

HIGH COURT OF CHATTISGARH AT BILASPUR

CR No. 139 of 2016

Reserved on 09.01.2020
Pronounced on 31.01.2020

- M/s Himmat Lal Agrawal, 71/ A, Krishna House, S.T. Bus Stand Road, Ganeshpeth, Nagpur 440018 (Maharashtra) Through Partner Brijesh Himmat Lal Agrawal, ----- **Applicant/Petitioner**

Versus

1. State Of Chhattisgarh, Through The Secretary, Department Of Panchayat And Rural Development, Mahanadi Bhavan, Mantralaya, New Raipur, District Raipur, Chhattisgarh,
2. The Chief Executive Officer, Rural Road Development Agency, Civil Lines, Raipur, District Raipur, Chhattisgarh,
3. The Chief Engineer, C.G. Rural Road Development Agency, Civil Lines, Raipur, District Raipur, Chhattisgarh,
4. The Chairman/Collector, Pradhan Mantri Gram Sadak Yojna, District Raipur, Chhattisgarh,
5. The Superintending Engineer, Pradhan Mantri Gram Sadak Yojna, Project Circle Durg, District Durg, Chhattisgarh,
6. The Executive Engineer Cum Member Secretary, Project Implementation Unit No.1, Pradhan Mantri Gram Sadak Yojna, Division Rajnandgaon, District Rajnandgaon, Chhattisgarh,

---- Respondents

For Applicant	:	Shri Narendra Kumar Vyas, Advocate
For Non-Applicants/State	:	Shri Vimlesh Bajpai, Govt. Advocate

Hon'ble Shri Justice Sanjay S. Agrawal

C.A.V. Order / Judgment

1. This Revision Petition has been preferred by the Contractor – M/s. B. Himmat Lal Agrawal under Section 19 of the Chhattisgarh Madhyastam Adhikaran Adhiniyam, 1983 (hereinafter referred to as the Act of 1983) questioning the legality and propriety of the order dated 15.06.2016

passed by the Chhattisgarh Madhyastam Adhikaran, Raipur (for short, the Arbitration Tribunal) in Reference Case No. 02/2012 whereby the Reference Petition preferred under Section 7 of the Act of 1983 has been rejected holding it to be not maintainable.

2. Briefly stated the facts of the case are that a Notice Inviting Tender was issued by the Respondent Authorities for the construction of maintenance of rural road under the 'Pradhan Mantri Gram Sadak Yojna' (PMGSY). The probable amount of work was Rs.125.26 lacs, which was allotted to one M/s. Patil Construction Company, Kolhapur, which could not have been carried out by the said Company owing to some dispute with the Department. The bitumen part of the alleged work was, thereafter, given to the petitioner, which was to be completed within a period of eight months and the contractor had to perform the routine maintenance of the road for five years. In pursuance of the work order, the petitioner has furnished performance security of Rs.8,43,000/- in form of bank guarantee in favour of the Respondent Authorities, as required under the terms and conditions stipulated in the said tender document. It is alleged that the petitioner has completed the work as per the approved drawing, specifications and directions to the satisfaction of the Respondent Authorities and consequent upon that the completion certificate was issued on 30.12.2007, although the work was completed prior to that, i.e., on 15.06.2007. The maintenance work was thus to be carried out by 15.06.2012 (16.06.2007 to 15.06.2012). According to the petitioner, there was no dispute upto November, 2009. It, however, started owing to unprecedented rains and flood and also use of road by overloaded vehicles which caused extra damages to the road. It is alleged further in the petition that the Respondent Authorities had

prepared an estimate for repair of the road under this package which was fabulous amount of Rs.59.38 lakhs in the year 2011, whereas, as per the agreement, the routine maintenance estimated around Rs.10.50 lakhs to 11.00 lakhs approximately for entire period of five years. According to the further contention of the petitioner, he was doing the maintenance work also, but inspection of it was done in his absence and without giving any opportunity of hearing, the Respondent Authorities had directed for recovery of Rs.59.38 lakhs against the petitioner vide letter dated 21.04.2011 after adjusting the security amount of Rs.8.73 lakhs and bank guarantee executed in favour of the Respondent Authorities. The petitioner had filed the reply to the said letter, but without considering the same, it was rejected and thereupon the Respondent Authorities had initiated the proceedings for encashment of bank guarantee. Being aggrieved with that, a writ petition being WPC No. 3904/2011 was filed. The said petition was disposed of vide order dated 21.07.2011 with a direction to avail the provisions of Clause 24 of the agreement relating to Dispute Redressal System. On 29.07.2011, the petitioner had raised the arbitration dispute with the Respondent Authorities, which was, however, not decided.

3. It is pleaded further in the petition by way of an amendment that an information was provided to him by the Respondent Authorities under the Right to Information Act that after the formation of Chhattisgarh Madhyastam Adhikaran, disputes are finally settled in Tribunal and when his dispute was not decided by the Competent Authority, the Reference Petition was filed by the petitioner.

4. According to the petitioner, the assessment of recovery amount has been based upon the inspection report and as per S.O.R. effective from

16.05.2008, however, the petitioner had completed the work on 15.06.2007. Therefore, the order of recovery sought to be enforced is not proper and justified.

5. The aforesaid claim has been contested by the Respondent Authorities alleging therein that the Reference Petition as made without following with the provisions prescribed under Clause 24 of the agreement is not maintainable. While referring to Clause 25.1, it is contended further that there will be no arbitration for the settlement of any dispute between the parties, and therefore, the Tribunal has no jurisdiction to entertain the Reference Petition.

6. After considering the evidence led by the parties, the Tribunal has dismissed the Reference Petition holding to be not maintainable as it was filed without questioning the order of the Authority in appeal as required under Clause 24.2 of the agreement before the Empowered Standing Committee and while referring to Clause 25, it has been held further that the Tribunal has no jurisdiction to arbitrate the dispute between the parties. The Reference Petition preferred by the petitioner under Section 7 of the Act of 1983 has thus been refused.

7. Being aggrieved, the Petitioner/Contractor has preferred this petition. Shri N.K.Vyas, learned counsel appearing for the Contractor submits that the Tribunal has committed an illegality in dismissing the Reference Petition by holding that the same is not maintainable for want of exhausting the remedy provided under Clause 24 of the agreement. While inviting attention to para 23 of the Reference Petition and the letter dated 21.04.2011 issued by the Respondent Authorities to this effect, he submits that after 2005-06, the Empowered Standing Committee, the

Appellate Authority provided under Clause 24.2 was not functional owing to the formation of the Chhattisgarh Madhyastam Adhikaran, therefore, the Tribunal ought not to have declined to entertain the Reference Petition. It is contended further that once the alleged letter was admitted into the evidence without any objection being raised, its authenticity ought not to have been discarded by the Tribunal. In support, he placed his reliance upon the decision rendered in the matter of ***R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple & Anr.***, reported in **(2003) 8 SCC 752**. According to his further contention, the Tribunal, while misinterpreting the Clause 25 of the agreement, erred in holding that the Tribunal has no jurisdiction to arbitrate the dispute or difference between the parties.

8. Countering the aforesaid contention, Shri Vimlesh Bajpai, learned Government Advocate appearing for the Respondent Authorities, while supporting the order impugned, submits that since the Reference Petition was preferred without complying with the provisions prescribed under Clause 24 of the agreement, the Tribunal has not committed any illegality in holding that the Reference Petition as made and instituted was prematured in nature. That apart, Clause 25 of the said agreement specifically ousted the jurisdiction of the Tribunal to arbitrate the dispute between the parties, therefore, the order impugned does not suffer from any infirmity so as to call for any interference in this revisional jurisdiction.

9. I have heard learned counsel for the parties and perused the entire record carefully.

10. What is reflected from a bare perusal of the order impugned is that the Arbitration Tribunal has dismissed the said Reference Petition

preferred by the petitioner under Section 7 of the Act of 1983 on the premises that it was not only prematured and/or not maintainable having been failed to comply with the provisions prescribed under Clause 24 of the agreement, but has no jurisdiction to entertain the dispute as per the provision prescribed under Clause 25.

11. In order to ascertain the propriety of the Order impugned, it is necessary to examine the Clause 24 of the agreement, which reads as under:-

“24. Dispute Redressal System

24.1. If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

24.2 Either party will have the right of appeal against the decision of the competent authority, to the Standing Empowered Committee if the amount appealed against exceeds rupees one lakh.

24.3 The composition of the Empowered Standing Committee will be:

- I. One official member, Chairman of the Standing Empowered Committee not below the rank of Additional Secretary to the State Government:
- II. One official member not below the rank of chief engineer: and
- III. One non-official member who will be technical expert of Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer.

24.4 The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, failing which the contractor can approach the appropriate court for the resolution of the dispute.

24.5 The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as “in full and final settlement of all claims”. If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of the five percent of the Initial Contract Price, he will be free to approach the courts applicable under the law.”

12. Undisputedly, the petitioner had referred the dispute on 29.07.2011 before the competent authority, i.e., the Chief Executive Officer, as required under the provisions prescribed in Clause 24 aforesaid. It was, however, returned vide letter/order dated 12.01.2012 by observing that according to the powers described in contract data, the Chief Executive Officer is empowered to settle the dispute only upto 4% up the contract cost or Rs.20.00 lakhs, whichever is less. Since the amount of claim is more than the said sum, it was, therefore, returned. The Respondent Authorities have thus declined to entertain the dispute referred by the petitioner and, even the Tribunal vide its order impugned has dismissed the same by observing that since the order of the competent authority has not been challenged before the appellate authority, i.e., Empowered Standing Committee, as provided under Clause 24.2, the Reference Petition cannot be held to be maintainable. It is, however, to be noted at this juncture that a specific plea as taken by the Petitioner at 33-A of its Reference Petition has not been controverted specifically by the Respondent Authorities. According to the said plea, the said Appellate

Authority was not functional after 2005-06 owing to the constitution of the Chhattisgarh Madhyastam Adhikaran and the letter dated 06.08.2013 (Ex.P.23), by which, the alleged information was furnished to the petitioner by the Respondent Authorities was also not controverted, yet its validity was not accepted by the Tribunal on the ground that it does not bear the seal of any of the official or authority. It, however, ought to have seen that the alleged specific plea was neither controverted by the Respondent Authorities nor the objection, if any, regarding its admissibility was raised when it was tendered in evidence, and therefore, the document, which has already been admitted in evidence and marked as an exhibit ought to have been given effect to.

13. At this juncture, the principles laid down in the matter of **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami** are to be seen where it has been held at paragraph 20 as under:-

“20. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the

party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.”

14. Applying the aforesaid principles to the case in hand, the Tribunal ought to have placed its reliance upon the alleged letter and thereby ought to have arrived at a conclusion that the Appellate Authority was not in function upon the formation of the Chhattisgarh Madhyastam Adhikaran. The Tribunal has, thus, committed an illegality in holding that the Reference Petition preferred by the petition is not maintainable. The finding so recorded is, therefore, liable to be and is hereby set aside.

15. Further observation of the Tribunal that its jurisdiction has been ousted by virtue of Clause 25 of the agreement and the Tribunal has no jurisdiction to arbitrate the dispute between the parties is also not sustainable and deserves to be set aside. The said clause, which is relevant for the purpose, reads as under:-

“25. Arbitration

25.1 In view of the provision of the clause 24 on Dispute Redressal System, it is the condition of the Contract that there will be no arbitration for the settlement of any dispute between the parties.”

16. It is true by virtue of the aforesaid clause that there will be no arbitration for the settlement of any dispute between the parties in view of the provision prescribed in Clause 24 of the said agreement but it does not mean that the jurisdiction of the Tribunal has been ousted, as interpreted by the Tribunal, else there would not have been any sub-clauses as prescribed in the agreement, like 24.4 and 24.5. According to both these clauses, it is evident that the Contractor and the Employer can approach the appropriate Court for resolution of the disputes, if they are not satisfied with the decisions of the Empowered Standing Committee. The Tribunal has thus misinterpreted the aforesaid clause even without considering these clauses by arriving at a conclusion that it has no jurisdiction to arbitrate the dispute or difference between the parties.

17. Consequently, the Revision Petition is allowed and the Order impugned dated 15.06.2016 passed by the Arbitration Tribunal, Raipur in Reference Petition No.2/12 is hereby set aside and the matter is accordingly remitted back to the concerned Tribunal with a direction to restore the file of the said Reference Petition preferred by the petitioner under Section 7 of the Act of 1983 to its original number and decide the same in accordance with law. The parties are directed to remain present before the concerned Tribunal on 20.02.2020. No order as to costs.

18. The Registry is directed to send the entire record to the concerned Tribunal forthwith.

Sd/-
Sanjay S. Agrawal
Judge