

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.424 of 2022

1. Chandra Shekhar Pandey, aged about 53 years, Male Son of Ramkrit Pandey.
2. Dasharath Pande, aged about 50 years, Male Son of Ramanath Pande.
3. Kanti Kunwar, aged about 56 years, Female Wife of Balrup Sah.
4. Tara Munee, aged about 68 years, Female, Wife of Baban Pandey.
5. Shankar Pandey, aged about 56 years, Male Son of Late Radha Pandey.
6. Vidya Devi, aged about 56 years, Female Wife of Surendra Tiwari.

All resident of Village-Jahanabad, P.S.-Kudra, District-Kaimur.

... .. Petitioner/s

Versus

1. The Union of India through its Principal Secretary, Road Transport and Highway Ministry, New Delhi.
2. The Chief Project Director National Highway Authority of India, New Delhi.
3. The Project Director, National Highway Authority of India, Project Implementation Unit Sasaram, Situated at House of Sri Chandramadhav Singh, Opp. D.M. Residence, Fazalganj, Sasaram, Rohtas.
4. The Divisional Commissioner Patna Division, Patna.
5. The District Magistrate, District Kaimur, Bhabua.
6. The District Land Acquisition Officer, cum Competent Authority, Land Acquisition, District Kaimur, Bhabua.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ramchandra Singh, Advocate
For the Respondent/s	:	Dr. Krishna Nandan Singh, ASG
		Mr. Radhika Raman, CGC
For the State	:	Mr. Sajid Salim Khan, SC 25



For the NHAI : Mr. Vandana Kishore, Advocate

**CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH
SHARMA**

ORAL JUDGMENT

Date : 31-03-2022

Heard the parties.

The case is being taken up from defect side.

Learned counsel for the petitioners is directed to submit the original petition along with attested affidavits and also remove all the defects pointed out by the Registry within two weeks from today.

The petitioners have preferred this writ petition assailing the order dated 08.09.2020 passed by the Arbitrator-cum-Divisional Commissioner, Patna. Learned counsel for the petitioners submits that after final award was passed by the Arbitrator no objection in this said regard was filed by the National Highway Authority of India.

However, without impleading the petitioners as party, it proceeded to move a fresh application before the Arbitrator-cum-Divisional Commissioner, Patna against the order of the land acquisition officer dated 31.10.2016. In the proceedings taken up by the concerned Arbitrator-cum-Divisional Commissioner, Patna, the Arbitrator has proceeded to direct the land acquisition officer to redraw his award under the land acquisition by taking into



consideration the different lands as specified by the six members committee report dated 05.10.2019, which has resulted in taking away the substantive right as created in favour of the petitioners earlier.

Learned counsel submits that since the petitioners were not given an opportunity of hearing. The award passed by the Arbitrator-cum-Divisional Commissioner, Patna deserve to be declared void *ab initio* as there is a complete violation of principles of natural justice.

I have considered the submissions. Award passed by the Arbitrator-cum-Divisional Commissioner, Patna under the NHAI Act, 1956 as under the powers given to it under Sections 3G (5) (6) and (7). Thus, any award would be governed by the provisions of the Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act, 1996 provides that the award passed therein can be challenged and prayer to set aside the same may be made by moving an application under Section 34 before the concerned learned District Judge.

Learned counsel submits that the provisions of Section 34 would have no application as the petitioners is not challenging the original arbitration award and is only challenging the subsequent order passed on 08.09.2020.



I have considered the submission, keeping in view of the provisions of Section 34 in mind, this Court finds that the order dated 08.09.2020 passed by the Arbitrator-cum-Divisional Commissioner, Patna is an award in itself Independent and earlier award passed by it, In view thereof, the petitioners, would have the remedy under Section 34 available to it.

Learned counsel during the course of argument has placed reliance of one judgment passed by this Court in the case of **Ram Bachan Singh Yadav @ Ram Bachan Singh & Ors. Vs. The Union of India & Ors.** in **C.W.J.C. No. 22211 of 2013**, decided on 10.03.2014, wherein the co-ordinate Bench has taken the view, which is as under:

“Shri Gupta for the Corporation submits that petitioners have efficacious remedy as per the Railways (Amendment) Act, 2008 to go to Civil Court challenging the order of the Divisional Commissioner-cum-Arbitrator under the Arbitration and Conciliation Act. I am noting this point only to reject it. Availability of alternative remedy is not always a bar to entertain writ petition. No statute can restrict the power of a High Court of judicial review under Article 226 of the Constitution and any legislation, which seeks to do, is constitutionally void. The doctrine of alternative remedy is a self-evolved restriction but as the Apex Court has held in the case of M/s Baburam Prakash Chandra Maheshwari –Versus– Antarim Zila Parishad, Muzaffarnagar, AIR 1969 Supreme Court-556, there are at least two well recognized exception to the doctrine with regard to exhaustion of statutory remedies. I need not elaborate but I can only quote from the judgment aforesaid:



“There are at least two well-recognized exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under the provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.- (See the decisions of this Court in *Carl Still G m b H v. State of Bihar*, AIR 1961 SC 1615 and *Bengal Immunity Co Ltd v. State of Bihar*, (1955) 2 SCR 603= (AIR 1955 SC 661). In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice. (See 1958 SCR 595, 605 = (AIR 1958 SC 86, 93).”

(emphasis supplied)

Thus, the order of Divisional Commissioner as an Arbitrator has to be set aside. The Corporation is directed to add every claimant, who is likely to be effected, as a party and then the Divisional Commissioner would decide the matter after noticing all the parties and granting them opportunity of hearing. That is the minimal requirement of natural justice.”

In the law as laid down by the Apex Court in **Baburam Prakash Chandra Maheshwari** (supra) is respectfully accepted. However, in the opinion of this Court the judgment passed by a Co-ordinate Bench is *per in- curium* as it does not take into consideration the statutory provisions contained under Section 34 and Section 37 of the Act of 1996. Had the said Section be brought



to the notice of the Court. The Court would not have invoked its powers under Section 226 of the Constitution of India.

In the opinion of this Court, powers of judicial review is inherent with the High Court under Article 226 of the Constitution. It cannot be taken away by any statute. However, where there is a specific statutory remedy providing for a forum of an appeal, this Court would restrain itself from invoking its powers under Article 226 of the Constitution of India.

The Apex Court has observed as under:

In case of **SBP & CO. v. Patel Engineering Ltd. & Anr.** reported as **(2005) 8 SCC 618**, it has been held as under:

“45. 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. 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 its 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, a 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. Such an intervention by the High Courts is not permissible.

46. The object of minimising 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 or under Article 226 of the Constitution 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.

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

- (i)
- (ii)
- (iii).....
- (iv)
- (v)

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the 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.”

In case of Deep Industries Ltd. v. ONGC Ltd. & Anr.

reported as **(2020) 15 SCC 706**, it has been held as under:

“20. While the learned Additional Solicitor General is correct in stating that this statement of the law does not directly apply on the facts of the present case, yet it is important to notice that the seven-Judge Bench [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC



618] has referred to the object of the Act being that of minimising judicial intervention and that this important object should always be kept in the forefront when an Article 227 petition is being disposed of against proceedings that are decided under the Act.

21. It is true that in *Punjab Agro Industries Corpn. Ltd.* [*Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128], this Court distinguished *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] stating that it will not apply to a case of a non-appointment of an arbitrator. This Court held : (*Punjab Agro Industries Corpn. Ltd. case* [*Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128], SCC p. 132, para 9)

“9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] does not bar such a writ petition. The observations of this Court in *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of *that High Court*. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice.”
(emphasis in original)

What is important to note is that the observations of this Court in *Punjab Agro Industries Corpn. Ltd.* [*Punjab Agro Industries Corpn. Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128] were for the reason that no provision for appeal had been given by statute against the orders passed under Section 11, which is why the High Court's supervisory jurisdiction should



first be invoked before coming to this Court under Article 136. Given the facts of the present case, this case is equally distinguishable for the reason that in this case the Article 227 jurisdiction has been exercised by the High Court only after a first appeal was dismissed under Section 37 of the Act.”

22. One other feature of this case is of some importance. As stated hereinabove, on 9-5-2018, a Section 16 application had been dismissed by the learned arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. What the High Court has done in the present case is to invert this statutory scheme by going into exactly the same matter as was gone into by the arbitrator in the Section 16 application, and then decided that the two-year ban/blacklisting was no part of the notice for arbitration issued on 2-11-2017, a finding which is directly contrary to the finding of the learned arbitrator dismissing the Section 16 application. For this reason alone, the judgment under appeal needs to be set aside. Even otherwise, as has been correctly pointed out by Mr Rohatgi, the judgment under appeal goes into the merits of the case and states that the action of putting the Contractor and his Directors “*on holiday*” is not a consequence of the termination of the agreement. This is wholly incorrect as it is only because of the termination that the show-cause notice dated 18-10-2017 proposing to impose a two-year ban/blacklisting was sent. Even otherwise, entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected. Therefore to state that the ban order was passed under a General Contract Manual and not Clause 18 of the agreement, besides being incorrect, would also be incorrect for the reason



that the General Contract Manual does not mean that such order was issued as an administrative order invoking the executive power, but was only as an order which emanated from the contract itself. Further to state that “serious disputes” as to jurisdiction seem to have cropped up is not the same thing as saying that the Arbitral Tribunal lacked inherent jurisdiction in going into and deciding the Section 17 application. In point of fact, the Arbitral Tribunal was well within its jurisdiction in referring to the contract and the ban order and then applying the law and finally issuing the stay order. Even if it be accepted that the principle laid down by Section 41(e) of the Specific Relief Act was infringed, in that damages could have been granted, as a result of which an injunction ought not to have been issued, is a mere error of law and not an error of jurisdiction, much less an error of inherent jurisdiction going to the root of the matter. Therefore, even otherwise, the High Court judgment cannot be sustained and is set aside.

In view of the above, the petitioners would be free to take up the remedy available under the Act.

Relegating the remedy available under Section 34 to the petitioners, it is directed that if such an application is moved, the learned District Judge concerned shall examine the matter on merits and would not reject the application on the question of limitation. Any of aggrieved parties of the order passed by the District Judge can always further take recourse to Section 37 of the Act.

The writ petition is dismissed.



The dismissal of the writ petition would not in any manner affect the adjudication of application under Section 34 before the concerned District Judge on merits.

(Sanjeev Prakash Sharma, J)

Anand Kr.

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

