writ

petition, it again appears the application was filed after the closure of evidence of the proceeding and the arbitration proceeding was posted for further

hearing. This Court again observes, this is no stage for filing any such application, as by this time, evidence was already closed.

7. Now coming to the claim of the petitioner on the application of section 17 of the Act, 1996, this Court going through the provision indicated herein,

observes the provision at Section 17 of the Act, 1996 does not prescribe any scope for calling for any records. Application of section 17 of the Act,

1996 is only in the circumstances, as enumerated therein. This Court, therefore, observes, the appellate authority was justified in its finding holding the

appeal under Section 37(2) of the Act, 1996 as not maintainable.

8. Now, coming to decide the other question involved herein as to maintainability of the writ petition under Articles 226 and 227 of the constitution of

India, this Court finds the provision at Section 5 of the Act, 1996 read as follows:

â??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.â??

9. Section 5 of the Act, 1996 therefore, restricts unnecessary intervention in the arbitration proceeding by judicial authorities.

10. Now coming to the decision cited at Bar, In the case of CDC Financial Services (Mauritius) Ltd .v. BPL Communications Ltd., 2005 (Supl.)

Arb. LR 558 (SC)/(2003) 12 SCC 140, the Hon'ble Apex Court held in paragraph-14 as follows:

â??Whatever may be the merits of the writ application, we are of the view and it has been fairly conceded by the learned senior counsel appearing on

behalf of respondent 1 that the High Court should have had regard to Section 5 of the 1996 Act before granting the reliefs it did. Under Section 5 of

the 1996 Act, courts are restrained from interfering with arbitration except in the manner provided in the 1996 Act. That the orders passed by the

High Court would amount to a violation of this mandate is not seriously disputed by the respondents. We, accordingly, set aside the orders of the High

Court without expressing our views on the merits of the contentions of the parties in any manner whatsoever. The orders dated 04.07.2002 and

23.07.2002 are accordingly, set aside. The respondents are restrained from moving any applications in the pending writ petition which would have the

effect of interfering with the continuance and conclusion of the arbitration proceedings. The appeal of respondent 1 before the Division Bench being

preferred from the refusal to grant an interim order, does not survive and is accordingly dismissed. The matter shall now be heard by the learned

Single Judge and disposed of in accordance with law.â??

11. In the case of S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 : AIR 2006 Supreme Court 450, the Hon'ble Apex Court in paragraph-

44 of the judgment held as follows:

â??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 Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of

the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his 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. This appears to be the

scheme of the Act. The arbitral tribunal is after all, the 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 Article 226 or 227 of the Constitution of India. Such an

intervention by the High Court is not permissible.â??

12. In the case of Lalitkumar V. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi v. Dharamdas V. Sanghavi, (2014) 7 SCC 255, the

Hon'ble Apex Court in paragraph-8 of the judgment held as follows:

“Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the

application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the

jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court

in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:

“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 Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders

of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his 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

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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 Article 226 or 227 of the Constitution of India. Such an

intervention by the High Courts is not permissible.” That need not, however, necessarily mean that the application such as the one on hand is

maintainable under Section 11 of the Act.”

13. For the settled position of law, as enumerated hereinabove, this Court finds no writ is maintainable involving such situation. Further for the decision

rendered in the case of State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6

SCC 485, where the Hon'ble Apex Court clearly observed that a court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the Court. Such decision, even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter se parties. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating the correct legal principle in basing the award. It is also held therein that since the arbitrator is a judge by choice of the parties and more often than not a person with little or no legal background, the adjudication of disputes by an arbitrator by way of an award can be challenged only within the limited scope of several provision of the Arbitration Act.

14. Under the circumstances and for the settled position of law, this Court while observing that the writ petition is not maintainable declines to interfere in the order passed by the appellate authority. The writ petition, thus, stands dismissed. There is no order as to cost.