



C.R.P.(N.P.D).No.1232 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.11.2021

PRONOUNCED ON : 01.02.2022

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

**C.R.P.(N.P.D)No.1232 of 2021
and C.M.P.Nos.9564 & 9565 of 2021**

BGR Energy Systems Ltd.,
Represented by its Authorized Signatory,
Mr.G.Sankaranarayanan
443, Anna Salai,
Teynampet, Chennai-600018.

...Petitioner

Vs.

1.Tandex Engineering & Services Pvt. Ltd.,
Represented by its Director
No.6, Mantralaya, 10th Street,
Tansi Nagar, Velachery,
Chennai-600042.

2. Indian Council of Arbitration,
Room 112, Federation House,
Tansen Marg, New Delhi, 110001.

...Respondents

Prayer:- Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the Impugned order/Interim award dated 21.05.2021 passed by the Arbitral Tribunal under the aegis of the second respondent in Case No.AC-2186.



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For Petitioner : Mr.Vishnu Mohan for
M/s.R.Parthasarathy
For Respondents : Mr.Kuriakhose Varghese for
M/s.KMNP Law and
Gautham Venkatesh for R1

ORDER

This Civil Revision Petition is filed challenging the impugned interim award dated 21.05.2021, passed by the Arbitral Tribunal under the Aegis of the second respondent in case No.AC-2186.

2. The first respondent filed statement of claims before the second respondent. The statement of claims, in brief is as follows:

The statement of claim was made by the first respondent against the service orders placed by the petitioner for 2 units of NTPC, Solapur and 2 units of NTPC, Meja. The work comprised of chemical cleaning and steam blowing. First respondent mobilized in January 2016 manpower and equipment at Solapur for carrying out this work. Equipments worth Rs.2.72crores including imports from Malaysia and procured from India, like pumpsets, pipes, pipe fittings, valves, flanges, fasteners, test and



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measuring equipment, tools and tackles were required for execution. First respondent engaged a sub contractor M/s.S.V.Engineering. It deployed around twenty workmen including fitters, riggers, welders, fabricators etc. The set up was completed by May 10, 2016 and operation of chemical cleaning was started and completed on June 3, 2016. After seven days of completion of chemical cleaning temporary piping set up was dismantled. First respondent started mobilising for the work of steam blowing during this period, which included preliminary engineering, preparation of drawings, lay out, equipment and planning to commence steam blowing. They ordered four numbers of custom built motor operated valves and bypass valves on M/s.Athena Engineers, Chennai, with advance payment. Athena returned advance later as they did not supply to TES. Chemical cleaning of main boiler of Unit 1 was completed on June 3, 2016. On June 6, 2016, the orders of first respondent were unilaterally cancelled for the un-executed portion. First respondent represented against the cancellation order vide letter reference TES/BGR/2016 dated 09.06.2016. Subsequently, orders were reinstated partially for chemical cleaning only. After two months, first respondent was compelled to surrender the order for MOVs made on



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M/s.Athena Engineers to M/s.BGR. In this process, the custom built, long delivery item valves for steam blowing, readily procured by BGR for Solapur project and thus benefited on costs by atleast around Rs.10,00,000/- per valve, totalling Rs.40,00,000/- at the expense of first respondent. First respondent engaged M/s.Pavo Power for designing the critical piping work required for Solapur Unit 1. M/s.Pavo had undertaken site process and necessary studies and made the drawings/details. First respondent ordered certain materials required for execution of complete service orders with local manufacturers and the creditor's payable towards these stands at over Rs.60,00,000/- When BGR wanted to reinstate the service orders excluding steam blowing on first respondent, first respondent demanded that extra cost of Rs.22,00,000/- per unit towards additional cost of inhibitor and compensation for reduction in scope of work and payment of dues for Unit 1 at Solapur to the tune of Rs.1crore. BGR also wanted additional 2 units of 500M³/hour of pumpsets over and above 2 existing ones. Since, BGR did not pay the dues but insisted upon mobilising at Meja site, the same could not be complied with by first respondent. Non-payment of dues for the work done put heavy financial stress on first respondent and all other operations



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of first respondent came to a standstill resulting mounting up financial losses. First respondent repeatedly requested BGR/petitioner for clearing dues, but no payment was still made. During a meeting with petitioner on 14.11.2016, petitioner indicated its intention to recover around Rs.61,00,000/- from TES/first respondent towards extra cost incurred by BGR on various accounts. Then, first respondent raised the claim for Rs.4,82,44,796/-.

3. Petitioner filed statement of defence dated 16.03.2020.

The case of the petitioner in brief is as follows:

The claim is not maintainable either in law or facts and it is clearly barred by law of limitation. It is also not maintainable in law since the first respondent has accepted full and final settlement by virtue of joint meeting between the parties on 14.11.2016. It is confirmed by letter dated 07.03.2018 by the first respondent claiming balance payment of the agreed sum as per the joint meeting between the parties. First respondent has never issued any notice of dispute or invoked arbitration clause in the contract as required under the General Conditions of Contract in the present



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case as well as under the provisions of the Arbitration and Conciliation Act, 1996. First respondent failed to issue notice for dispute resolution in the clause 18 of the General Conditions of Contract. Therefore, clause 19 cannot be invoked by the first respondent. It filed an application under Section 16 of the Arbitration and Conciliation Act. The statement of claim is vague and bereft of material particulars, details and necessary averments for seeking compensation/damages. Petitioner is engaged in and possesses technical expertise to execute various projects including large scale projects in the area of power sector. It is a leading player in the business of Turnkey contracts and executed a number of contracts on EPC basis for leading State run power companies such as NTPC, BHEL, TNEB, etc. Petitioner obtained an order from NTPC limited, for supply erection and commissioning of boilers for its thermal power plant to be commissioned in Meja in Uttar Pradesh and Solapur in Maharashtra. It was looking for sub-contractors to execute the work for chemical cleaning and steam blowing for the boilers which were to be erected in the above site. First respondent expressed interest in the project and petitioner issued a letter of intent dated 25.11.2015 for the Solapur project and letter dated 26.11.2015 letter of



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intent for Meja project. Petitioner placed service orders bearing numbers S.O.No.3300014929 for Solapur project and S.O.No.3300015227 for Meja project. Each order was separate and independent. Solapur project service order was issued for a sum of Rs.2.82crores. First respondent was to complete the work by 31.03.2016 for Unit 1 and by 30.09.2016 for Unit 2. Meja project cost was Rs.2.82crores. First respondent was to complete the work by 31.07.2016 for Unit 1 and by 31.01.2017 for Unit 2. Petitioner gave a service order for hiring of package boiler for a sum of Rs.74,42,500/-. first respondent commenced mobilisation only during the last week of January 2016. First respondent's progress of work was unsatisfactory. Petitioner sent an email on 29.02.2016 informing about the slow progress of the work due to insufficient man power and materials. First respondent admitted in his email dated 02.03.2016 about the slow process of work. The quality of the work was also poor. Petitioner sent email to the first respondent on 01.08.2016 notifying the issues with regard to the poor quality of work. First respondent was requested to rectify the same. However, it has not taken any corrective measures. Petitioner had no other option except to issue notice of termination. First respondent through an



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email dated 02.08.2016 requested for reinstatement order. Petitioner asked the first respondent to go ahead with chemical cleaning work for unit 2 Solapur project and Unit 1 and Unit 2 in Meja project . The termination of steam blowing work was confirmed. First respondent accepted the reduction of scope of work through a letter dated 09.08.2016. First respondent issued a revised quotation dated 12.08.2016. Petitioner replied through a letter dated 20.08.2016 that it would not be in a position to provide any concession or upward revision for payment on chemical cleaning. First respondent insisted on price revision through its letter dated 23.08.2016. That was not accepted by the petitioner. First respondent refused to perform the work as per earlier contract. It performed only part of the contract of chemical cleaning work of Unit 1 Solapur project. Consideration for this work was Rs.81,00,875/- and Rs.74,42,500/- for hire charges of package boilers. After deducting the payments made the balance amount payable was only Rs.43,42,975/-. After joint meeting and going through the accounts, it was decided that petitioner has to pay only Rs.43,42,975/-. A statement was prepared and it was signed by the first respondent. Petitioner was making payment of the agreed amount at regular intervals to the first



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respondent. Only a sum of Rs.8,34,195/- is alone payable to first respondent, if at all anything is payable. The amount claimed by the first respondent is false and untenable. Claim is barred by limitation.

4. Petitioner filed an application before the Arbitral Tribunal under Section 16 of the Arbitration and conciliation Act, reiterating the above averments, seeking dismissal of arbitration proceedings.

5. First respondent filed reply supporting its claim. The Arbitral Tribunal while considering the issues,

i) Does the Arbitral Tribunal have jurisdiction?

ii) Is the Arbitration agreement valid in view of the following:

a. Unsigned Agreement,

b. Moreso, when this issue is not contested by either of the parties,

c. Suo moto raised by one of the Learned Co-Arbitrator Dr.Bhatt?



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- iii) Is there a full and final settlement?
- iv) Have all the procedures been followed with regard to the initiation of arbitration proceedings?
- v) Is the claim time barred?
- vi) Whether provisions of Section 21 of the Arbitration and Conciliation Act, 1996 were duly followed?

found that the “Arbitral Tribunal thus by majority decides that the matters can be taken up in trial and decided upon including the matter relating to application filed under Section 16 of the Arbitration and Conciliation Act, 1996 in the Final Award”. Against the said order this revision is filed.

6. The learned counsel for the petitioner submitted that only if there is an arbitrable dispute, the dispute can be referred to arbitration. In the case before hand, there is no arbitrable dispute between the parties. First respondent has not given any notice before invoking arbitration. In the application filed under Section 16 of the Arbitration and Conciliation Act, 1996, before the Indian Council of Arbitration, petitioner claimed that the arbitral tribunal has no jurisdiction to entertain the matter



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for the reason that there is no dispute, much less, arbitrable dispute between the parties for taking a decision. The dispute with regard to payment in connection with contractual obligation was settled between the parties. The first respondent has clearly endorsed that the amounts have been settled between them and there is no further claim against each other. Notice was sent to the petitioner only after initiation of arbitration proceedings. The general conditions of contracts were not followed.

7. It is further submitted that the condition no.18 mentions that all disputes, claims and differences of any kind shall be referred by the contractor to BGRESL. If the contractor has any unresolved dispute or claim, he shall promptly refer to site engineer of BGRESL. If he could not resolve the issue, then the contractor may appeal to site incharge. If the contractor is not satisfied with the decision of site incharge, only then he can resort to arbitration. None of these procedures were be followed before the initiation of arbitration proceedings in Indian Council of Arbitration. The respondent initiated the arbitration proceedings before Indian Council of Arbitration through a letter dated 03.11.2018, but it was informed to the



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respondent only on 04.07.2019. The statement of claim is bereft of details.

No notice was given with regard to this claim. Fresh claim is raised after the settlement of dues between the parties, alleging that the settlement was sham transaction. On the other hand, one Ramprasad, Director of first respondent, accepted the details of accounts and requested the release of balance payment of Rs.10,85,803/-. The claim that the settlement is a sham and forged settlement, is an after thought made only on 08.03.2021. Co-arbitrator has given a dissenting view. Therefore, the finding of the majority view that the matter can be taken up for trial and decided upon, including the matter relating to application filed under Section 16 of Arbitration and Conciliation Act, 1996 in the final award, is not correct and liable to be set aside.

8. Per contra, the learned counsel for the first respondent submitted that the work involved in this case relates to chemical cleaning and steam blowing. It is the case of technical arbitration. Arbitration and Conciliation Act, 1996 is a complete code. Arbitral tribunal conducted five hearing through virtual hearing, framed six issues and finally concluded that



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all the issues can be taken up and a finding can be given in the final award.

Once the arbitration proceedings is initiated, no judicial interference is permitted. Moreover, this petition filed under Article 227 is not maintainable for the reason that Arbitration and Conciliation Act, 1996, is a complete code in itself and it has its own procedural mechanism to deal with arbitration matters. In this regard, the learned counsel for the respondent relied on the following judgments:

SBP & Co. Vs. Patel Engineering Ltd., and Another reported in **(2005) 8 SCC 618**, the relevant para, which reads as follows:

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



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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.

47. (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.

Bhaven Construction Through Authorised Signatory

Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada

Nigam Lit. and Another, reported in **2021 SCC OnLine SC 8**, the relevant



para, which reads as follows:

11. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.” The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

12. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

13. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7



of the Arbitration Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

14. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for Court assistance under Section 8 or 11 of the Arbitration Act.

15. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No.1 mounting a judicial challenge at that stage. Respondent No.1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

16. Thereafter, Respondent No.1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as 'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in



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accordance with sub-Section (2) and sub-Section (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

27. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No.1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case (*supra*), this Court observed as follows:

“22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, 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.”

Madarshi Dayanand University and Another v. Anand Coop.

L/C Society Ltd., and Another, reported in (2007) 5 SCC 295, the relevant



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para, which reads as follows:

13. But we make it clear that the arbitrator, in the first instance, has to decide whether the existence of an arbitration agreement in terms of Section 7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of clause 25-A of the tender conditions in case it is found to be an agreement within the meaning of Section 7 of the Act. Only on deciding these two aspects can the arbitrator go into the merits of the claim made by the respondent. But we clarify that it does not mean, that he should treat these two aspects as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award.

9. In reply, the learned counsel for the petitioner submitted that without a notice, an arbitration cannot be initiated and when there is an illegal proceeding is initiated, the High Court is empowered under Article 227, to interfere and set right the illegality. In this regard, he relied on the following judgments.

Deep Industries Ltd., v. ONGC, reported in ***(2020) 15 SCC 706***,



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the relevant para, which reads as follows:

“17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.”

Bhaven Construction v. Executive Engineer, Sardar Sarovar

Nigam Ltd., reported in ***2021 SCC OnLine SC 8***, the relevant para, which reads as follows:

“18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond



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the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe Deep Industries Limited v. Oil and Natural Gas Corporation Limited, 2019 SCC OnLine SC 1602, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

“15. Most significant of all is the nonobstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)

16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Article



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226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.”

20. In the instant case, Respondent No.1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits,



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which is challenged by the Respondent No.1 in a separate Section 34 application, which is pending.”

Judgment in ***Kvaerner Cementation India Limited v. Bajraglal Agarwal and Another***, reported in **(2012) 5 SCC 214**, is relied to highlight the scope of engaging under Section 16 of Arbitration and Conciliation Act.

“4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-Sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.

5. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into



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the entire gamut of arbitration proceedings.”

10. On the importance of arbitration agreement and notice before the limitation of arbitration proceedings, the learned counsel for the petitioner relied on the judgment in ***Alupro Building Systems Pvt. Ltd., v. Ozone Overseas Pvt. Ltd.***, reported in ***2017 SCC OnLine Del 7228***. The relevant para, reads as follows:

“30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz., the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the first respondent invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be



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unsustainable in law.”

Judgment in ***SREI Investment Finance Ltd., v. Tuff Drilling Pvt. Ltd.***, reported in **(2018) 11 SCC 470**, is relied for the proposition that Arbitral Tribunal is not incapacitated in drawing sustenance from CPC and Evidence Act.

“26. There cannot be a dispute that the power exercised by the Arbitral Tribunal is quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the Arbitral Tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution insofar as the power of procedural review is concerned. We have already noticed that Section 19 provides that the Arbitral Tribunal shall not be bound by the rules of procedure as contained in the Civil Procedure Code. Section 19 cannot be read to mean that the Arbitral Tribunal is incapacitated in drawing sustenance from any provisions of the Code of Civil Procedure.”

11. Considered the rival submissions and perused the



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records.

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12. The perusal of the interim award of Arbitral Tribunal dated 21.05.2021, shows that the Arbitral Tribunal conducted five virtual hearings. Claimants/respondents participated in the hearings with their representatives. When an issue regarding jurisdiction was raised before the Arbitral Tribunal, the arbitral tribunal framed the following six issues:

i) Does the Arbitral Tribunal have jurisdiction?

ii) Is the arbitration agreement valid in view of the following:

a) unsigned agreement,

b) Moreso, when this issue is not contested by either of the parties,

c) Suo moto raised by one of the Ld.Co-Arbitrator Dr.Bhatt?

iii) Is there a full and final settlement?

iv) Have all the procedures been followed with regard to the initiation of arbitration proceedings?

v) Is the claim time barred?

vi) Whether provisions of Section 21 of the Arbitration &



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Conciliation Act, 1996 were duly followed?

13. The Arbitral Tribunal consists of one presiding arbitrator and two co-arbitrators. The presiding arbitrator and one co-arbitrator on considering the rival submissions found that the application under Section 16 of Arbitration and Conciliation Act, 1996 can be considered at the time of final award. Other issues such as,

a)Reconciliation statement dated 14.11.2016.

b)The submissions of the first respondents that the reconciliation statement has been obtained under duress/coercion.

c)The validity or otherwise of the reconciliation statement in view of the non-payment of the amount appearing in the reconciliation statement.

d)The apparent arithmetical inaccuracy in the said reconciliation statement.

e)The unilateral act of the deduction by the respondents of a certain amount from the figure appearing in the reconciliation statement, and

f)The applicability of law of limitation

can be decided on the basis of the evidence produced in the trial.



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Final conclusion by majority members was reached to the effect that the matters can be taken in trial and decided upon, including the matter relating to application filed under Section 16 of Arbitration and Conciliation Act, 1996, in the final award. The dissenting member made a separate note and the learned member is of the view that the arbitration proceedings are without jurisdiction and it has to be discontinued.

14. Certain documents are filed to show that parties have reached settlement and payments have been made in pursuance of the settlement. The case of the first respondent is that the respondent is a small contractor. It completed its work. For some reason or other, the petitioner discontinued the respondent's contract and reduced the payments. The respondent was in dire need of funds and it was bludgeoned and forced to enter into an unconscionable settlement. Left with no option and there was immediate need for money to sustenance, the respondent was forced to enter into settlement. The respondent was not paid proper and reasonable amount for the work completed. It is submitted by the respondent that the alleged settlement was a forceful settlement, written on a blank sheet. A proper



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settlement would have been entered into in a proper document. Unless, the respondent signed the alleged settlement, petitioner would have withheld the amount. Even the amount agreed to be settled was not paid. Petitioner paid only Rs.2,50,000/- as evident from schedule 1. Petitioner admitted in a letter dated 12.12.2019 that substantial part payment out of the alleged settlement is yet to be made. Respondent is a small contractor and he was under the patronage of the petitioner. Therefore, he was made to enter into a sham settlement under duress.

15. Thus, it is clear that there are discrepancies in the account and the claim of settlement between the parties is itself arbitrable in the light of the reasons stated above. First respondent should be given an opportunity to prove that the settlement was not voluntary but a forced settlement, taking advantage of the plight of the first respondent as a poor contractor. *Necessitas non habet legem* is an old age maxim which means necessity knows no law. A person may sometimes has to succumb to the pressure of other party to the bargain, who is in a stronger position. It is observed in ***Chairman and MD, NTPC Ltd., v. Reshmi Constructions,***



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Builders & Contractors, reported in (2004) 2 SCC 663, that,

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27. *Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a “No-Demand Certificate” is signed. Each case, therefore, is required to be considered on its own facts. There are arbitrable issues involved in this case.*

16. Whether, the claim of the first respondent is true or not is required to be examined. Merely because notice prior to invoking arbitration was not issued, we cannot subvert the arbitration proceedings. Admittedly, there is an arbitration agreement. Reference of dispute to site



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engineer or site incharge under clause 18 of general conditions of contract, would not resolve the issue, for the reason that they are the employees of the petitioner. Therefore, we cannot find fault with respondent for approaching Indian Council of Arbitration for settling the issue with the petitioner.

17. It is pertinent here to refer to certain provisions of the Arbitration and Conciliation Act, 1996. Section 7 deals with the arbitration agreement. As per Section 7 (2), an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Admittedly, in this case, there is no dispute with regard to the fact that there is an arbitration agreement between the parties. Only grievance of the petitioner is that arbitration proceedings was initiated without any arbitral issue and without any prior notice. Section 5 restricts the scope of judicial intervention in matters governed by part I. It is made clear that no judicial authority shall intervene except provided in part I. We are concerned about Section 16 in this case. This Section deals with jurisdiction of Arbitral Tribunals. The Arbitral Tribunal may rule on its own



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jurisdiction, including ruling on any objections with regard to the existence or validity of the arbitration agreement. If a plea is raised with regard to the jurisdiction of the Arbitral Tribunal, the Arbitral Tribunal may take a decision rejecting the plea and continue with the arbitral proceedings and make an arbitral award. The party aggrieved by such an arbitral award may make an application for setting aside such award in accordance with Section 34. This is a statutory remedy provided when a question of jurisdiction of Arbitral Tribunal is raised and that was rejected and an arbitral award is passed. In the case before hand, the petitioner instead of filing an application for setting aside, the interim award of Arbitral Tribunal under Section 34 of the Act, filed a petition under Article 227 of the Constitution of India. The reading of the judgments relied by both, especially judgment reported in **2021 SCC Online SC 8** shows that, "power of judicial interference needs to be exercised in exceptional rarity, wherein one party is left remedyless under the statute or clear bad faith shown by one of the parties. If the petitions are filed under Article 226/227 of the Constitution of India against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not give fruition for many years". It is clear from this judgment,



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that the judicial interference under Article 227 of the Constitution of India is permitted only in exceptional cases and when statutory remedy is not provided under the Act.

18. As pointed out by the learned counsel for the respondent, Arbitration and Conciliation Act, 1996 is a self contained Act, it has provisions to meet every situation. If the petitioner is aggrieved against the interim award passed by the Arbitral Tribunal, it has to file an application only under Section 34 and it cannot file a petition, under Article 227 of Constitution of India.

19. In this view of the matter, this Court finds that petitioner has to go through the process of arbitration before the Arbitral Tribunal. This petition filed under Article 227 of the Constitution of India by passing the remedy provided in Section 34 of the Arbitration and Conciliation Act, is not maintainable. Thus, this Civil Revision Petition is dismissed with the costs of the respondent. Consequently, connected miscellaneous petitions stand closed.



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Ep/At
Index:Yes/No
Internet:Yes/No
Speaking Order: Yes/No

01.02.2022

To
The Section Officer,
VR Section,
High Court of Madras.



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G.CHANDRASEKHARAN.J,

Ep/At

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01.02.2022