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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1908/2023

ECI- SANJOSE (JV)

A JOINT VENTURE BETWEEN ECI ENGINEERING AND CONSTRUCTION COMPANY LIMITED, HAVING ITS REGISTERED OFFICE AT PLOT NO. A12 AND A13, PANCHAVATI TOWNSHIP, MANIKONDA, RAJENDRA NAGAR MANDAL, DIST-RANGA REDDY, HYDERABAD-500089, TELANGANA AND M/S CONSTRUCTOR A SANJOSE, S.A. HAVING ITS REGISTERED OFFICE AT ROSALIA DE CASTRO, 44, PONTEVEDRA, SPAIN AND ITS INDIAN OFFICE AT UNIT 602, GLOBAL FOYER BUILDING, GOLF COURSE ROAD, SECTOR-43, GURGAON-122002, HARYANA AND HAVING ITS PRINCIPAL PLACE OF BUSINESS AT 11TH FLOOR, HIRANANDANI, KNOWLEDGE PARK, TECHNOLOGY STREET, POWAI, MUMBAI-76 AND IS REPRESENTED THROUGH ITS AUTHORISED REPRESENTATIVE MR. P.M.V. RAGHUNADH BABU, S/O P. KOTESWARA RAO, R/O FLAT NO. 111, JALVAYUVIHAR, OPPOSITE JNTU KUKTPALLY, HYDERABAD, 500072, TELENGANA

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF RAILWAYS, NEW DELHI-110001

2:NORTHEAST FRONTIER RAILWAY
REPRESENTED BY ITS GENERAL MANAGER
NF RAILWAY H.Q.
MALIGAON
GUWAHATI-781011

3:GENERAL MANAGER (CONSTRUCTION)
NORTHEAST FRONTIER RAILWAY
NF RAILWAY HQ
MALIGAON
GUWAHATI-781011

4: PRESIDING ARBITRATOR SHRI A.K. MITTAL
EX. ME
RAILWAY BOARD AND FLAT C-2/10 (3102)
VANSHREE PLOT 1 AND 2 SECTOR 58A PALM BEACH ROAD
NEAR SEAWOODS ESTATE
NERUL
NAVI MUMBAI-400706
MAHARASHTRA

5: CO-ARBITRATOR SHRI AKHIL AGARWAL
EX-DG/S AND T/RAILWAY BOARD
K-122
GULSHAN VIVANTE
SECTOR-137
NOIDA-201304
U.P

6: CO-ARBITRATOR SHRI HARSH KUMAR
EX-FA AND CAO/NORTHERN RAILWAY
HOUSE NO. G-1001
NBCC HEIGHTS
SECTOR-89
PATAUDI ROAD
GURUGRAM-122505
HARYAN

Advocate for the Petitioners : Mr. G. N. Sahewalla, Sr. Advocate
: Mr. D. Senapati, Advocate
Advocate for the Respondents : Mr. B. Chakraborty, CGC

Date of Hearing : 22.08.2024

Date of Judgment : 22.08.2024

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (ORAL)

Heard Mr. G. N. Sahewalla, the learned senior counsel assisted by Mr. D. Senapati, the learned counsel appearing on behalf of the petitioner. Mr. B. Chakraborty, the learned CGC appears behalf on

behalf of the respondents.

2. The question which arises in the instant proceedings is as to whether this Court should exercise the writ jurisdiction under Article 226 of the Constitution in respect to a challenge to the Constitution of the Arbitral Tribunal vide the communication dated 19.07.2022. Additionally, this Court is called upon to decide the legality of the order dated 06.01.2023 by the Arbitral Tribunal whereby the application filed by the petitioner to keep the Arbitration proceedings in abeyance was rejected. For deciding the said questions, this Court in brief, would like to take note of the facts involved which led to the filing of the instant writ petition.

3. The Respondent No.2 herein through the Respondent No.3 had invited a Notice Inviting Tender for "Construction of Single Line BG Tunnel No.25 (App. Total Length 867 RM) in between Noney to Tupul in connection with construction of New Railway Line Project Jiribam-Tupul (Imphal) of NF Railway (Construction)". The Petitioner herein was found to be eligible and was awarded the work by issuance of a Letter of Intent dated 13.10.2009. The Petitioner, thereupon, as per the contract terms, furnished the requisite performance guarantee in the form of an irrevocable bank guarantee. Pursuant thereto, the contract agreement with the Petitioner was entered into on 26.02.2010.

4. While carrying out the said work, in respect to Tunnel No.25, it was alleged that the respondent Railway Authorities informed the petitioner that there was misalignment of both the ends of the said tunnel. The Petitioner claimed that the misalignment was rectified and resultantly the length of the Tunnel No.25 was changed from 867 meters to 1382 meters. The extra cost which was on account of the increase in the length of the

Tunnel No.25 was paid to the petitioner by the Railway Authorities in the year 2016. Subsequently, on 26.02.2021, a letter was written to the petitioner wherein the petitioner was directed to deposit the amount of Rs.6,06,86,646.25p with the Railway Authorities else it was mentioned that the Railway Authorities shall deduct the said amount from the already pending bills. This communication dated 26.02.2021 was put to challenge by the petitioner in WP(C) No.2438/2021.

5. The said writ petition was taken up on 05.04.2021. The Standing Counsel of the Railways apprised this Court in the said proceedings that in terms with Clause 64 of the General Conditions of the Contract, there is an Arbitration Clause subject to the demand made by the party concerned. It was also submitted that as the matter would involve adjudication of disputed question of facts, the forum of arbitration as available under the General Conditions of the Contract would be a more effective and efficacious remedy. It was also submitted that for invoking Clause 64 of the General Conditions of the Contract, the person aggrieved has to make a request.

The learned counsel appearing on behalf of the writ petitioner in the said proceedings during the course of the hearing readily agreed to the said suggestion and submitted that the petitioner was ready to demand for arbitration as per the mandate of Section 64(1) of the General Conditions of the Contract. In addition to that, it was submitted by the learned counsel for the writ petitioner that till the issues raised in the writ petition were decided by the Arbitral Forum, no coercive measures should be taken by the respondent Railways on the basis of the letter dated 26.02.2021.

The learned counsel for the Railway Authorities, though objected to interim protection, but this Court disposed of the writ petition at the motion stage itself by an order dated 05.04.2021 thereby directing the respondent Railways not to initiate any coercive measures on the basis of the letter dated 26.02.2021 against the writ petitioner subject to the demand made by the writ petitioner for arbitration within a period of 30 days from the date of the said order. It was also clarified by this Court that the interim order shall remain in force till the dispute is decided by the Arbitral Tribunal or completion of the period of 30 days, whichever was earlier and thereafter the same shall cease to operate.

6. The records herein transpire that in pursuance to the said order dated 05.04.2021 passed in WP(C) No.2438/2021, the writ petitioner submitted a demand for arbitration vide a communication dated 29.04.2021. In the said letter, a request was made by the writ petitioner that the General Manager (Construction), N.F. Railway, Maligaon should appoint an Arbitrator for the NF Railways who does not fall under any of the categories specified in the Schedule VII of the Arbitration and Conciliation (Amendment) Act, 2015. It was also mentioned that upon receipt of the communication from the General Manager (Construction), the petitioner shall appoint their nominee Arbitrator and both the Arbitrators so appointed shall then appoint a third and Presiding Arbitrator for constituting the Arbitral Tribunal.

7. Pursuant to the said communication dated 29.04.2021, the General Manager (Construction) issued a letter dated 18.05.2022 to the Petitioner whereby the General Manager (Construction) nominated four names of retired Railway Officers for constitution of the Arbitral Tribunal. It is very

pertinent to take note of the names of the persons who have been nominated taking into account the dispute involved. The nominated Arbitrators who were

- (i) Shri A.K. Mittal, Ex. M.E., Railway Board who retired on 31.08.2017;
- (ii) Shri Radhe Shyam, Ex G.M./South Eastern Railway who retired on 31.10.2015;
- (iii) Shri Akhil Agarwal, Ex DG/S&T/Railway Board who retired dated 30.06.2018 and
- (iv) Shri Harsh Kumar, Ex FA&CAO/1/Northern Railway who retired on 02.01.2014.

The petitioner was asked to nominate at least two names out of the list so provided of Retired Railway Officers for appointment of the Arbitrator as nominees from the petitioner side so that further necessary action may be taken in the matter.

8. The petitioner did not challenge or object to the communication dated 18.05.2022. On the other hand, on 15.06.2022, sent a communication to the General Manager (Construction), thereby selecting two names, namely, Shri A.K. Mittal, Ex. M.E., Railway Board and Shri Akhil Agarwal, Ex DG/S&T/Railway Board and requested that an early action in the constitution of the Arbitral Tribunal may be taken and the petitioner be notified about the various details of all the members of the Arbitral Tribunal.

9. Pursuant to the said communication dated 15.06.2022, the General Manager (Construction) constituted the Arbitral Tribunal with two Arbitrators who were nominated by the petitioner, i.e. Shri A.K. Mittal and

Shri Akhil Agarwal and in addition to that Shri Harsh Kumar as the nominees of the Railways. This aspect was informed to the petitioner vide a communication dated 19.07.2022.

10. The petitioner did not challenge the communication dated 19.07.2022 in any manner whatsoever then. On the other hand on 12.09.2022, the petitioner submitted its Statement of Claim. The Statement of Claim is not a part of the records of the instant proceedings. Under such circumstances, this Court while hearing the instant writ petition on 20.08.2024 directed the petitioner to produce the said Statement of Claim. Accordingly, the same has been produced today which is kept on record and marked with the letter "X".

11. A perusal of the said Statement of Claim do not in any manner, show that the petitioner had challenged the constitution of the Arbitral Tribunal. On the other hand, a perusal of Paragraph No.13 and its sub-paragraphs of the Statement of Claim would show that the petitioner without any demur had submitted to the jurisdiction of the Arbitral Tribunal. Paragraph Nos.13 (1) to 13 (6) of the Statement of Claim being relevant is reproduced herein under:-

13. EVENTS LEADING TO CONSTITUTION OF ARBITRAL TRIBUNAL:

13.1 In compliance of the directions of the Hon'ble Court, the Claimant invoked Arbitration clause of the contract agreement and made demand for Arbitration vide letter dated 29.04.2021 (RD-20) addressed to the Respondent, i.e., The General Manager (Construction), N.F. Railway, Malegaon, Guwahati, Assam. In the Appendix-I enclosed to the said letter, the Claimant notified the disputes between the Parties to be referred to the Arbitral Tribunal for adjudication as under:

<i>Dispute No.</i>	<i>Particulars of Dispute</i>	<i>Amount in Dispute</i>
1	Why the N.F. Railway although being aware of the misalignment in Nov 2015 itself, did not investigate the reasons for misalignment?	
2	Why the N.F. Railway although being aware of the misalignment in Nov 2015 itself, still continued to make payment for the misalignment portion to M/s ECI-SANJOSE (JV)?	
3	Whether recovery of Rs.6,06,86,646.25 proposed by N.F. Railway against M/s ECI-SANJOSE (JV) vide letter dated 26.02.2021 issued by the Dy.CE/CON/3/NFR/Imphal which was paid earlier in 2015-16 is valid under the law ?	Rs.6,06,86,646.25
4	Const of Arbitration	As per actuals

13.2 In reply to the Claimant's letter demanding Arbitration vide letter dated 29.04.2021, the Respondent notified a panel of 4 names vide letter dated 18.05.2022 (**CD-21**), and asked the Claimant to select 2 names from the panel for appointment as the Claimant's nominee Arbitrator.

13.3 Accordingly, the claimant selected 2 names from the panel sent by the Respondent and conveyed the same to the Respondent vide letter dated 15.06.2022 (**CD-22**).

13.4 The Respondent constituted the Arbitral Tribunal comprising of Shri Aditya Kumar Mittal, Ex ME/RB as Presiding Arbitrator, Shri Akhil Agarwal, Ex DG/S&T/RB and Shri Harsh Kumar Ex FA&CAO/I/NR as Co Arbitrators by issuing a notification dated 19.07.2022 (**RD-23**).

13.5. The Hon'ble Arbitral Tribunal has entered in to reference on 23.07.2022 as

conveyed to the Claimant and the Respondent vide Notification No.1 dated 23.07.2022 (RD-24).

13.6 During the 1st Virtual Arbitration Proceedings dated 18.08.2022, the Hon'ble Arbitral Tribunal directed the Claimant to submit Statement of Claims and supporting documents by 15.09.2022 (RD-25).

12. Subsequent to the Statement of Claim being submitted by the petitioner, the Railways submitted their Statement of Defence. Pursuant thereto on 31.12.2022, the petitioner submitted an application for keeping the arbitration proceedings in abeyance in view of the fact that the judgment of the Supreme Court rendered in the case of **Central Organization for Railway Electricity Certification vs. ECI-SPIC-SMO-MCML (JV)**, reported in **(2020) 14 SCC 712** had been referred to a Large Bench by the Supreme Court in the case of **Union of India vs. Tania Construction Pvt. Limited** vide an order dated 11.01.2021. It is under such circumstances, the petitioner sought by the said application that the arbitration proceedings be kept in abeyance till such an issue of appointment of the Arbitrator by the General Manager, Railways is finally settled by the larger Bench of the Supreme Court. The said application dated 31.12.2022 was rejected vide the impugned order dated 06.01.2023 and the petitioner herein was directed to file rejoinder on 18.01.2023. It is under such circumstances, the petitioner approached this Court by filing the writ petition challenging the constitution of the Arbitral Tribunal vide the letter dated 19.07.2022 as well as the order dated 06.01.2023 passed by the Arbitral Tribunal. In addition to that, the petitioner has also sought for appropriate directions upon the respondents to keep the Arbitral Proceedings in abeyance till the determination of the question by the Supreme Court.

13. Today, during the course of the hearing, the learned senior counsel for the petitioner submitted that on 15.01.2023, the rejoinder was filed by the petitioner in continuation to the direction so passed in the order dated 06.01.2023 by the Arbitral Tribunal wherein for the first time, the constitution of the Arbitral Tribunal was questioned.

14. The instant writ petition was filed before this Court on 30.03.2023. This Court vide an order dated 03.04.2023 posted the matter on 20.04.2023 for consideration of the interim prayer. Vide an order dated 26.06.2023 passed by this Court, the arbitration proceedings was kept in abeyance.

15. An application was filed for vacating of the said interim order dated 26.06.2023 which was registered and numbered as I.A.(C) No.478/2024. This Court further takes note of that an affidavit-in-opposition had also been filed by the respondent Railways wherein the stand taken is that the petitioner having already surrendered to the jurisdiction of the Arbitral Tribunal, now cannot make a somersault and take a different stand. An affidavit-in-reply has also been filed by the petitioner reiterating the stand of the petitioner in the writ petition.

16. In the backdrop of the above facts, it is relevant to take note of that when the writ petition was taken up for hearing on 19.08.2024, this Court raised the issue as regards the maintainability of the instant writ petition, and as such, gave an opportunity to both the parties to address this Court on the same. The matter was heard on 20.08.2024 when submissions were made even on merits as regards the legality of the order dated 06.01.2023 as well as that the petitioner did not submit to the jurisdiction of the Arbitral Tribunal. It is under such circumstances this Court as

stated above directed the Statement of Claim so filed by the petitioner before the Arbitral Tribunal be brought on record as the same would aid in deciding as to whether the petitioner herein had submitted to the jurisdiction of the Arbitral Tribunal.

SUBMISSION OF THE PETITIONER

17. Mr. G. N. Sahewalla, the learned senior counsel for the petitioner submitted that when the request was made vide the communication dated 29.04.2021 pursuant to the order passed by this Court on 05.02.2021 in WP(C) No.2438/2021, it was clearly mentioned that the respondents should nominate their own Arbitrator and the petitioner thereupon shall nominate its own Arbitrator and both the Arbitrators thereupon shall appoint the third Arbitrator. It is submitted that though the petitioner agreed to the nomination and thereby nominated two Arbitrators amongst the panel so provided, but the appointment of the Presiding Arbitrator could not have been made by the General Manager (Construction) as it would be in violation to the provisions of Section 12 (5) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'). He submitted that as per the judgment of the Supreme Court in the case of **TRF Limited vs. Enegro Engineering Projects Limited**, reported in **(2017) 8 SCC 337** as well as in the judgment in the case of **Perkins Eastman Architects, DPC & Another vs. HSCC (India) Limited**, reported in **(2020) 20 SCC 760**, the Supreme Court observed that a person who cannot be appointed as an Arbitrator cannot also appoint an Arbitrator. He further submitted that though in the case of **Central Organization for Railway Electricity Certification** (supra), the Supreme Court while interpreting Clause 64 (3) of the General Conditions of the Contract opined that it cannot be said

that the General Manager had become ineligible to nominate the Arbitrator and held that the judgment in the case of **TRF Limited** (supra) was not applicable, but the said view in the decision rendered in **Central Organization for Railway Electricity Certification** (supra) doubted by the Supreme Court in the cases of **Tantia Construction Pvt. Limited** (supra) as would be seen from the order dated 11.01.2021 as well as order dated 16.08.2022 in **JSW Still Limited vs. South Western Railway & Another** and as such the matter is presently pending before a Constitution Bench of the Supreme Court. He therefore submitted that the Arbitral Tribunal ought to have stayed the arbitration proceedings pending the decision by the Constitution Bench on the said issue. He further referred to the order of the Constitution Bench of the Supreme Court in the case of **Central Organization for Railway Electricity Certification vs. ECI-SPIC-SMO-MCML (JV)**, reported in **2023 SCC OnLine SC 55**, {hereafter for short referred to as the '**CORE (2)**'}. The learned senior counsel for the petitioner further referred to the judgment of the Coordinate Bench in the case of **Barpeta Agro Infra vs. Union of India** (Arbitration Petition No.21/2023) wherein the Coordinate Bench did not agree that the General Manager, N.F. railway could appoint an Arbitrator in view of Section 12 (5) and VIIth Schedule to the Act of 1996, and accordingly, appointed an Arbitrator to decide the dispute. The learned senior counsel for the petitioner therefore summed up that the arbitral proceedings so pending be kept in abeyance till the decision is rendered by the Constitution Bench in the case of the **CORE (2)** (Supra).

SUBMISSION OF THE RESPONDENTS

18. Per contra, Mr. B. Chakraborty, the learned counsel appearing on

behalf of the Railway Authorities submitted that the petitioner herein knowing very well the scope and ambit of Clause 64 of the General Conditions of the Contract had submitted before this Court in the earlier round of litigation that it would submit itself to the jurisdiction of the Arbitral Tribunal, and accordingly, made the request vide the communication dated 29.04.2021. He submitted that though in the communication dated 29.04.2021, the petitioner mentioned as to how the Arbitrators were to be appointed including the Presiding Arbitrator, but when the nomination of four Arbitrators were made by the General Manager (Construction), the petitioner not only submitted two names of their choice to be the Arbitrators, but subsequently, in terms with the appointment of the Arbitrators vide the communication dated 19.07.2022, had submitted the Statement of Claim that too without raising any objection to the Constitution of the Arbitral Tribunal. He submitted that the Supreme Court recently in the case of ***Union Territory of Ladakh and Others vs. Jammu and Kashmir National Conference and Another***, reported in ***2023 SCC OnLine SC 1140*** categorically observed at paragraph No.35 that it was not open unless specifically directed by the Supreme Court to await an outcome of a reference or a review petition and it is also not open to the High Court to refuse to follow a judgment by stating that it has been doubted by the later Coordinate Bench. He therefore submitted that in the order by which reference was made to the Constitution Bench of the Supreme Court in the case of ***Core (2)*** (supra), there is no bar to the arbitral proceedings being continued, the Arbitral Tribunal was justified in passing the order dated 06.01.2023, more so, in view of the mandate of Section 29A of the Act of 1996. The learned counsel for the respondents

further submitted that in the case of ***Bhaven Construction vs. Executive Engineer, Sardar Sarobar Narmada Nigam Limited***, reported in ***(2022) 1 SCC 75***, the Supreme Court observed that the exercise of the powers under Article 226/227 of the Constitution ought not to be made in respect to an arbitral proceedings, unless in very exceptional circumstances. He therefore submitted that the instant writ petition, therefore, is nothing but a proceedings initiated with an oblique purpose to delay the arbitration proceedings and consequently the interim order so passed by this Court in its order dated 05.04.2021 in WP(C) No.2438/2021 can be continued.

POINTS FOR DETERMINATION

19. From the materials on record and the submissions so made, the following points for determination arise for consideration:

(A) Whether this Court should entertain the challenge to the Constitution of the Arbitral Tribunal vide the communication dated 19.07.2022?

(B) Whether the Arbitral Tribunal was justified in passing the order dated 06.01.2023?

ANALYSIS AND DETERMINATION

Let this Court first deal with the point for determination No.(A).

20. The facts narrated above would show that the petitioner in the earlier round of litigation, i.e. in WP(C) No.2438/2021 had agreed to submit to arbitration in terms with Clause 64 of the General Conditions of the Contract and on the basis thereof, this Court directed the respondent authorities not to take any coercive measures on the basis of the letter dated 26.02.2021 against the petitioner subject to the petitioner

demanding for arbitration within the period of 30 days. The petitioner thereupon submitted before the General Manager (Construction) vide the communication dated the 29.04.2021 for appointment of Arbitrators in terms with Clause 64 of the General Conditions of the Contract. In doing so, the petitioner has categorically stated that the General Manager (Construction) should nominate the Arbitrator for the Railways. Thereupon, upon intimation, the petitioner would appoint its Arbitrator and the Arbitrators jointly shall appoint the Presiding Arbitrator. Be that as it may, four names were forwarded by the General Manager (Construction) vide the communication dated 18.05.2022 to the petitioner for nomination of at least two names for appointment of Arbitrator as nominee from the petitioner's side so that further necessary action may be taken. At this stage, it is pertinent to observe that from details mentioned in the communication dated 18.05.2022, it shows that the persons named therein were erstwhile officials who retired from the services of the Railways and the last one to retire was one Shri Akhil Agarwal dated 30.06.2018. The petitioner replied vide a communication dated 15.06.2022 thereby selecting two out of the four names and requested the General Manager (Construction) to constitute the Arbitral Tribunal by notifying their names, addresses, contact numbers and email IDs to the petitioner.

21. At this stage, this Court finds it relevant to take note of Section 4 of the Act of 1996. The said Section being relevant is reproduced herein below:-

“4. Waiver of right to object.—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

A perusal of the above provision could show that a party who knows that any provision in Part I of the Act of 1996 from which a party may derogate or any requirement under the arbitration agreement has not been complied with but yet proceeds with the Arbitration without stating his objections without undue delay or within the time limit provided, it shall be deemed that the party had waived the right to object.

22. The petitioner herein did not object to the constitution of the Arbitral Tribunal vide the communication dated 19.07.2022 except in the instant proceedings for the first time. The petitioner readily without any objection submitted to the jurisdiction of the Arbitral Tribunal by submitting the Statement of Claim. The relevant paragraphs of the Statement of Claim have been quoted herein above which would clearly show that the petitioner did not object to the constitution of the Arbitral Tribunal.

23. The respondents thereupon submitted the Statement of Defence. On 31.12.2022, the petitioner submitted an application for keeping the arbitration proceedings in abeyance till the Constitution Bench, of the Supreme Court decides in the case of **CORE (2)** (supra). A perusal of the said application which has been enclosed as Annexure-13 to the instant writ petition do not show that there is a challenge to the constitution of the Arbitral Tribunal. Rather, it is a simple application for keeping the

arbitral proceedings in abeyance. This application was rejected vide the order dated is 06.01.2023 which has been impugned in the instant proceedings. As stated above, it is only in the instant proceedings that the petitioner had challenged the constitution of the Arbitral Tribunal for the first time.

24. Now question falls which for consideration is how to challenge the constitution of the Arbitral Tribunal. The Act of 1996 stipulates the manner by which the appointment or constitution of an Arbitral Tribunal can be challenged. Section 13 of the Act of 1996 stipulates the procedure of challenge. Section 13 of the Act of 1996 is quoted herein below:-

*“13. **Challenge procedure.**—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under subsection (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-

section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

A perusal of Section 13 (2) of the Act of 1996 shows that the time limit for challenging the Arbitrator is within 15 days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstance referred to in Sub-section (3) of Section 12 of the Act of 1996. How such challenge is to be made is also stipulated in Section 13 (2) of the Act of 1996. A conjoint reading of Sub-sections (3), (4) & (5) of Section 13 of the Act of 1996 would show that if the challenge made under Sub-section (2) of Section 13 of the Act of 1996 fails, the Arbitration proceedings shall continue and only by way of Section 34 of the Act of 1996, it can be challenged.

25. This Court further finds it relevant to take note of Section 14 of the Act of 1996 which stipulates when the mandate of an Arbitrator shall terminate. Either the Arbitrator may withdraw or the parties terminate the mandate mutually. In addition to that, the mandate may terminate if the Arbitrator become de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. In terms with Section 15 (2) of the Act of 1996, a substituted Arbitrator can be appointed. But for doing so, a party has to apply to the Court in terms with Section 14 (2) of the Act of 1996, i.e. the Court within the meaning of Section (e) of the Act 1996 {See para 17 of ***Bharat Broadband Network Ltd. vs. United Telecom Ltd.***, reported in **(2019) 5 SCC 755**}. The reference to Section 14 and 15 of the Act of 1996 is being made herein taking into account the eventuality if the Constitution Bench holds overrules the decision rendered in ***Central Organization for Railway Electricity Certificate*** (supra) and does not apply

the judgment rendered by the Constitution Bench of the Supreme Court prospectively.

26. Now coming back to the facts involved, it would be seen that the petitioner did not exercised its rights under Section 12 or 14 of the Act of 1996. In fact, prior to the challenge to the constitution of the Arbitral Tribunal, by way of the present proceedings, there is no challenge to the constitution of the Arbitral Tribunal. Therefore, in the said backdrop, the question arises as to whether this Court under Article 226 of the Constitution should entertain the challenge in the instant proceedings to the constitution of the Arbitral Tribunal. The judgment of the Supreme Court in ***Nivedita Sharma vs. COAL***, reported in **(2011) 14 SCC 337**, at paragraph No.11 states about when a writ petition should be entertained when statutory remedies are available. Paragraph No.11 of the said judgment is quoted herein below:-

“11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation—L. Chandra Kumar v. Union of India. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ

petition should not be entertained ignoring the statutory dispensation."

(emphasis applied upon the underlined portion)

27. In ***Deep Industries Ltd. vs. ONGCL & Another***, reported in **(2020) 15 SCC 706**, the Supreme Court explained the inter play of Section 5 of the Act of 1996 with Article 227 of the Constitution. Paragraph Nos.16 & 17 of the said judgment is reproduced herein below:-

"16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].

17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

28. In ***Bhaven Construction*** (supra), the Supreme Court was specifically dealing with the question of entertaining writ petition under Article

226/227 of the Constitution vis-à-vis an order rejecting an application challenging the appointment of Sole Arbitrator under Section 16 (2) of the Act of 1996. Paragraph Nos.11, 12, 13, 20, 22, 23, & 27 being relevant are quoted herein below:-

*“**11.** Having heard both the parties and perusing the material available on record, the question which needs to be answered is whether the arbitral process could be interfered under Articles 226/227 of the Constitution, and under what circumstance?*

***12.** We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under*

*“**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.”*

(emphasis supplied)

The non obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

***13.** The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.*

***20.** In the instant case, Respondent 1 has not been able to show exceptional circumstance or “bad faith” on the part of the appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power*

to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by Respondent 1 in a separate Section 34 application, which is pending.

22. *The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering Respondent 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the appellant herein had actually acted in accordance with the procedure laid down without any mala fides.*

23. *Respondent 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, Respondent 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and Respondent 1 has already preferred a challenge under Section 34 to the same. Respondent 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.*

27. *In view of the above reasoning, we are of the considered opinion that the High Court erred in utilising its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned order⁴ of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."*

(Emphasis applied to the underlined portion)

29. The above settled law, if applied to the present case, it would be seen that the petitioner herein has never challenged the jurisdiction of the Arbitral Tribunal as per the statutory mandate. There is no exceptional circumstances made out which would inspire this Court to exercise its jurisdiction under Article 226/227 of the Constitution. Even otherwise also, the filing of the Statement of Claim and participating in the Arbitration proceedings without any objection, clearly shows that the petitioner submitted to the jurisdiction of the Arbitral Tribunal. How much Section 4 of the Act of 1996 would debar the petitioner to challenge the constitution of Arbitral Tribunal even in a proceedings under Section 34 of the Act of 1996 is left open to be decided in a proceedings, if so initiated under Section 34 of the Act of 1996.

30. The learned senior counsel for the petitioner has referred to the judgment of the Coordinate Bench in the case of **Barpeta Agro Infra** (supra). However, the said judgment would not be applicable to the present proceedings taking into account that the said judgment was rendered in a proceedings under Section 11 of the Act of 1996 for appointment of an Arbitrator whereas in the instant proceedings, the petitioner has already submitted to the jurisdiction of the Arbitral Tribunal by submitting the Statement of Claim. Furthermore, this proceedings is under Article 226/227 of the Constitution.

31. Therefore, the challenge to the communication dated 19.07.2022 of the constitution of the Arbitral Tribunal is rejected on the ground of that the exercise of jurisdiction under Article 226/227 of the Constitution is not called. However, the petitioner should be at liberty to challenge at the stage of Section 34 of the Act of 1996, if so advised.

32. Let this Court now take up the next point for determination No.(B) as to whether the Arbitral Tribunal was justified in rejecting the application dated 30.12.2022 which resulted in the passing of the impugned order dated 06.01.2023. For that purpose, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of ***Union Territory of Ladakh and Others*** (supra) wherein the Supreme Court at paragraph No.35, dealt with the issue in the context of various High Courts not deciding cases on the ground that the leading judgment of the Supreme Court in the subject matter was either referred to a Larger Bench or a review petition relating thereto was pending. The Supreme Court observed that the High Courts should proceed to decide matters on the basis of the law as it stands. It was further observed that it is not open unless specifically directed by the Supreme Court to await an outcome of a reference or a review petition as the case may be. Paragraph No.35 of the said judgment is reproduced herein below:-

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in

National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 6805. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

33. In the background of the above, if this Court duly takes note of the submission of the learned senior counsel appearing on behalf of the petitioner, it would be seen that the petitioner has sought that the arbitration proceedings should be kept in abeyance in view of the fact that two subsequent Three Judges Bench of the Supreme Court have doubted the decision in the case of **Central Organization for Railway Electricity Certification** (supra). It is relevant to take note of that the perusal of the judgment in the case of **Central Organization for Railway Electricity Certification** (supra), the Three Judges Bench of the Supreme Court categorically observed that the decision in the case of **TRF Limited** (supra) is not applicable as regards the interpretation to be made in respect to Clause 64 (3) of the General Conditions of the Contract. This judgment may have been doubted and referred to a Constitution Bench, but not overruled. It is also apposite to take note of that in the case of **TRF Limited** (supra), Clause 64 (3) of the General Conditions of the Contract was not an issue, rather what was in issue was Clause 33 of the General Conditions of the Purchase Order and this aspect has been clearly distinguished by the Supreme Court in the case of **Central Organization for Railway Electricity Certification** (supra). Therefore, taking into account the judgment in the case of **Union Territory of Ladakh and Others** (supra), this Court finds no ground to interfere with the order dated 06.01.2023 passed by the Arbitral Tribunal. This Court also takes note of the statutory mandate contained in Section 29A of the Act of 1996 as well as the

principles of unbreakability which is ingrained in an Arbitral proceedings and is therefore of the opinion that the order dated 06.01.2023 is in accordance with law.

CONCLUSION

34. (i) The challenge to the communication dated 19.07.2022 is rejected on the ground that the said issue is not being entertained in the present proceedings for the reasons above mentioned. The petitioner would be at liberty to challenge the constitution of the Arbitral Tribunal at the stage of Section 34 of the Act of 1996. It would however be open to the petitioner to take recourse to Section 14 of the Act of 1996 in terms with the judgment of the Supreme Court in ***United Telecom Ltd.*** (supra), if the Constitution Bench overrules the judgment in ***Central Organization for Railway Certification*** (supra).

(ii) The order of the Arbitral Tribunal dated 06.01.2023 is in accordance with law and calls for no interference.

(iii) The Arbitral Tribunal shall proceed with the Arbitration proceedings. The interim order stands vacated.

(iv) The period during which the Arbitral proceedings were stayed by this Court shall be excluded from the operation of Section 29A of the Act of 1996.

(v) The writ petition accordingly stands disposed off. Pending applications stands closed in view of the instant judgment.

JUDGE