

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
*FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE T. AMARNATH GOUD**

+ C.R.P.No.519 of 2016

% Date: -03-2018

BETWEEN:

m/S. 4g Identity Solutions Private Limited
(A company Incorporated under the Companies Act, 1956)
Regd Office at Plot No.330 & 331, Road No.79,
Jubilee Hills, Hyderabad 500 034.
Rep. by its Vice President & Authorised Signatory.

Petitioner/respondent

Vs.

1. M/s. Bloom Solutions Pvt. Limited, Having its Regd. Office at
G1, Chaitanya Place, Street No.8, SBI Colony, Gandhinagar,
Hyderabad 500 080, rep. by its Managing Director.

... Respondent/Clamimant

2. Ch. Ramesh Babu (Arbitrator) Chamber 401, 4th Floor,
H.No.16-2-677/2, Tirumala Towers, Judge's Colony, Malakpet,
Hyderabad 500 038.

... Respondent/Arbitrator

For Petitioner : Mr. S. Ravi, senior counsel

For Respondents : Mr. P.V. Ramaraju

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> Head Note:

? Cases referred:

1. AIR 2006 SC 450
2. AIR 2004 AP 89
3. AIR 1999 BOMBAY 219
4. LAWS (BOM) 2007 (7) 83
5. LAWS (GAU) 2008 (5) 33
6. LAWS (CAL) 2015 (2) 95
7. (2017) 12 SCALE 105
8. (2010) 8 SCC 329
9. AIR 1963 SC 874
10. AIR 1976 SC 425
11. AIR 2003 SC 3044
12. AIR 2003 SC 3044

**HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE T. AMARNATH GOUD**

Civil Revision Petition No.519 of 2016

ORDER: *(V. Ramasubramanian, J)*

Challenging an Arbitration Award, the company which suffered the award, has come up with the above revision under Article 227 of the Constitution of India.

2. Heard Mr. S. Ravi, learned senior counsel appearing for the petitioner and Mr. P.V. Ramaraju, learned counsel appearing for the 1st respondent/award holder.

3. At the outset, the very maintainability of the revision under Article 227 of the Constitution as against an Arbitration Award is questioned and hence, the same has to be dealt with, before any other aspect could be gone into.

4. It appears that the petitioner and the 1st respondent entered into two Memoranda of Understanding and they contained a clause for arbitration. A dispute arose after the termination of the Memoranda of Understanding with effect from 31-12-2001. Therefore, the 1st respondent herein issued a notice to the petitioner on 08-08-2014 invoking the arbitration clause and calling upon them to have discussions with their General Manager for the appointment of an Arbitrator by consent and also cautioning that if the petitioner failed to respond, they would proceed to appoint an Arbitrator by themselves.

5. On the ground that the petitioner did not respond, the 1st respondent appointed the 2nd respondent as the Arbitrator and he entered reference.

6. However, the petitioner filed an application in I.A.No.1 of 2015 challenging the appointment of the Arbitrator. But the said application was dismissed by the Arbitrator on 18-04-2015.

7. It appears that the counsel for the petitioner thereafter never appeared before the Arbitrator. Therefore, the petitioner was set *ex parte* and an Arbitration Award came to be passed on 18-05-2015.

8. In the meantime, the petitioner seems to have made an abortive attempt to challenge the order dated 18-04-2015 passed by the Arbitrator in I.A.No.1 of 2015, by way of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. But the same was not even numbered by the court of the Chief Judge, City Civil Court, Hyderabad, and the petitioner did not pursue the matter further.

9. It appears that the petitioner attempted to challenge the *ex parte* award by way of an application under Section 34 of the Act, but the same was rejected as having been filed with a delay beyond the condonable period. Therefore, the petitioner filed an earlier revision in C.R.P.No.5786 of 2015, which did not see the light of the day. However, a petition for execution was filed in E.P.No.54 of 2015 by the 1st respondent/award holder. Therefore, the petitioner came up with the above revision challenging the award, abandoning C.R.P.No.5786 of 2015. It appears that a stay of further proceedings

in the execution proceedings was granted in the above C.R.P., after which the first revision in C.R.P.No.5786 of 2015 was withdrawn.

10. The above sequence of events discloses that there is no challenge to the Arbitration Award in a manner prescribed by the Arbitration and Conciliation Act, 1996. The time available for challenging an Arbitration Award under Section 34 of the Act has also expired. According to the petitioner, they were taken for a royal ride by their counsel at every stage and that they have also filed a complaint against their previous counsel before the Bar Council and that in such extraordinary circumstances, they have come up invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution.

11. Challenging the very maintainability of the revision, it is contended by Mr. P.V. Rama Raju, learned counsel for the respondent that the Constitution Bench of the Supreme Court has already settled the issue by holding in paragraph No.44 of its decision in **S.B.P. & Co vs. Patel Engineering Ltd.**¹, that the awards passed by arbitral tribunals are not capable of being corrected by the High Court under Articles 226 or 227. The same view was also echoed by a learned Judge of this Court in **Government of Madhya Pradesh vs. P.V. Vidyasagar**².

12. However, relying upon (1) a judgment of a learned Judge of the Bomba High Court in **M/s. Anuptech Equipments Private**

¹ AIR 2006 SC 450

² AIR 2004 AP 89

Ltd vs. M/s. Ganpati Co-op. Housing Society Ltd.³; (2) a decision of the Division Bench of the Bombay High Court in **Dowell Leasing and Finance Ltd., vs. Radhesyam B. Khandelwal**⁴; (3) the decision of a learned Judge of the Gauhati High Court in **Raj International vs. Tripura Jute Mills Ltd.**⁵; (4) the decision of a learned Judge of Calcutta High Court in **Tuff Drilling Pvt. Ltd. vs. Srei Infrastructure Pvt. Ltd.**⁶; (5) the decision of the Supreme Court arising out of the said decision in **Srei Infrastructure Pvt. Ltd. vs. Tuff Drilling Pvt. Ltd.**⁷; and (6) the decision of the Supreme Court in **Shalini Shyam Shetty vs. Rajendra Shankar Patil**⁸, it is contended by Mr. S. Ravi, learned Senior Counsel appearing for the petitioners that under extraordinary circumstances, the remedy under Articles 226 or 227 is not ousted.

13. We have considered the rival contentions.

14. At the out set it should be pointed out that the Arbitration and Conciliation Act, 1996 provides an alternative dispute resolution mechanism, enabling the parties to have their disputes resolved, outside the court, as provided by the terms of the contract entered into by them. Arbitrators and arbitral tribunals are creatures not of statute but of contract. Therefore, Courts do not have administrative superintendence over arbitrators and arbitral tribunals.

³ AIR 1999 BOMBAY 219

⁴ LAWS (BOM) 2007 (7) 83

⁵ LAWS (GAU) 2008 (5) 33

⁶ LAWS (CAL) 2015 (2) 95

⁷ (2017) 12 SCALE 105

⁸ (2010) 8 SCC 329

15. As a matter of fact, arbitration agreements are intended to keep the interference by the Courts to the minimum. Generally an agreement in restraint of legal proceedings is void under Section 28 of the Indian Contract Act, 1872. But an agreement to refer a dispute to arbitration is an exception to the prescription under Section 28. This is why, Section 5 of the Arbitration and Conciliation Act, 1996 makes it clear that there shall be no judicial intervention in respect of any proceeding under the Act except as provided in the Act itself. An award passed in terms of Section 31 (1) of the Act is amenable to challenge only in a manner prescribed by Section 34. Once a challenge made under Section 34 is rejected or the time limit for filing a petition under Section 34 has expired, an award becomes final and binding on the parties in terms of Section 35. Keeping this fundamental principle in mind, we shall now examine the decisions relied upon by the learned Senior Counsel for the petitioner.

16. In *Anuptech Equipments Pvt. Ltd.*, the arbitral tribunal terminated the proceedings under Section 32(2) on account of the failure of the claimant to file his statement of claim, by invoking Section 25 (a). But after the arbitral tribunal decided to terminate the proceedings, a challenge was made to the appointment of one of the arbitrators, on the ground that he was not a fellow of the Indian Institute of Architects, as required by Clause-56 of the agreement. However, the arbitral tribunal terminated the proceedings. Therefore, the petitioner before the Bombay High Court filed an Arbitration Petition, purportedly under Sections 12(3) (b), 13, 14, 15 and 24 of

the Arbitration and Conciliation Act, 1996. It must be pointed out that no petition under Articles 226 or 227 was filed before the Bombay High Court in *Anumptech Equipments*.

17. Therefore, an objection was raised in that case that the challenge to the arbitration award was barred by Section 34(3) and that the petition was not maintainable. Instead of confining the discussion to the question whether a petition under Sections 12, 13, 14, 15 and 24 was maintainable or not, the Bombay High Court, in *Anumptech Equipments*, extended the scope of the enquiry by holding that wherever an order affecting the rights of a party attains finality, the party affected thereby can seek recourse to the extraordinary remedy available under Articles 226 or 227. To come to the said conclusion, the Bombay High Court drew parallel from Section 10-A of the Industrial Disputes Act 1947 and the decisions of the Supreme Court in **Engineering Mazdoor Sabha vs. Hind Cycles Ltd.**⁹ and **Rohtas Industries Ltd. vs. Rohtas Industries Staff Union**¹⁰, wherein it was held that even if the arbitrator appointed under Section 10-A of the Industrial Disputes Act, 1947, was not a Tribunal, a writ may lie against his Award under Article 226. The Bombay High Court went by the logic that irrespective of whether it was a statutory arbitration or private arbitration, the arbitrator or arbitral tribunal would at least be a “person” and hence would be amenable to the jurisdiction under Articles 226 or 227.

⁹ AIR 1963 SC 874

¹⁰ AIR 1976 SC 425

19. The ratio laid down by the learned Single Judge of the Bombay High Court in *Anuptech Equipments* was reiterated by a Division Bench of the very same High Court in *Dowell Leasing and Finance Limited*. Though the decision of the Constitution Bench of the Supreme Court in *S.B.P. & Co* was cited before the Division Bench of the Bombay High Court in *Dowell Leasing*, the Division Bench took a view that the Supreme Court did not go in *S.B.P. & Co.*, to the extent of holding that no writ would lie against an arbitral tribunal or that an arbitral tribunal is not a person against whom a writ can be issued.

20. In *Tuff Drilling Pvt. Ltd.*, a single Judge of the Calcutta High Court was concerned with a case where after having appointed a sole arbitrator by consent, the petitioner did not submit a statement of claim, resulting in the termination of the proceedings under Section 25(a). The application to recall the said order was dismissed on the ground that the arbitrator had become *functus officio*. When that order was challenged, the learned Judge of the Calcutta High Court took the view that an arbitral tribunal is a quasi judicial authority discharging judicial functions and that therefore, there was no impediment for entertaining a petition under Article 227.

21. The above decision of the learned Judge of the Calcutta High Court in *Tuff Drilling Pvt. Ltd.*, was taken on appeal to the Supreme Court. The Supreme Court framed three issues as arising for consideration, which are as follows:

1. Whether arbitral tribunal which has terminated the proceeding Under Section 25(a) due to non filing of claim by claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?
2. Whether the order passed by the arbitral tribunal Under Section 25(a) terminating the proceeding is amenable to jurisdiction of High Court under Article 227 of the Constitution of India?
3. Whether the Order passed under Section 25(a) terminating the proceeding is an award under the 1996 Act so as to amenable to the remedy under Section 34 of the Act?

On issue No.1 the Supreme Court came to the conclusion that the arbitral tribunal had jurisdiction to consider an application for recalling the order terminating the proceedings. After holding so, on issue No.1, the Supreme Court refused to go into issue Nos.2 and 3. In other words, the question of maintainability of a petition under Articles 226 or 227 was left open.

22. In *Raj International*, a learned Single Judge of the Gauhati High Court equated an arbitral tribunal to a statutory authority and held in paragraph 21 that when he did not exercise his power vested on him, a petition under Article 227 was maintainable. Despite the decision of the Constitution Bench in *S.B.P. & Co.*, being brought to its notice, the Gauhati High Court relied upon the decision of the Supreme Court in **Surya Dev Rai v. Ram Chander Rai**¹¹ to hold that the power of superintendence conferred upon the High Court under Article 227 was both administrative as well as judicial.

23. But as we have pointed out earlier, the first judgment relied upon by Mr. S. Ravi, learned Senior Counsel, which was that

¹¹ AIR 2003 SC 3044

of a learned Judge of the Bombay High Court in *Anumtech Equipments Pvt. Ltd.*, did not actually arise out of a petition under Articles 226 or 227. What was before the learned Judge was actually a petition under Sections 12 to 15 and 24 of the Arbitration and Conciliation Act, 1996 itself. Therefore, we do not know how the scope of the enquiry was extended beyond the provisions of the Arbitration and Conciliation Act, 1996.

24. In any case, two reasons appear to have weighed with the learned Judge of the Bombay High Court in *Anuptech Equipments* to take the view that he did. They are – (1) that even a private person is amenable to the writ jurisdiction under Article 226; and (2) that the remedy of a writ was held to be available even against an award passed by an arbitrator appointed under Section 10-A of the Industrial Disputes Act, 1947.

25. But with great respect to the learned Judge, what was overlooked by the learned Judge is the fact that in order to maintain a writ petition as against a private person, who does not come within the purview of a State or other authority, he must be vested with an obligation to perform a public duty. The fundamental requirement for the maintainability of a writ against a private individual is that he should have been called upon to discharge a public duty.

26. While adjudicating a dispute arising out of a contract between two commercial entities, an arbitrator or arbitral tribunal cannot be said to be performing a public Duty. This aspect has been

completely lost sight of by the Bombay High Court in *Anuptech Equipments*.

27. The decision of the Division Bench of the Bombay High Court in *Dowell Leasing* was authored by the same learned Judge who decided *Anuptech* and the Division Bench read the decision of the Constitution Bench in *S.B.P. & Co* narrowly. It would be appropriate at this stage to extract paragraph-44 of the decision of the Constitution Bench in *S.B.P. & Co.*, which reads as follows:

“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.”

28. There was absolutely no scope for the Division Bench of the Bombay High Court to come to the conclusion that the Supreme Court did not take the view in *S.B.P. & Co.* that no writ will lie against an arbitral tribunal, or that an arbitral tribunal is not a person against whom a writ can be issued.

29. As we have indicated earlier, it is the vesting of a public duty upon a private individual that would make such an individual amenable to the writ jurisdiction. The reason as to why the Supreme Court held an arbitration award under Section 10-A of the Industrial Disputes Act, 1947 to be amenable to the jurisdiction under Articles 226 or 227, was that such an award was actually binding not only upon the parties before the arbitrator but also the persons, who were not parties to the arbitration. The very object of the Industrial Disputes Act was to maintain peace in industries. That is why conciliation always precedes adjudication by an Industrial Tribunal or labour Court or arbitrators. An Arbitrator under Section 10-A of the Industrial Disputes Act, 1947 performs a public duty in the sense that he attempts to bring harmony and peace in the industry. More over, sub-section (3) of Section 10-A of the Industrial Disputes Act requires a copy of the arbitration agreement to be forwarded to the appropriate Government and the appropriate Government is obliged to publish the agreement in the Government Gazette. Under sub-section (3-A) of Section 10-A even the employers and workmen, who are not parties to the arbitration agreement, but who are concerned in the dispute, are entitled to an opportunity to present their case before the arbitrator. Therefore, arbitration under the Industrial Disputes Act is not merely confined to the parties to the agreement, as in the case of arbitration under the Arbitration and Conciliation Act, 1996. In fact, the arbitration award passed under Section 10-A is to be submitted to the appropriate Government and the

appropriate Government is entitled to issue a notification prohibiting the continuance of any strike or lock out in connection with such a dispute. Therefore, the arbitrator under Section 10-A of the Industrial Disputes Act performs both statutory and public duties. But an arbitrator appointed by contract between two commercial entities cannot be elevated to the status of a person performing public duties.

30. The decision of the learned Judge of the Calcutta High Court in *Tuff Drilling Pvt. Ltd.*, cannot be pressed into service, on the basis of the judgment of the Supreme Court in *Srei Infrastructure Finance Ltd.*, since the Supreme Court did not answer the second issue arising for consideration. Similarly, the decision of the learned Single Judge of the Gauhati High Court, with great respect, does not reflect the correct position in law. The Gauhati High Court proceeded on the basis as though an arbitrator is a statutory authority. The inference drawn by the Gauhati High Court in *Raj International* on the basis of the decision of the Supreme Court in *Surya Dev Rai* that the power of superintendence conferred upon the High Court under Article 227 is both administrative as well as judicial, does not apply to arbitral proceedings. The contours of jurisdiction of this Court under Articles 226 or 227 over Tribunals, is clearly demarcated by the Constitution Bench in **L. Chandra Kumar vs. Union of India**¹². In paragraphs 91 and 92 of its decision, the Supreme Court pointed out that the jurisdiction of this Court under Articles 226 or 227 is over

¹² (1997) 3 SCC 261

the “***decisions of such tribunals***”. Therefore, we do not have administrative superintendence over arbitrators and arbitral tribunals appointed either by the parties under the contract or by the High Court in terms of Section 11(6).

31. Coming to the judicial superintendence, Section 5 of the Arbitration and Conciliation Act, 1996 read with Sections 34 and 35 provide a complete answer. Once a judicial remedy is provided as against an arbitral award and such remedy is either extinguished or exhausted, no party can take recourse to the writ jurisdiction of this Court. Articles 226 or 227 are not the panacea for all diseases. If the argument of the learned Senior Counsel for the petitioner is accepted on the ground that a party cannot be left without a remedy, then as against every order which has attained finality, a writ can be filed.

32. We can examine this issue from another angle also. Arbitral proceedings are actually a substitute for civil proceedings before civil Courts. Even in civil proceedings, a writ under Articles 226 or 227 is not maintainable as against a judgment and decree of a subordinate Court. Every judgment and decree of a subordinate Court is open to challenge in a regular appeal under Section 96 and thereafter by way of a second appeal under Section 100 of the Code of Civil Procedure. Let us take for instance, a case where an *ex parte* decree is passed and the party could not avail any of the remedies available under CPC. Will it be open to such a party to file a writ petition under Article 226 or 227 challenging the decree on the

ground that he lost all other avenues. Even in a case where the decree is vitiated by fraud, the remedy is not under Article 226 or 227. But a case of fraud, allegedly perpetrated by a party's own counsel, will not come within the purview of a fraud that would vitiate the decree of a Civil Court.

33. Therefore, to hold that a writ petition or a revision petition under Articles 226 or 227 would lie as against an arbitration award, would be to recognize a remedy not available even to a litigant before the civil Court. Hence the objection as to the maintainability of the revision is liable to be sustained and the revision is liable to be dismissed.

34. Accordingly, the civil revision petition is dismissed as not maintainable. As a sequel, miscellaneous petitions, if any, pending in this revision shall stand closed no costs.

V. RAMASUBRAMANIAN, J

T. AMARNATH GOUD, J

Date: -03-2018

Ksn/Js.

L.R. copy to be marked.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE T. AMARNATH GOUD

C.R.P.No.519 of 2016

(per VRS, J.)



Ksn/ Js

_____ March, 2018.