

IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No.20908 of 2020
(Through hybrid mode)**

Odisha Hydro Power Corporation Ltd. Petitioner

Mr. Sanjit Mohanty, Sr. Advocate
Mr. D.P. Nanda, Sr. Advocate
Mr. Pradeep Rout, Advocate

-versus-

***Traflgar House Construction (T), Opposite Party
(TSSJV)***

Mr. G.M. Rath, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
08.03.2022**

Order No.

7. 1. Mr. Mohanty, learned senior advocate appears on behalf of petitioner and submits, impugned is order dated 10th August, 2020, whereby parties were directed to comply with directions contained in order dated 6th March, 2020 and 10th July, 2020. He submits, the reconstituted tribunal cannot compel, in exercise of discretion, repetition of pleadings. The discretion of the reconstituted tribunal to cause repetition relates only to hearings. He relies on sub-sections (3) and (4) in section 15, Arbitration and Conciliation Act, 1996.
2. Mr. Rath, learned advocate appears on behalf of opposite party and submits, the direction to file statement of claim, made by the

reconstituted Tribunal, was accepted by petitioner in seeking further time to do so. It is thereafter that this purported objection was raised. His client's security is held up. Petitioner, being claimant, does not have a claim and therefore does not want adjudication, to be able to hold on to his client's security.

3. Mr. Rath submits, judicial review is not possible in matters of arbitration. Section 5 limits interference to except where provided in Part-I of the Act. The intervention is provided for in, inter alia, sections 34 and 37. He relies on judgments of the Supreme Court in -

(i) **SBP & Co. v. Patel Engineering Ltd.**, reported in **(2005) 8 SCC 618**, paragraphs 44 and 45;

(ii) **Lalitkumar V.Sanghavi v. Dharamdas Sanghavi**, reported in **(2014) 7 SCC 255**, paragraph 8;

(iii) **Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd.**, reported in **(2020) 15 SCC 706**, paragraphs 19, 20 and 22; and

(iv) **Order dated 5th March, 2021 in Civil Appeal nos.1098-1099 of 2021 (Navayuga Engineering Company v. Bangalore Metro Rail Corporation Ltd.)**

4. In reply Mr. Mohanty also relies on **Deep Industries Ltd.** (supra). He then relies on **judgment dated 6th January, 2021** of the Supreme Court in **Civil Appeal no.14665 of 2015 (Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.** to submit, said Court declared the law to be that interference in writ jurisdiction must only be in rarest of rare cases of exceptional or cases, which are stated to be patently lacking in inherent jurisdiction [**Navayuga Engineering Company** (supra)].

5. It appears that opposite party had filed a writ petition against order passed on the section 14 petition. Appeal was thereafter preferred by said party. Meanwhile both parties submitted to appointment of arbitrator pursuant to request made under sub-section (6) in section 11. By order dated 13th December, 2019, parties agreed to have their respective nominated arbitrators be appointed and thereafter the appointees to agree on the presiding arbitrator. As such, the reconstituted tribunal can be said to have been appointed pursuant to agreement of parties as under clause-(b) in section 15(1).

6. In impugned order there is discussion on section 15. That it relates to an arbitrator as well as an arbitral tribunal, has been found thereby. Also found is that the reconstituted tribunal can, in the facts and circumstances, exercise discretion as done by it.

7. Sub-sections (3) and (4) in section 15 are reproduced below.

“15. Termination of mandate and substitution of arbitrator-

(1) xx xx xx

(2) xx xx xx

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

Sub-section (3) makes it clear that the discretion to be exercised is in respect of hearings in previous reference. The provision does not include pleadings. Sub-section (4) has obviously been relied upon by petitioner to show that the earlier direction for pleadings, complied with, do not stand invalidated because of replacement of the tribunal.

8. Section 4 provides for waiver. Here petitioner, being claimant, cannot be said to be a party, who knows that the provisions in sub-sections (3) or (4) of section 15 are something, from which it may derogate. The provisions relate to discretion of the substituted tribunal

and the consequence of substitution. As such, petitioner cannot be said to have waived under provisions of section 4. Petitioner cannot also be barred by estoppel on having sought enlargement of time to comply with the direction to file pleadings before the reconstituted tribunal because estoppel does not operate against law.

9. The position on declaration of law by the Supreme Court regarding interference in writ jurisdiction appears to be as has been submitted by Mr. Mohanty. This is a case where there has been demonstration, of the substituted tribunal having exercised discretion not provided by relevant provision in the statute. As such it appears to be a case where the exercise of discretion was lacking in inherent jurisdiction, as not sourced from the power to exercise discretion given or conferred by sub-sections (3) and (4) in section 15. The case consequently qualifies as an exceptionally rare case since challenge to the award that may ultimately be passed, under section 34, cannot include a ground that may arise on the working of section 15.

10. The writ petition is allowed. Impugned order is set aside and quashed. The parties are to proceed in the reference on the pleadings already exchanged.

11. Mr. Mohanty submits, the direction should also include issues earlier framed. Mr. Rath submits, framing of issues is commencement

of hearing. There is no bar upon the reconstituted tribunal to exercise discretion in framing issues afresh. This submission is accepted.

12. The writ petition is disposed of.

(Arindam Sinha)
Judge

Sks

