

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.973 OF 2015

ORDER: (*Per Hon'ble Sri Justice M. Satyanarayana Murthy*)

Aggrieved by the Order dated 08.05.2014, passed in Arbitration Application No.125 of 2013 by the Sole Arbitrator, Sri Justice Ch.S.R.K. Prasad, Former Judge of this Court, the respondents therein preferred this Petition, challenging the finding to the extent of existence of an arbitrable dispute.

2. The brief facts necessary for disposal of the present Petition are that, the respondent herein filed a Petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') seeking appointment of an arbitrator. The petitioners herein, being the respondents in the Arbitration Application No.125 of 2013, objected for appointment of arbitrator on the ground that there exists no arbitrable dispute, however, the Hon'ble Chief Justice of this Court, while disposing of the Arbitration Application by appointing Sri Justice Ch.S.R.K. Prasad as the sole arbitrator, left open the issue of existence of arbitrable dispute to the sole arbitrator. The respondent herein, filed a claim statement before the sole arbitrator, seeking an amount of Rs.26,50,80,480/- under various heads and also filed additional claim statement claiming an amount of Rs.10,53,195/- under various heads; thereafter, the petitioners herein, being the respondents in the Arbitration Application, filed their written statement raising a specific contention that there exists no arbitrable dispute besides raising other contentions with reference to clauses 23.1 to 23.2 of the agreement dated 29.01.2007.

3. Basing on the claim and additional claim statement and additional written statement filed by both the parties, the sole arbitrator framed as many as 7 issues, which are as follows:

1. Whether there is any arbitrable dispute in this case?
2. Whether case falls under the purview of civil Courts?
3. Whether the claims are barred by limitation?
4. Whether claimants made endorsement in M. Books giving up all his future claims and final payment was made on 31.03.2010?
5. Whether the endorsement found in B.Book relate only to measurement?
6. Whether the respondent delivered possession as per stipulation and whether the claimant was made to wait?
7. Whether the claimant is entitled to claims made?

4. Upon hearing argument of both the counsel, the sole arbitrator, without touching the remaining six issues, decided the first issue pertaining to existence of arbitrable dispute in favour of the respondent-claimant and against the petitioners-respondents.

5. Aggrieved by the finding of the sole arbitrator, the present Civil Revision Petition, under Article 227 of the Constitution of India, is preferred by the petitioners herein, who were the respondents before the sole arbitrator, on various grounds.

6. Considering rival contentions, perusing the order under challenge and the law laid down by the Apex Court and this Court in various judgments cited by both the counsel, the points that arise for consideration are:

- 1) Whether Revision, against an order passed by the sole arbitrator, during pendency of reference to the sole arbitrator, is maintainable under Article 227 of the constitution of Indian?**
- 2) Whether there exists an arbitrable dispute to be decided by the sole arbitrator in the agreement for execution of work? If so, is the arbitrator competent to proceed further to decide the claim of the claimant, respondent herein?**

7. **POINT No.1:** This Petition is filed challenging the finding of sole arbitrator but before its registration, the Registry took an objection about the maintainability. Consequently, when the matter came up before this Court, we directed the Registry to register the Petition subject to objection about the maintainability. Thus, the Petition was registered only subject to objection. Therefore, this Court has to decide about the maintainability of Civil Revision Petition under Article 227 of the Constitution of India.

8. Sri K. Rama Krishna Reddy, learned Advocate General for the State of Telangana and Smt. Kalpana Ekbote, Learned counsel for the petitioners herein, while raising several contentions with regard to jurisdiction of the arbitrator referred the judgment of the Apex Court in ***State of Andhra Pradesh Vs. Obul Reddy***, which does not pertain to maintainability of Revision Petition under Article 226 of the Constitution. Even in the written submissions of the petitioners herein nothing has been brought to our notice about maintainability of the Petition under Article 227 of the Constitution. The whole concentration of the petitioners is only with regard to G.O.Ms. No.430 dated 24.10.1983 and G.O.Ms. No.160 dated 01.06.1987 but they are not relevant for deciding the real controversy for the present.

9. Sri Gopal G. Naik, learned counsel for the respondent herein, while contending that the Petition is not maintainable against the order passed by the sole arbitrator, drawn the attention of this Court to several judgments of the Apex Court in ***J. Kondanda Rami Reddy Vs. State of Andhra Pradesh, M/s. S.B.P. and Company Vs. M/s. Patel engineering Limited and another, H. Lathakumari Vs. Vamnapuram Block Panchayat*** and a Division Bench judgment of this Court in ***Chintakayala Siva Rama Krishna Vs. Nadimpalli Venkata Rama Raju and others***.

10. In view of the specific contention of the respondent herein about very maintainability of Civil Revision Petition under Article 227 of the Constitution of India, we must necessarily decide the maintainability of this Petition adverting to the law laid down by the Apex Court and this Court in the decisions referred *supra*.

11. Undoubtedly, the powers of this Court under Article 227 are supervisory over the subordinate Courts and Tribunals and this Court can exercise the power under

Article 226 of the Constitution to correct the decisions of the Subordinate Courts and Tribunals. Therefore, this Court can exercise unfettered power to correct the orders and proceedings before the Tribunals and Subordinate Courts, based on law.

12. Admittedly, the order under challenge, about existence of arbitrable dispute, is an order passed before termination of arbitration proceedings since it is a decision on preliminary issue as directed by the Hon'ble Chief Justice of this Court, while making a reference appointing Sri Justice Ch.S.R.K. Prasad, Former Judge of this Court, as sole arbitrator. Now, the question is maintainability of Revision Petition against the said order, which is no more *res-integra* in view of the judgment of the Apex Court in ***M/s. S.B.P. and Company Vs. M/s. Patel Engineering Limited and another***, which held as follows in Paragraphs 44 to 46:

“44. 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 Courts is not permissible.

45. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article [227](#) of the Constitution of India or under Article [226](#) of the Constitution of India against every order made by the arbitral tribunal. therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

46. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief

Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article [136](#) of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Railway Corporation Limited and Another v. Rani Construction Private Limited* (2000) 2 SCC 388 and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from

this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in *Konkan Railway Corporation Limited and another v. Rani Construction Private Limited* (2000) 2 SCC 388 is overruled.”

13. In view of the law declared by the Constitutional Bench of the Apex Court in ***Patel Engineering Limited***⁶, the Civil Revision Petition under Article 227 is not maintainable and, at best, the remedy open to the aggrieved party is to file a Petition under Section 34 of the Arbitration and Conciliation Act, after termination of arbitral proceedings by the sole arbitrator. The intention of creating fetter on the power of this Court to maintain a Civil Revision Petition under Article 227 of the Constitution is only to settle the claims without judicial intervention before termination of arbitration reference. The very object of engaging the Arbitration and Conciliation Act is to decide the claims by alternative mechanism instead of directing the parties to approach the Civil Court and obtain a decree following cumbersome procedure. If the judicial intervention is permitted on account of the procedural hurdles, it is difficult for the Arbitration Tribunal or the sole arbitrator to give a quietus to the arbitration proceedings pending before the sole arbitrator or Arbitration Tribunal. Therefore, to avoid such delays, such fetter is created by the Apex Court. In fact, the provisions of the Act did not take away the jurisdiction of this Court to entertain Civil Revision Petitions under Article 227 or Writ Petitions under Article 226 either by expression or by necessary implication but the Constitutional Bench of the Apex Court while deciding similar issue in ***Patel Engineering Limited***⁶ concluded that Civil Revision Petition under Article 227 is not maintainable and basing on the judicial precedent we have no hesitation to hold that this Petition is not maintainable under Article 227 of the Constitution of the India.

14. In a recent Division Bench judgment of the Apex Court in ***Arasmeta Captive Power Company Private Limited and another Vs. Lafarge India Private Limited***, the Apex Court while deciding Civil Appeal against the order passed by the High Court of Chattisgarh at Bilaspur made serious comments about the understanding of

the High Court about consistency of the principle laid down in **Patel Engineering Limited**⁶ referred *supra*, and based on the principle laid down by the Apex Court in **Government of Andhra Pradesh and others Vs. AS.P. Jaiswal and others** observed that consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decise *etc.*, These rules and principles are based on public policy and, finally, in Paragraphs 40 and 41 of the judgment therein, the Apex Court ruled as follows:

“40. We will be failing in our duty if we do not take note of another decision in **Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others** (2011) 5 SCC 532 on which Mr. Ranjit Kumar has heavily relied upon. He has drawn our attention to paragraph 34 where the Court has dealt with the meaning of the term "arbitrability" and stated that arbitrability has different meanings in different contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal. In sub-para (ii) of the said paragraph it has been stated that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement. On a careful reading of the said judgment we find that the learned Judges have referred to paragraph 19 of **SBP & Company** (*supra*) and thereafter referred to Section [8](#) of the Act and opined what the judicial authority should decide. Thereafter the Court proceeded to deal with nature and scope of the issues arising for consideration in an application under Section [11](#) of the Act for appointment of the arbitrator and, in that context, it opined thus:

While considering an application under Section [11](#) of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section [34](#) of the Act, relying upon Sub-section (2)(b)(i) of that section.

41. The said ruling is absolutely in consonance with the principle laid down in **SBP & Company** (*supra*). The meaning given to arbitrability thereafter has been restricted to the adjudication under Section [8](#) and not under Section [11](#) of the Act. Thus, the reliance on the said decision further reflects how the court has consistently understood the principles laid down in **SBP &**

Company (supra).”

15. In another Full Bench judgment of the Apex Court in ***Lalitkumar Vs. Sanghavi (died) L.Rs Neeta Lalit Kumar Sanghavi and another Vs. Dharmadas V. Sanghavi and others***, following the law earlier laid down in ***Patel Engineering Limited***⁶, the Apex Court held that the Civil Revision Petition is not maintainable under Article 227 of the Constitution of India. However, in ***I.T.I. Limited Vs. Siemens Public Communications Network Limited***, the Division Bench of the Apex Court while deciding the Civil Revision Petition filed under Section 115 of C.P.C. ruled as follows in Paragraphs 11 and 12:

“11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a *lis* between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section [37\(2\)](#), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is now settled by the judgment of a 3-Judge Bench of this Court in the case of ***Bhatia International Vs. Bulk Trading S.A. and Another*** ([2002] 2 SCR 411) in C.A. No. 6527/2001 -- decided on 13.03.2002 where in while dealing with a similar argument arising out of the present Act, this Court held : "While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."

12. In the said view of the matter, we are in respectful agreement with the view expressed by this Court in the case of *Nirma Limited* (*supra*) and reject the argument of Mr. Parasaran on this question.”

16. At the same time, in Para 18 of the judgment, the Apex Court held that the Revision under Section 115 of C.P.C. can be maintained as the higher Courts exercises superintendence over the powers within its jurisdiction and, finally, concluded in Para 22 that supervisory jurisdiction to be exercised by the High Court under Section 115 of the C.P.C. is for the purpose of correcting jurisdiction error, if any, committed by the Subordinate Court in exercise of power in appeal under Section 37(2) of the Act. The approach of the Revisional Court under Section 115 of

the Code is not a resort to remedy of appeal. In appeal, interference can be made both on facts and law whereas in revision only errors relating to jurisdiction can be corrected. Such revisional remedy is not expressly barred by the provisions of the Act. We have also not found any implied exclusion of the same on examination of the scheme and relevant provisions of the Act.

17. In another Division Bench judgment of the Apex Court in ***Shin-Etsu Chemical Company Limited Vs. Vindhya Telelinks Limited and others***, the Apex Court while considering the revisional jurisdiction of the Courts under Article 227, despite availability of remedy of appeal, held that mere availability of remedy of appeal under the provisions of the Arbitration and Conciliation Act is not a bar to entertain a Petition under Article 136 of the Constitution.

18. When we adverted to the provisions of the Arbitration and Conciliation Act, it is clear that the issue decided by the arbitrator is only by exercising power under Section 16 of the Arbitration and Conciliation Act and a remedy by way of appeal is available under Section 37 of the Arbitration and Conciliation Act against an order passed under Section 16(3) and 17 of Arbitration and Conciliation Act.

19. If the principle laid down by the Apex Court in the decisions referred *supra*, is applied to the present facts, mere availability of remedy of appeal under Section 37 of the Arbitration and Conciliation Act against the order passed by the sole arbitrator by itself is not a bar to entertain a Revision under Section 115 of the C.P.C. or to entertain a Petition under Article 136 of the Constitution. Thus, in view of the Division Bench judgment of the Apex Court in ***Vindhya Telelinks***¹¹ and the Constitutional Bench judgment of the Apex Court in ***Patel Engineering Limited***⁶, we are unable to disagree with the contention of learned counsel for the respondent herein, therefore, the above two judgments of the Apex Court are of no assistance of the petitioners herein to maintain a Civil Revision Petition under Article 227 of the Constitution of India.

20. Learned counsel for the respondent herein, placed reliance on the Division Bench judgment of this Court in ***Chintakayala Siva Rama Krishna***⁵, wherein this

Court reiterated similar principle as laid down by the Apex Court in ***Patel Engineering Limited⁶***.

21. In view of the law declared by different benches of the Apex Court referred *supra*, we are of the considered view that the Civil Revision Petition under Article 227 of the Constitution is not maintainable. Accordingly, the point is held in favour of the respondent and against the petitioners herein.

22. **POINT No.2:** In view of our finding on point No.1, it is a futile exercise to record any finding on this point since the petitioners herein are entitled to agitate about non-existence of arbitrable dispute in a Petition filed under Section 34 of the Arbitration and Conciliation Act, as it is a ground to set-aside the Arbitration Award passed by the sole arbitrator under Section 34 of the Act. The petitioners are entitled to raise all contentions, legally available, including existence of arbitrable dispute, in accordance with law, in a Petition filed under Section 34 of Arbitration and Conciliation Act. Hence, no separate finding need be recorded on this issue. Accordingly, the point is held in favour of the respondent and against the petitioners. In view of our foregoing discussion, this Revision is not maintainable and, accordingly, liable to be dismissed.

The Civil Revision Petition is, accordingly, dismissed. However, the petitioners herein are at liberty to raise all contentions, available under law, in a Petition filed under Section 34 of the Arbitration and Conciliation Act, after termination of arbitration proceedings before the sole arbitrator.

In consequence, miscellaneous petitions, if any, pending in this Writ Petition, shall stand dismissed. No order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 01-06-2015.

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HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.973 OF 2015

(Order of the Division Bench delivered by
Hon'ble Sri Justice M. Satyanarayana Murthy)

Date. 01-06-2015

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