

10.05.2024
Sl. No.2(DL)
srm/cp

C.O. No.97 of 2024
JKS Infrastructure Pvt. Ltd.
Versus
Zamil Steel Buildings India Pvt. Ltd.

Mr. Debnath Ghosh,
Mr. Soumava Mukherjee,
Mr. Biswaroop Mukherjee,
Mr. Subhankar Chatterjee
...for the Petitioner.

Mr. Mrinal Beri
...for the Opposite Party.

1. The revisional application arises out of an order dated December 14, 2023 passed by the learned Arbitrator in connection AP No.238 of 2022.
2. By the order impugned, the learned Arbitrator rejected an application under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).
3. The petitioner has raised a point with regard to the arbitrability of the matter. According to the petitioner, clause 19 of the said agreement is not an arbitration clause. The clause 19 is quoted below:-

“19. Arbitration

The jurisdiction for any arbitration is limited to Kolkata.

Any legal Disputes, if arises, will be limited to Kolkata Jurisdiction only. In case of any litigation under this Contract, the courts of law in the city of Kolkata only shall have the jurisdiction.”

4. According to Mr. Debnath Ghosh, learned Advocate appearing on behalf of the petitioner, merely by using the expression 'arbitration', the clause would not *per se* become an arbitration clause. Essential elements of an arbitration clause are absent.
5. Mr. Ghosh submits that to constitute an arbitration clause, certain essential ingredients are required to be present, namely, (a) an intention of the parties to refer to all present and future disputes to arbitration; (b) the Arbitrator should be an independent person; (c) the parties should be *ad idem* and agree to be bound by the decision of the Arbitrator; (d) mere desire of the parties that they may go for arbitration would not be sufficient.
6. In the instant case, the clause provides that if legal disputes arise, only courts in Kolkata would have jurisdiction. Mr. Ghosh submits that at best, this could be an ouster of jurisdiction clause and not an arbitration clause. It also relates to litigations arising out of the contract.
7. Section 7 of the said Act was also referred to in order to substantiate the plea that the essential elements of an arbitration clause are absent in clause 19. Mr. Ghosh further submits that although the learned Arbitrator had the right to rule on his own jurisdiction, but the learned Arbitrator did not

pass any orders in this regard. Rather, the learned Arbitrator proceeded on the basis that the arbitration should continue. The application was liable to be rejected as the same was filed at a belated stage.

8. Mr. Ghosh points out several observations of the learned Arbitrator, which were contrary to the final conclusions. On the one hand the learned Arbitrator held that delay was not fatal and a party could file an application under Section 16 of the said Act at any stage, but on the other hand, the same Arbitrator went on to dismiss the application on the ground of delay and imposed cost of Rs.50,000/-. This, according to Mr. Ghosh, was an order passed in bad faith. The order suffered from perversity and was amenable to the jurisdiction of this Court under Article 227 of the Constitution of India, it is urged.
9. Mr. Ghosh next pointed out to the decisions of the Hon'ble Apex Court, wherein it had been held that questions with regard to nullity, inherent lack of jurisdiction on the subject matter, etc. could be raised at any stage, even at the stage of a proceeding before the Hon'ble Apex Court even if the same had not been raised earlier, either at the Section 11 stage or at the Section 16 stage.

10. Mr. Ghosh submits that even if the learned Advocate had not objected to the appointment of the learned Arbitrator at the time of disposal of the application under Section 11(6) of the said Act, the same would not amount to waiver. The party challenging the arbitrability of a particular agreement and the non-existence of an arbitration clause, could approach the learned Arbitrator under Section 16 of the said Act at any stage. Although, the said application could have been filed prior to the submission of the statement of defence, yet power was conferred upon the learned Arbitrator to accept delayed pleas under Section 16 of the said Act.
11. Overall, Mr. Ghosh urged this Court to take note of the manner in which the learned Arbitrator proceeded with the matter and deprived the petitioner from raising valid pleas, at appropriate stages of the proceeding. Mr. Ghosh also urged that the mandate had terminated.
12. Mr. Beri, learned Advocate appearing on behalf of the opposite party/claimant submits that on two earlier occasions learned Arbitrators were appointed under Section 11(6) of the said Act, by the Hon'ble Chief Justice and both the learned Arbitrators had declined to enter into arbitration. The present

learned Arbitrator was appointed by the third order under Section 11(6) of the said Act.

13. Referring to the order dated June 24, 2022, Mr. Beri submits that the Hon'ble Chief Justice had recorded that the arbitration agreement dated December 12, 2017 was not in dispute. Thus, the petitioner had waived the right to file an application under Section 16 of the said Act, thereby, challenging the arbitration clause.
14. Mr. Beri submits that the petitioner could not blow hot and cold and relies on the decision of ***Prasun Roy vs. Calcutta Metropolitan Development Authority & Anr.*** reported in ***(1987) 4 SCC 217***.
15. Reliance is next placed on the decision of ***M/s. S.B.P. & Co. vs. M/s. Patel Engineering Ltd. & Anr.*** reported in ***(2005) 8 SCC 618***. It was held by the Hon'ble Apex Court that a decision of the Chief Justice on the issue of jurisdiction and existence of a valid arbitration agreement, would be binding on the parties when the matter goes to the arbitral tribunal and at all subsequent stages of the proceeding, except in an appeal before the Supreme Court. Further reliance is placed on paragraph 19 of the said judgement in support of the contention that Section 16 of the said Act could not be held to empower the arbitral tribunal to ignore the decision given by a judicial authority or the Chief Justice,

before the reference it was made. The finality of the decision of the Chief Justice with matters relating to the arbitration were incapable of being reopened by the arbitral tribunal.

16. In the instance case, the observation of the Chief Justice that parties were not in dispute with regard to the existence of an arbitration agreement, would preclude the petitioner from approaching a learned Arbitrator under Section 16 of the said Act.
17. Paragraph 24 is relied upon in support of similar contentions and observations of the Hon'ble Apex Court with regard to the remedy of the parties to raise their grievance in respect of any decision under Section 16 of the said Act, at the appropriate stage, i.e. under Section 34 of the said Act.
18. Lastly, paragraph 44 is referred to wherein the Hon'ble Apex Court held that the High Court was not capable of proceeding either under Article 226 or Article 227 of the Constitution of India. Section 37 made certain orders appealable and apart from such orders, the aggrieved party had an avenue for ventilating his grievance against in between orders that might have been passed by the learned tribunal, under Section 34 of the said Act. Thus, a party aggrieved by an order of the tribunal, which is not appealable under Section 37 of the said Act,

had to wait until the award was passed by the tribunal. That appears to the scheme of the Act.

19. The Hon'ble Apex Court was of the view that judicial intervention should be minimised and interference under Articles 226 and 227 of the Constitution of India in respect of any order made by the learned tribunal, would defeat the whole purpose of promulgation of the said Act. The said Act was a complete Code and provided for all remedies within the Act itself.
20. Reliance is also placed on a decision of the Hon'ble Apex Court in the matter of **A. Ayyasamy vs. A. Paramasivam & Ors.** reported in **(2016) 10 SCC 386**. Paragraph 12(2) of the said decision has been placed. The Hon'ble Apex Court was of the view that even after the arbitral tribunal rules on its jurisdiction and decides that the arbitration clause is valid, the aggrieved party had to wait till the final award was pronounced and only at that stage, the aggrieved party was allowed to raise such objection before the court in a proceeding under Section 34 of the said Act, while challenging the arbitral award.
21. Lastly, reliance is placed in **N N Global Mercantile (P) Ltd. Vs. Indo Unique Flame Ltd.** reported in **2023 INSC 1066 (In Re: Interplay Between Arbitration Agreement Under The Arbitration And Conciliation Act 1996 And The Indian**

Stamp Act 1899). According to Mr. Beri, the Constitution Bench once again reiterated the principle of judicial non-interference in arbitral proceedings. Judicial non-interference was fundamental to both domestic as well as international commercial arbitration. The principle of minimum judicial interference respected the autonomy of the parties to get their disputes resolved by arbitration. The principle had been incorporated in international instruments including the New York Convention and the Model Law.

22. What falls for determination before this Court is whether the order impugned should be interfered with by this Court at this stage, by exercising power under Article 227 of the Constitution of India.
23. The plea of Mr. Ghosh, with regard to termination of mandate upon expiry of a year from completion of pleadings, is not answered in this proceeding. The revisional application does not arise out of the said orders passed by the learned Arbitral Tribunal and parties are at liberty to raise such questions and issues, at the appropriate stage.
24. In **Punjab Agro Industries Corporation Limited vs. Kewal Singh Dhillon**, reported in **(2008) 10 SCC 128**, the Hon'ble Apex Court held that the power under Article 227 of the Constitution of India could not be ruled out if a challenge was thrown to

any orders passed under Sections 11(4), 11(5), 11(6) of the said Act. The view of the Apex Court was based on the logic that as no appeal was maintainable against the order of the designate, the only course available was to challenge such order under Article 227 of the Constitution of India.

25. On this issue, another decision of a Coordinate Bench was relied upon by Mr. Ghosh, i.e., ***Satyendra Nath Ray vs. VCK Share & Stock Broking Services Limited***, reported in ***2021 SCC Online Cal 2096***, wherein His Lordship was of the view that any order which resulted in gross miscarriage of justice, could be interfered with under Article 227 of the Constitution of India. Thus, according to Mr. Ghosh, this court should interfere with the order impugned by invoking the superintending power under Article 227 of the Constitution of India, even if there is a microscopic chance to undo an injustice.
26. Asserting that the arbitration clause did not satisfy the essential ingredients, ***Mahanadi Coalfields Ltd. & anr. vs. IVRCL AMR Joint Venture***, reported in ***2022 SCC Online SC 960***, is heavily relied upon. Mr. Ghosh submits that paragraph 8 of the said decision clarified the essential requirements of an arbitration clause. The Apex

Court held that even if counsel did not raise any objection with regard to the arbitration clause, such issue could be raised at the appropriate stage. In the said direction, a clause which had provided for an in-house mechanism for resolution of a dispute between the parties at the company level, was not treated as an arbitration clause.

27. Reliance is further placed on the decisions of the Hon'ble Apex Court in the matter of ***Hindustan Zinc Limited (HZL) vs. Ajmer Vidyut Vitran Nigam Limited***, reported in ***(2019) 17 SCC 82***, and ***Chief General Manager, (IPC), Madhya Pradesh Power Trading Company Limited & anr. vs. Narmada Equipments Private Limited***, reported in ***(2021) 14 SCC 548***, in support of the contention that when the plea of inherent lack of jurisdiction etc. had not been raised earlier, the same could be raised whenever and wherever it is sought to be enforced or relied upon. Such defect of jurisdiction could not be cured even by consent of the parties.

28. Thus, it is vehemently urged that this court should interfere at this stage instead of allowing the proceeding to continue, thereby relegating the parties to the remedy available under Section 34 of the said Act, at a later stage. The proceeding would

be a useless formality. Reliance is also placed on some other decisions, namely, ***Bernhard Consultancy Private Limited vs. Ind. Agro Synergy Limited, Nagpur***, reported in ***2001 SCC Online AP 534***, ***Foomill Pvt. Ltd. vs. Affle (India) Ltd.***, reported in ***2022 SCC Online Del 843*** and ***BGM and M-RPL-JMCT(JV) vs. Eastern Coalfields Limited***, reported in ***2024 SCC Online Cal 486*** to emphasize that clause 19 is not an arbitration clause.

29. I find that the learned Arbitrator rejected the application on the ground of delay as the application was filed at the stage of evidence. The law provides that plea of jurisdiction can be raised before the Arbitrator at any time, but not later than submission of the statement of defence. The section also clarifies that a party shall not be precluded from raising such a plea merely because an Arbitrator had been appointed or the party had participated in the proceeding for appointment of an Arbitrator. The section also empowers the Arbitrator to admit a belated plea, if the Arbitrator considers that the delay is justified. In this case, the learned Arbitrator did not condone the delay and rejected the application, thereby continuing with the proceeding. Reference has been made to Section 15(5) of the said Act.

30. The questions raised by Mr. Ghosh with regard to the correctness of the observations made while rejecting an application under Section 16 of the said Act, will be available at the appropriate stage. Section 16(5) provides that the arbitral tribunal shall decide on a plea referred to in Sub-Section (2) or Sub-Section (3) and where the arbitral tribunal takes a decision rejecting the plea, the tribunal will continue with the proceedings and make an arbitral award. Sub-Section (6) states that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34 of the said Act. A conjoint reading of Sub-Sections (5) and (6) of Section 16 clearly indicates that the remedy of the petition is inbuilt in the said Act. The petitioner should file an application under Section 34 of the said Act once the award is made, even challenging the order impugned.
31. All the points raised by Mr. Ghosh pertaining to the rejection of the application under Section 16 of the said Act including the plea that there was no waiver at the Section 11 stage and the learned Arbitrator instead of returning a finding on jurisdiction, mechanically rejected the application, would be available at the Section 34 stage.

32. This court agrees with Mr. Beri that the Arbitration and Conciliation Act, 1996 is a complete Code which provides all remedies within itself. The points with regard to the interpretation of Clause 19 raised by Mr. Ghosh may have support from other decisions of the Hon'ble Apex Court where similar clauses were held to be not an arbitration clause. Such plea will be available to Mr. Ghosh at the stage of Section 34. The learned Arbitrator continued with the proceedings meaning, thereby, the learned Arbitrator was of the view that clause 19 was an arbitration clause and the tribunal had jurisdiction. The point may not have been expressly elaborated, but the conclusion was that the Arbitrator should continue with the proceeding.
33. Thus, the situation is covered by Section 16(5) of the said Act. The remedy of the petitioner would be under Section 16(6) of the said Act. Only because the learned Arbitrator continued with the proceeding, the petitioner would not be precluded from raising these issues at the stage of Section 34 of the said Act. The Hon'ble Seven Judges Bench in ***M/s. S.B.P. and Co. vs. M/s. Patel Engineering Ltd. & anr.***(supra), has laid down such law specially in paragraphs 44 and 45.

34. The contention of Mr. Beri on waiver, merits and the conduct of the petitioner, shall be available at the appropriate stage.
35. Reference is made to the decision of the Hon'ble Apex Court in the matter of **Narayan Prasad Lohia vs. Nikunj Kumar Lohia & ors.**, reported in **(2002) 3 SCC 572**. Paragraph 18 of the said decision clarifies the position of law that an award could be set aside on the ground of challenge under Sections 12, 13 and 16 of the said Act, provided such challenge was first raised before the learned Arbitrator. In this case, the petitioner approached the learned Arbitrator under Section 16 of the said Act and the learned Arbitrator rejected the said application.
36. The decision in **A. Ayyasamy** (supra), paragraphs 12.2 clarifies that Section 5 of the said Act begins with a non obstante clause which sends a clear message that there should not be any judicial intervention at a stage which would scuttle an arbitration proceeding. Even if a party has an objection to the initiation of such a proceeding on the ground of invalidity of an arbitration agreement or invalidity of an arbitration clause, the challenge should be first raised before the learned Arbitrator and the decision of the learned Arbitrator must be

challenged under Section 34 of the said Act, while challenging the award.

37. The decisions in **BGM and M-RPL – JMCT** (supra), **Mahanadi Coalfields Ltd.** (supra), **Foomill Pvt. Ltd.** (supra) Bernhard Consultancy Private Limited (supra) all deal with clauses which were held by the courts not to be arbitration clauses.
38. Mr. Ghosh has advanced arguments by drawing support from the said decisions in order to point out the similarity between clause 19 of the instant case and the arbitration clauses in those decisions. The points of similarity between the clauses also, can be raised at the appropriate stage under Section 34 of the said Act.
39. This Court under Article 227 of the Constitution of India should not interfere with the order impugned. The petitioner is not remediless and the law as also judicial precedents have clarified that the right of challenge to an order under Section 16 is available under Section 34 of the said Act.
40. The decision of this court in **Satyendra Nath Ray** (supra) would not be applicable in the facts and circumstances. In the case before His Lordship, even before the learned Arbitrator had decided on the procedure to be followed, an application for appointment of a hand-writing expert had been

summarily rejected. His Lordship was of the view that the hot haste with which the application was rejected, had caused injustice.

41. In the case in hand, a clear finding has been returned by the learned Arbitrator that the proceeding should continue in terms of Section 16(5) of the said Act. Hence, the scenario is different in this case. The remedy is available at the stage of Section 34 and the petitioner is at liberty to raise all points which have been raised in this application, at the appropriate stage.
42. The counter arguments of Mr. Beri is also left open to be urged at the appropriate stage.
43. The revisional application is accordingly disposed of.
44. There shall be no order as to costs.
45. Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)