

(2018) 01 TP CK 0004
In the Tripura High Court
Case No : 81 of 2017

Sri Dhiraj Dhar, Contractor

APPELLANT

Vs

The State of Tripura & Ors

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

[Constitution of India](#), [Article 227](#) -
Power of superintendence over all courts by the High Court
[Arbitration and Conciliation Act, 1996](#), [Section 16](#), [Section 11](#)

Citation : (2018) 01 TP CK 0004

Hon'ble Judges : T. Vaiphei

Bench : Single Bench

Advocate : A. Bhowmik, A.S. Lodh, A. Pal

Final Decision : Dismissed

Judgement

1. Aggrieved by the order dated 17-3-2017 passed by the sole arbitrator ""in lieu of an award"" after holding that there was no agreement between

the petitioner and the State-respondents, both this civil revision and arbitration petition are filed for quashing the said order and for appointing a

new arbitrator to arbitrate the arbitral dispute arising out of the construction of work for ARWS Scheme in Baikhora.

2. Mr. Arijit Bhowmik, the learned counsel for the petitioner, and Mr. A. Pal, the learned counsel with Mrs. AS Lodh, the learned State counsel

appearing for the State-respondents, were heard at length. A preliminary objection has been raised by the learned counsel for the State challenging

the maintainability of this revision petition on the ground that there is statutory remedy of appeal provided for by Section 37 of the Arbitration and

Conciliation Act, 1996 as amended in 2015 (""the Act"" for short), and both the

petitions are, therefore, liable to be dismissed. Countering the above submission, the learned counsel for the petitioner contends that the impugned order is not an award within the meaning of Section 37 of the Act and it cannot, therefore, be said that an appeal lies against the impugned order. He this contends that this revision petition under Article 227 of the Constitution is maintainable.

3. Before proceeding further, it will be necessary to understand what exactly is the order ("Findings in lieu of Award") passed by the sole

arbitrator? In the impugned order, the arbitrator recorded the finding that following the acceptance of the tender and the issuance of the work

order, the claimant-contractor (petitioner herein) was duly requested to attend the Office of the Executive Engineer, PHE Division No. III, Udaipur

for completing the formal agreement within seven days from the receipt of the work order, but the claimant-contractor did not attend and sign in

the formal agreement; no agreement was accordingly concluded/executed/made. He further recorded the finding that the claimant-contractor also

did not commence the work as per the work order dated 6-3-1999 and that finding no other alternative, the work was rescinded/determined by

the Engineer-in-charge i.e. the respondent Executive Engineer under Clause 3(a), (b) & (c) of the agreement by forfeiting the earnest money

submitted by the contractor-claimant while submitting the tender. It was observed by the arbitrator that since there was no signed agreement,

hence the existence of Clause 3(a), 3(b) and 3(c) as well as the arbitration Clause, i.e. Clause 25 in the agreement could not have arisen. He

further observed that serving of show cause notice to the claimant contractor and thereafter the rescission/determination of the Work Order under

Clause 3(a), 3(b) and 3(c) as done by the Engineer-incharge, i.e. the respondent Executive Engineer, submission of the application under Clause

25 of the agreement for appointment of an arbitrator by the claimant-contractor to the Chief Engineer, PWD(PHE), Tripura and also the

appointment of sole arbitrator(s) under Clause 25 of the agreement as time to time made by the then Chief Engineer(s), PWD/DWS, Tripura

seemed to be bad in law. He, therefore, ruled that since an arbitrator is the creature of an agreement and the arbitrator must act and make his

award in accordance with the general law of the land and the agreement, he,

therefore, had no role to play at that stage. Earlier, he recorded the finding that following the acceptance of the tender and the issuance of the work order, the claimant-contractor (petitioner herein) was duly requested to attend the Office of the Executive Engineer, PHE Division No. III, Udaipur for completing the formal agreement within seven days from the receipt of the work order, but the claimant-contractor did not attend and sign in the formal agreement; no agreement was accordingly concluded/executed/made. He further recorded the finding that the claimant-contractor also did not commence the work as per the work order dated 6-3-1999 and that finding no other alternative, the work was rescinded/determined by the Engineer-in-charge i.e. the respondent Executive Engineer under Clause 3(a),(b) & 3(c) of the agreement by forfeiting the earnest money submitted by the contractor-claimant while submitting the tender.

4. On careful consideration of the findings recorded by the arbitrator, I have no doubt in mind that what the arbitrator ruled therein is that as the agreement for execution of the work order was not signed by the petitioner, there was no valid agreement in existence between the petitioner and the respondent and that once it was found that there was no valid agreement between the parties, the arbitration clause forming a part of the such invalid agreement could not be invoked by the petitioner for initiating the arbitral proceeding. As the sole arbitrator was to be the creature of an agreement, once the agreement was found to be non-existent or invalid, he had no role to play. In other words, this amounts to saying that as there was no agreement in existence or a valid agreement, he had no power or authority to proceed with the arbitration. Thus, the pith and substance of the impugned order is that the arbitrator decided that he had no jurisdiction to decide the dispute between the parties under the provisions of Arbitration and Conciliation Act.

5. The question to be determined now is whether the impugned order as understood by me is an appealable order or not under Section 37 of the Act? To appreciate the rival contentions, it will be beneficial to refer to the provision for appeal provided for by Section 37 of the Act, which reads thus:

37. Appealable orders.-(1) An appeal shall lie from the following orders (and

from no others) to the court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-

- (a) refusing to refer the parties to arbitration under section 8;
- (b) granting or refusing to grant any measure under Section 9;
- (c) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal-

(a) accepting the plea referred in sub-section (2) or subsection (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to

appeal to the Supreme Court.

6. Undoubtedly, the provision of sub-Section (1) of Section 37 is not applicable to our case. However, we may examine as to whether the

provision of Section 37(2)(a) can be applied in the instant case. This inevitably necessitates reference to Section 16, which are in the following

terms:

16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any

objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a

party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its

authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2)

or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

7. The scope of Section 37 of the Act came up for consideration before the Apex Court in *National Thermal Power Corpn. Ltd. v. Siemens*

Atkeingesellschaft, (2007) 4 SCC 451 where it was held:

17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by

limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it

will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In *Pandurang Dhoni Chougule v.*

Maruti Hari Jadhav, AIR 1966 SC 153 this Court observed that: (AIR p. 155, para 10)

It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the court which tries the

proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on

these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code.

In a particular sense, therefore, any decision declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

18. The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section

16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. *SBP*

& Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was

constituted at the instance of the parties to the contract without reference to the Chief Justice under Section 11(6) of the Act. In a case where the

parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under subsection (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression "jurisdiction" and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

(Underlined for emphasis)

8. However, Mr. A. Bhowmik, the learned counsel for the petitioner submits that the petitioner had already completed all the formalities including

deposit of the earnest money and the signing of the agreement by him thereby clearly evidencing the coming into existence of the agreement and the

fact that the respondent did not sign the agreement cannot lead to an inference that the contract had not been concluded. Drawing my attention to

Section 16(1)(a) of the Act, which provides that an arbitration clause which forms a part of the contract shall be treated as agreement independent

of the other terms of the contract, he contends that even on the termination of the agreement/contract, the arbitration agreement would still survive.

He places strong reliance on *Reva Electric Car Co.(P) Ltd. v. Green Mobil*, (2012) 2 SCC 93 and *State of UP v. Combined Chemicals Co. (P)*

Ltd., (2011) 2 SCC 151 to fortify his two contentions. In *Reva Electric Car* (supra), the Apex Court was considering the application of the

petitioner under Section 11 of the Act for appointment of an arbitrator. This is what the Apex Court observed therein:

54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the

arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of

the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the

contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the

existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By

virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions

contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms Ahmadi that

with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist.

55. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject-matter of the relationship between the parties

which came into existence through the MoU. Clearly, therefore, the disputes raised by the petitioner need to be referred to arbitration. Under the

arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint

an arbitrator under the agreed procedure, it is necessary for this Court to appoint the arbitrator.

9. At this stage, we may also refer to Combined Chemicals Co. (supra), wherein it was held:

17. We have given our serious thought to the respective arguments. A reading of the letter dated 16-11-1985 shows that the same was issued for

and on behalf of the Governor of Uttar Pradesh. In the opening paragraph of the letter, Appellant 2 indicated that the bid given by the respondent

was being accepted on behalf of the Governor of Uttar Pradesh. At the end of that letter and Schedule A appended thereto, it was clearly

mentioned that the contract was being made for and on behalf of the Governor of Uttar Pradesh. The contents of Paras 4, 7, 12 and 14 show that

Appellants 1 and 2 had awarded a contract to the respondent for supply of 200 metric tons of zinc sulphate of agriculture grade for a total price of

Rs. 10,95,200 and the terms and conditions mentioned in the acceptance letter, tender form and the agreement forms were treated as part of the

contract. The schedule of supply was also indicated in the acceptance letter. Clause 10 of the terms and conditions embodied in the acceptance

letter did speak of formal agreement, but the same was to be executed only if required. Undisputedly, the respondent completed all the formalities

inasmuch as it deposited the security money and dispatched a duly signed agreement to the Directorate of Agriculture, which was to take the

supply of zinc sulphate, and also sent letters for placing the supply order. Thus, a contract had come into existence between the parties and the fact

that the Director of Agriculture did not sign the formal agreement sent by the respondent cannot lead to an inference that the contract had not been

executed.

10. What distinguishes the instant case from the above two decisions is that the first decision was rendered in the context of the application for

appointment of arbitrator filed by the petitioner therein under Section 11 of the Act whereas the second decision was rendered in the context of the

appeal filed by the petitioner therein against the ex parte award by the arbitrator. In the instant case, the issue confronting this Court under Article

227 of the Constitution is whether the impugned order declining to pass an award is appealable or not. In my opinion, the instant case is squarely

covered by the decision of the Apex Court in National Thermal Power Corpn. Ltd. (supra). Consequently, this Court has no jurisdiction to

entertain this civil revision. I, therefore, hold that since the sole arbitrator in this case has declined to pass an award, the petitioner has the statutory

appellate remedy provided for by Section 37(2) of the Act to ventilate his grievance.

11. The result of the foregoing discussion is that this civil revision is not maintainable and is, accordingly, dismissed. It is, however, made clear that

the question as to whether there is an arbitration agreement between the parties or whether the agreement in question is enforceable or not or

whether the other contentions raised by the petitioner are tenable or not will be decided by the appellate court in accordance with law as and when

the same is filed in accordance with law. In other words, nothing stated in the foregoing shall be construed to be observations on the merit of the

case. Consequently, his application for appointment of the sole arbitrator to decide the dispute raised by him cannot also be entertained by me.

Resultantly, Arbitration Petition No. 5 of 2017 is also rejected. No costs.