

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on: 13/02/2017****Order delivered on: 12/05/2017****Civil Revision No. 7 of 2013**

- M/s R.S. Bajwa & Company, through R.S. Bajwa, S/o Late M.S. Bajwa, aged about 60 years, Managing Partner, B-4, Minocha Colony, Bilaspur, Tahsil and Distt. Bilaspur, Chhattisgarh

---- Applicant**Versus**

1. State of Chhattisgarh Through- The Secretary, Department of Water Resources, D.K.S. Bhawan, Mantralaya, Raipur, Chhattisgarh
2. The Chief Engineer, Chhattisgarh Water Resources, Department, Hasdeo Basin, Bilaspur, Chhattisgarh
3. The Superintendent Engineer Shyam Barnai Project Circle, Ambikapur, Distt. Surguja, Chhattisgarh
4. The Executive Engineer Barnai Canal Division, Ambikapur, Distt. Surguja, Chhattisgarh

---- Respondents

For the Applicant : Shri Rajkamal Singh, Advocate.

For the State/Respondents : Shri R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Order****12/05/2017**

1. This civil revision is being disposed of. Initially applicant brought a writ petition under Article 226/227 of Constitution of India seeking writ of

certiorari and mandamus for setting aside the impugned order. The petition was dismissed by order dated 5.8.2008 by the Learned Single Bench. This writ appeal No.208/2008 which was allowed by the Learned Division Bench by 27.8.2010 in which the order dated 5.8.2008 by Learned Single judge in WPC 370/2008 along with the order passed dated 5.5.2007 passed on the Learned District Judge, Surguja Ambikapur in execution proceeding No.1/2007 were set aside, with a direction to District Judge to proceed in accordance with law.

2. The review petition No.8 No.8/2011 was filed by respondents which was decided by order dated 16.3.2011 by the same Division Bench of this Court and the review petition was dismissed. Respondents filed an Appeal No.3666-3667 of 2012 before Hon'ble Supreme Court of India which was disposed of by order dated 17.4.2012 by allowing the appeal and setting aside the impugned judgment and order of this Court with a direction to decide the matter afresh. The writ appeal was again heard and decided on 20.9.2012 by the Learned Division Bench of this Court in which the appeal was allowed and the order passed by the Learned Single Bench was set aside. The case was remanded with a direction to the Registry to register the case as civil revision under the provision of Section 115 of Civil Procedure Code and place it for hearing before the appropriate Bench. Therefore, the matter is listed as civil revision.

3. The facts of the case are these, that the applicant is a contractor. A notice inviting a tender for construction of Masonry Dam in Shyam

Barnai Project Circle, Ambikapur, District-Surguja was published. Applicant was a successful bidder and an agreement dated 25.3.1983 was executed between applicant and respondents. Performance of the contract work was completed on 30.7.1992. Bills submitted for payment regarding the work done, which were kept unpaid on the part of the respondents. Invoking the condition under Clause 51 of the agreement for settlement of disputes, applicant wrote a letter dated 26.4.1994 to respondent/State seeking resolution of dispute and claims were submitted. After a delay of almost 11 years Superintending Engineer of Shyam Barnai Project Circle, Ambikapur, District-Surguja passed order dated 28.11.2005, in which, all the claims of applicant were rejected.

In the meanwhile, during the pendency of the proceeding mentioned above applicant wrote a letter of Chief Engineer dated 3.10.2003 for appointment of Sole Arbitrator under Clause 52 of the agreement for resolution of dispute between the parties and further a reminder dated 20.11.2003(**Annexure-P4**) and 18.12.2003 (**Annexure-P5**) were also moved. Respondent No.2 by reply dated 24.11.2003 (**Annexure-P6**) responded that the consideration of the claim made by applicant is still pending, hence, further proceeding demanded cannot be acceded to. Later on, respondent No.2 appointed Shri C.M. Malhotra, Retired Superintending Engineer as the Sole Arbitrator by appointment letter dated 13.3.2006 (**Annexure-P7**). Sole Arbitrator conducted the arbitration proceeding and passed the arbitration award dated 22.8.2006 (**Annexure-P8**) by which the claims of applicant were partly allowed and respondent No.4 was ordered to

pay a sum of Rs.2,19,64,448/- within a period of 30 days from the date of award with interest.

The award dated 22.8.2006 was not complied with by all the respondents, on which applicant moved an application for execution of award before the Court of District Judge, Ambikapur under Order 21 Rule 11 of the Code of Civil Procedure, 1908, the application was registered as Execution Case No.1 of 2007. Respondent/State raised an objection dated 14.3.2007, which was decided by the Executing Court by impugned order dated 5.5.2007 by allowing the application and rejecting the execution application, giving reason that Arbitration and Conciliation Act, 1996 (for short, hereinafter referred to as 'the Act of 1996') is not applicable, as the dispute raised by the applicant could have been raised before the Arbitration Tribunal constituted under Madhyastham Adhikaran Adhiniyam, 1983 (for short, hereinafter referred to as 'the Adhiniyam, 1983') and that respondent no.2 had no authority to appoint the arbitrator, hence, the award passed is without jurisdiction.

4. The impugned order is challenged on these grounds that the Act of 1996 was applicable for execution of arbitration award in this case. Arbitration Tribunal under the provision of the Adhiniyam, 1983 was not in existence until 2.9.2005 and the arbitration proceeding had already commenced under the provisions of Section 21 of the Act, 1996 by the arbitrator appointed by the respondent/State. Further, respondents participated in said arbitration proceeding as well. The jurisdiction and authority of the arbitrator was never questioned by the

respondent/State. No application was moved under Section 34 of the Act, 1996 for setting aside the award passed by the Sole Arbitrator. For these reasons, the award dated 22.8.2006 has become final and binding on the litigating parties and the execution Court was bound to execute it under Section 36 of the Act 1996. The executing Court does not have any authority to travel beyond a decree, hence, for these reasons, the impugned order is erroneous and illegal which may be set aside.

5. In reply, respondents admitted about the work contract being given to the applicant and about its completion on 30.7.1992. It is submitted that entire amount for the work has been paid to the applicant. Applicant filed a petition Writ Petition No.505/1997, by order dated 30.4.1998 in this petition, the applicant was permitted to file a detailed representation. The representation made by the applicant was rejected by the respondent on 5.8.1998, applicant did not invoke arbitration clause, hence, the order of rejecting his claim became final. Denying the applicants statements about request for appointment of arbitrators, it is stated that applicant made a repeated reference for settlement of dispute under Clause 51 of the Agreement vide letter dated 17.3.2005 which were duly rejected by the Superintending Engineer on 28.11.2005. It is not disputed that Sole Arbitrator was appointed by respondent No.2, who has delivered impugned award. It is stated that by filing reference under Clause 51 of the Agreement on 17.3.2005, applicant had already waived his right to invoke Clause 52 of the Agreement. It was further stated, that after Constitution of

arbitration tribunal under the Adhiniyam, 1983, from 3.9.2005 the Clause 52 of the agreement stood suspended by the effect of Section 7 of the Act, 1983. Thus, the appointment of Sole Arbitrator by order dated 13.3.2006 was *void ab initio* and the award dated 22.8.2006 passed by Sole Arbitrator is a nullity.

6. Ongoing through the submissions made by the parties and the material on record, a point of contention between the parties appears to be this “whether the award dated 22.8.2006 passed by Sole Arbitrator is a legally sustainable award after constitution of tribunal on 3.9.2005 under the Adhiniyam, 1983.”
7. Section 20 of Madhyastam Madhyastham Adhikaran Adhiniyam, 1983 is as under:-

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

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

Explanation-For the purpose of this sub-section “indigent person” shall have the meaning assigned to it in the Code of Civil

Procedure, 1908.

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

8. It was held in **VA Tech Escher Wyass Flovel Ltd. Vs. Madhya Pradesh State Electricity Board and another** reported in **(2011) 13 SCC 261** that the Adhiniyam, 1983 stood repealed by the reason of enactment of the Act, 1996 which was relied upon by the Division Bench of this Court while passing order dated 27.8.2010 in Writ Appeal No. 208/2008 and Review Petition No.8/2011 ordered on 16.3.2011. It was observed in the order of Hon'ble Supreme Court in Civil Appeals No.3666-3667 dated 17.4.2012 that the view laid down in VA Tech Escher Wyass Flovel Ltd.(supra) has been reversed in **M.P. Rural Road Development Authority & another Vs. M/S LG Chaudhary Engineers & Cont** reported in **(2012) 1 Scale 688**.

9. The finding and observation of Hon'ble Supreme Court and M.P. Rural Road development authority (supra) is only to this extent that the Adhiniyam, 1983 is not repealed by the enactment of the Act, 1996. Whether the dispute in this case is covered and governed by the provisions of M.P./C.G. Madhyastham Adhikaran Adhiniyam, 1996 is still a question.

10. Section 2d of the Act, 1983 defines “dispute” which means claim of ascertained money valued at Rs.50,000/-or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof.

Section 7 of this Act provides referring the dispute for arbitration irrespective of there being an arbitration agreement or not to the tribunal constituted under this Act. A distinction has been made in the judgment of Supreme Court and M.P. Rural Road Development Authority(supra) about referring a dispute to arbitration tribunal constituted under the Act 1983. The essential requirement is this, that the works contract should be in existence it should not have been canceled or repudiated. In case the works contract is not in existence on account of cancellation then Section 7 of the Act, 1983 shall not apply to such a case and the dispute shall become referable to independent arbitrator under the provisions of the Act, 1996.

11. Reliance has been placed on the judgment of Apex Court in Civil Appeal No.10778 of 2014 M/s MSP Infrastructure Ltd. Vs. M.P. Road Development Corp. Ltd. decided on 5.12.2014. It was argued in this case that the Act, 1996 being a parliamentary statute would have precedence over MP Act, 1983. Deciding the issue in Para No.14 of the judgment, it was held that Section 16(2) of the Act, 1996 provides that an objection to jurisdiction of arbitration tribunal shall be made before the submitting of statement of defence of not later than that. This provision disables a party from challenging the jurisdiction of

tribunal at a later stage and a party which has awaited not to raise any objection invoking the provision of sub-Section 15 of the Act, 1996 shall be deemed to have waived the right to object. Further, the party aggrieved with the award can raise such objection in petition under Section 34 of the Act, 1996, it was held in Para-17 that the contention that award in conflict with public policy of India cannot be equated with the contention that tribunal under Central Act does not have jurisdiction and the tribunal under the State Act has jurisdiction to decide upon the dispute. It was further held that where the question arises out of a conflict between an action under a State Law and an action under a Central Law, the term public policy of India must necessarily understood as being referable to the policy of the Union.

12. This is a case where although the arbitration tribunal under the State Act was constituted, but this being the fact situation, the respondent submitted to the request of the applicant for appointment an arbitrator and in consequence sole arbitrator was appointed who conducted arbitration proceeding and passed Award dated 22.8.2006. Respondent parties participated in this proceeding and never raise any objection under Section 16(2) of the Act, 1996,

13. There is no information available as to any action was taken by respondents for setting aside the award of the arbitrator under Section 34 of the Act, 1996. In these circumstances, the question arises whether an executing Court is empowered to nullify the effect of an award presented for execution before it. The order passed by learned

District Judge as an executing Court, can act and proceed within the limits of Section 35 of the Act, 1996. The effect of impugned order dated 5.5.2007 passed by learned District Judge, Surguja is that of setting aside an award passed by an arbitral tribunal which can not be considered as permissible under the law. As per the settled position regarding the prevalence of Central Act over the State Act and that the respondents by not raising any objection to the jurisdiction of arbitration tribunal within their rights available to them under Section 16(2) of the Act, 1996 have waived their opportunity to plead and object in this respect. Hence, as per the principal laid down in MSP Infrastructure (supra) respondent are precluded from raising any objection to the jurisdiction of arbitral tribunal at the such of execution and further, the executing Court has no jurisdiction to pass an order to the effect of nullifying an award passed by an arbitration tribunal. On the basis of these findings and the reasons aforementioned this revision petition deserves to be allowed. This civil revision is allowed. The impugned order of learned District Judge, Surguja is hereby set aside. The execution petition is restored and the learned District Judge is directed to proceed in the execution proceeding in accordance with law.

Sd/-

(Rajendra Chandra Singh Samant)

Judge