



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th OCTOBER, 2023

IN THE MATTER OF:

+ **W.P.(C) 2724/2023 & CM APPL. 10506/2023**

SREI EQUIPMENT FINANCE LIMITED

..... Petitioner

Through: Mr. Arijit Mazumdar, Mr. Shambo Nandy, Ms. Anushka Dey, Advocates.

versus

RUGBY RENERGY PRIVATE LTD & ANR

..... Respondents

Through: Mr. Abhishek Puri, Ms. Surbhi Gupta, Mr. Sahil Grewal, Advocates for R-1. Mr. Anirban Bhattacharya, Mr. Rajeev Chowdhary, Mr. Muneeb Rashid Malik, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner seeks to challenge an Order dated 03.01.2023 passed by the Arbitral Tribunal which has been constituted for adjudicating disputes between Respondent No.1/ Rugby Renergy Private Limited and Respondent No.2/ India Power Corporation Limited.
2. The facts leading to the present the case are as under:-
 - i. The Petitioner is an equipment finance company. The operations of the Petitioner company are being conducted by an Administrator appointed by the Reserve Bank of India.
 - ii. It is stated that the Petitioner has given on lease, equipment to



Respondent No.2 which manufactures electricity by using wind energy. For the said purpose, a master lease agreement had been entered into between the Petitioner and Respondent No.2 on 01.11.2016. The said agreement has its own dispute resolution mechanism under Clause 21. It is stated that the Master Lease Agreement dated 01.11.2016 which was in force till 03.04.2023 was entered into by the Petitioner with Respondent No 2, whereby the Petitioner had agreed to give the wind business equipment on lease to Respondent No.2 in return for payment from the receivables generated from the operation of the said wind business. The wind business was operated on lands owned by the State of Gujarat, which were leased to Enercon India Limited which was further sub-leased to Respondent No.2. Respondent No.2 had also entered into power purchase agreement with Gujarat Urja Vikas Nigam Limited for sale of the power produced via operation of the wind business.

- iii. An Operations and Maintenance Agreement was also entered into by the Petitioner with Wind World India Limited for providing Operations and Maintenance support for the leased wind assets of the Petitioner and regular monthly charges for the same are paid by the Petitioner out of lease revenues received from Respondent No.2.
- iv. Respondent No.1 herein entered into a Term Sheet Agreement dated 20.01.2021 with the Petitioner for sale of this wind business and on the very same dated Respondent No.1 herein also entered into another Term Sheet agreement with Respondent No.2 herein



for transfer of wind business contracts being the Sub Lease Agreement with Enercon India Limited and the Power Purchase Agreement with the Gujarat Urja Vikas Nigam Limited.

- v. Insolvency proceedings were initiated by the RBI against the Petitioner under Section 227 read with Section 239(2)(zk) of the Insolvency and Bankruptcy Code, 2016, by filing an Application bearing No. CP (IB)294/KB/2021 before the National Company Law Tribunal (NCLT) in Kolkata and the said application was admitted on 08.10.2021.
- vi. On 29.07.22, upon the commencement of the insolvency proceedings, Respondent No.2 expressed its inability to proceed ahead with the Term Sheet Agreement dated 20.01.2021 with Respondent No.1 which was contended to have come to an end due to efflux of time.
- vii. It is stated that a petition under Section 9 of the Arbitration and Conciliation Act, 1996, being OMP(I)(COMM) No.236/2022, was preferred by the Respondent No.1 against Respondent No.2 before this Court and Order dated 03.08.2022 was passed by this Court directing Respondent No.2 to maintain status quo with regard to the revenue arising out of the Wind Power Project from 01.01.2021 onwards, as an interim measure.
- viii. Subsequently, *vide* Order dated 06.09.2022, Respondents No.1 and 2 were referred to arbitration by this Court before the learned Arbitral Tribunal and an interim order was passed on 03.08.2022 which was to continue till the first date of hearing before the learned Arbitrator. In view of the above proceedings, Respondent



- No.2 *vide* letter dated 27.09.22 expressed its inability to pay the lease rentals payable from the receivables any further to the Petitioner as payable under the Master Lease Agreement.
- ix. It is stated that the Petitioner was receiving rentals from Respondent No.2, and that the Petitioner's interests are directly and vitally affected in the arbitration proceedings between Respondent No.1 and Respondent No.2.
- x. The Petitioner, thereafter, filed an application to be impleaded as a party in the dispute between Respondent No.1 and Respondent No.2. It was the contention of the Petitioner that the Petitioner was not getting rentals because of the stay order passed by this Court in OMP (I) (COMM.) 236/2022 wherein this Court even after being aware of the fact that there is an Term Sheet Agreement between Petitioner and Respondent No.2 herein had directed maintenance of status quo in favour of Respondent No.1 herein.
- xi. The learned Arbitrator has rejected the application in the order dated 03.01.2023 under Order 1 Rule 10 CPC stating that the Arbitral Tribunal is not vested with the powers under Section 11(6) of the Arbitration & Conciliation Act to implead a third party which is not a signatory to the agreement in respect of the disputes which have been referred for arbitration.
- xii. Challenging the said order, the Petitioner has approached this Court by filing the instant writ petition.
3. Learned Counsel for the Petitioner states that the rights and liabilities of the Petitioner, Respondent No.1 and Respondent No.2 are inter-connected and, therefore, the Petitioner ought to have been impleaded in the dispute



between Respondent No.1 and Respondent No.2, since the Petitioner claims rentals from Respondent No.2.

4. Learned Counsel for the Petitioner places reliance on the judgment of the Apex Court in Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. & Ors., **2013 (1) SCC 641** and contends that in exceptional circumstances, applying the principles of composite performance or implied authority, a third party who is not a signatory to the agreement can join the arbitration proceedings. In this context, learned Counsel for the Petitioner also places reliance on Ameet Lal Chand Shah & Ors. v. Rishabh Enterprises & Anr., **2018 (15) SCC 678**.

5. Learned Counsel for the Petitioner further places reliance in the Order dated 06.09.2022 passed by this Court in OMP (I) (COMM.) 236/2022 referring the disputes between Respondent No.1 and Respondent No.2 to arbitration to contend that there was no restriction placed in the said order which would inhibit the learned Arbitrator from going into the question as to whether the rights of the Petitioner would be directly and substantially affected in the arbitration proceedings between Respondent No.1 and Respondent No.2 and the Petitioner should be impleaded in the proceedings in view of the dictum of the Apex Court in Chloro Controls Private Limited (supra). He, therefore, states that the inhibition expressed by the learned Arbitrator that it was not open for the Arbitrator to pass an order impleading the Petitioner in the arbitration disputes between Respondent No.1 and Respondent No.2 cannot be sustained and the matter should be remanded back to the Arbitral Tribunal to decide as to whether the disputes between the parties arises out of a composite transaction which the learned Arbitrator has chosen not to enter into.



6. *Per contra*, learned Counsel for the Respondents only contend that the present petition is not maintainable under Article 227 of the Constitution of India and more particularly when there is an independent arbitration agreement between the Petitioner and Respondent No.2 for resolution of their disputes. Since a pure question of law arises and no adjudication is required on facts, this Court has taken up the case for final disposal at the admission stage itself.

7. The scope of interference while exercising jurisdiction under Article 227 of the Constitution of India under the Arbitration and Conciliation Act is well settled. The power of the High Court for exercising its jurisdiction under Article 227 of the Constitution of India has been succinctly explained by the Apex Court in Estralla Rubber v. Dass Estate Private Limited, 2001 (8) SCC 97, has observed as under:-

"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an



appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

7. This Court in Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand [(1972) 1 SCC 898 : AIR 1972 SC 1598] in AIR para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565] . This Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarte [(1975) 1 SCC 858 : AIR 1975 SC 1297] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order."

8. While dealing with the scope of a petition under Article 227 of the Constitution of India filed against an order passed by an Arbitral Tribunal the Apex Court in SBP & Company v. Patel Engineering Limited & Anr., **2005 (8) SCC 618**, has observed 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."

9. The said judgment was distinguished by the Apex Court in Punjab Agro Industries Corporation Limited v. Kewal Singh Dhillon, 2008 (10) SCC 128, wherein the Apex Court has observed as under:-

"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 [(2005) 8 SCC 618] does not bar such a writ petition. The observations of this Court in SBP [(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."

10. The Apex Court in Deep Industries Limited v. Oil & Natural Gas Corporation Limited & Anr., 2020 (15) SCC 706, after adverting the above two judgments in Estralla Rubber (supra) and SBP & Company (supra) has observed as under:-

"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 hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

(emphasis supplied)

11. After analysing the scope of interference under Article 227 of the Constitution of India and applying the aforesaid judgments on the facts of this case, the facts which emerge are that the Petitioner is a company which deals with equipment finance entered into a Master Lease Agreement with Respondent No.2 herein. Under the said agreement, the Petitioner agreed to give on lease the equipment for production of electricity and supply thereof. The consideration under the said agreement was that Respondent No.2 agreed to transfer the receivables generated from the wind mill business to the Petitioner.

12. Respondent No.1 had entered into an agreement with Respondent No.2 for transfer of the lease hold interest and power purchase agreement of the project run by Respondent No.2. The agreement entered into is a Term Sheet Agreement. The agreement deals with the transfer of power purchase agreement entered into Respondent No.2 and Gujarat Urja Vikas Nigam Limited and the sub lease agreement entered into between Respondent No.2 and Enercon India Limited.

13. This Court while passing an order of status quo on 03.08.2022 was examining a petition under Section 9 of the Arbitration & Conciliation Act filed by Respondent No.1 against Respondent No.2. In the said petition, the



case put up by Respondent No.2 herein was that it was no longer bound by the agreement with Respondent No.1 in view of the fact that the Petitioner herein is undergoing a Corporate Insolvency Resolution Process (CIRP) under the Insolvency & Bankruptcy Code, 2016, and that the agreement between Petitioner and Respondent No.2 had come to an end by the efflux of time. The Order of status quo had been passed when Respondent No.1 contended that it apprehends that any transfer by Respondent No.2 herein to the Petitioner of the monthly receivables which were payable on account of the lease of the equipments by the Petitioner would go contrary to the escrow arrangements entered into between Respondent No.2 and Respondent No.1 which would result in a loss to Respondent No.1 and more particularly because the Petitioner was undergoing insolvency proceedings.

14. The dispute between Respondent No.1 and Respondent No.2 were referred to arbitration by an Order dated 06.09.2022 passed by this Court in O.M.P. (I) (COMM.) 236/2022. The claim of the Petitioner against Respondent No.2 is based on a master lease agreement which has its own dispute resolution clause. The Petitioner has nothing to do with the agreement entered into between Respondent No.1 and Respondent No.2. The Petitioner has already sold off his equipment to Respondent No.1, therefore, it cannot be said that the Petitioner would become a necessary party between the dispute of Respondent No.1 and Respondent No.2. The Petitioner's claim against Respondent No.2 would become independent of the dispute between Respondent No.1 and Respondent No.2.

15. In this view of the matter, this Court does not find it necessary to exercise its jurisdiction under Article 227 of the Constitution of India while interfering with the decision taken by the learned Arbitrator who had been



appointed only to decide the disputes between Respondent No.1 and Respondent No.2.

16. In this context, it is necessary to refer to the decision of the Apex Court in Vidya Drolia & Ors. v. Durga Trading Corporation, **2021 (2) SCC 1**, wherein the Apex Court has observed as under:-

"129. Principles of competence-competence have positive and negative connotations. As a positive implication, the Arbitral Tribunals are declared competent and authorised by law to rule as to their jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the Arbitral Tribunal to rule as to their jurisdiction and decide non-arbitrability questions. As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability. Such prioritisation of the Arbitral Tribunal over the courts can be partial and limited when the legislation provides for some or restricted scrutiny at the "first look" referral stage. We would, therefore, examine the principles of competence-competence with reference to the legislation, that is, the Arbitration Act. "

17. The view taken by the learned Arbitrator is a plausible view and the power of this Court while exercising its jurisdiction under Article 227 of the Constitution of India is limited to interfere with matters only when it is completely perverse. This Court, is, therefore, not inclined to interfere with the order of the learned Arbitrator not allowing the Petitioner herein to be impleaded in the arbitration proceedings between Respondent No.1 and



Respondent No.2.

18. The writ petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

OCTOBER 13, 2023

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