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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 25th July, 2024.

+ W.P.(C) 10027/2024, CM APPL. 41022-41024/2024
 CS CONSTRUCTION COMPANY PVT LTD & ANR.Petitioners

Through: Mr. Abhinav Mukerji, Senior
 Advocate with Mr. Chaitanya
 Mahajan, Ms. Payal Kakra,
 Mr. Ehraaz Zafar, Ms. Poonam,
 Mr. Kunal Kakumanu and
 Ms. Khushboo Hora, Advocates.

versus

EXCELLING GEO AND ENGINEERING CONSULTANT & ORS.

.....Respondents

Through: Mr. Rakesh Kumar and Mr. Ankit
 Kumar, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA
JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The Petitioner No. 1, CS Construction Company Pvt. Ltd., is a counter claimant in ongoing arbitration proceedings. They have invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, 1950 for issuance of appropriate directions for quashing the orders passed in the said arbitration proceedings by Respondent No. 2 - Sole Arbitrator as well as an order dated 22nd March, 2024¹ passed by Respondent No. 3 - Coordinator, Delhi International Arbitration Centre².

2. The Petitioner's contention for invoking the extraordinary jurisdiction of this Court, is premised on the following facts:

¹ "Impugned order"

² "DIAC"



2.1. Petitioner No. 2 is a Joint Venture Company of Petitioner No. 1. The Petitioners have been awarded a contract for a Tunnel Design and Construction project in the State of Jammu and Kashmir by the Ministry of Road Transport & Highway. For this purpose, on 11th January, 2022, Petitioner No. 2 entered into an agreement with Respondent No. 1 for consultancy services for the said project. Owing to disputes between the parties, arbitration proceedings were initiated as per the terms of the agreement and a Sole Arbitrator was appointed by this High Court under Section 11 of the Arbitration and Conciliation Act, 1996³.

2.2. On 15th December, 2022, the arbitration proceedings commenced before the Sole Arbitrator at DIAC and subsequently a provisional assessment of arbitration fees was calculated on the basis of the Statement of Claim received on 20th December, 2022. The same was duly accepted by both the parties and appropriate fees was paid accordingly. Thereafter, Petitioner No. 2 filed a counter claim on 24th May, 2023 and *vide* order dated 29th May, 2023, the Sole Arbitrator requested the DIAC to re-calculate the deposits of both the parties in accordance with claims and counter claims.

2.3. Subsequently, on 10th July, 2023, the Sole Arbitrator recorded that parties have been informed about the deposits to be made in accordance with claims and counter claims. Accordingly, Petitioner No. 2 deposited their share of arbitral fee and administrative charges with respect to counter claims on 11th January, 2024 and the same were verified by DIAC. With respect to Respondent No. 1's share of the arbitral fee and administrative charges in terms of the counter claim, the Sole Arbitrator, in the order dated

³ "Arbitration Act"



1st February, 2024 recorded that counsel for Respondent No. 1 made a categorical submission before the Sole Arbitrator that Respondent No. 1 shall deposit his share of arbitral fee and the administrative charges with respect to counter claims within one week.

2.4. In this background, the Petitioners contend that, in order to build their case for re-assessment of arbitral fee, Respondent No. 1 submitted before the Sole Arbitrator that they are unable to deposit their share of the Arbitral fee in terms of the counter claim filed by the Petitioner. The counsel submitted that Respondent No. 1 is instead willing to pay the entire Arbitral fees with regards to their claim. Respondent No. 1's inability to deposit the Arbitral fee with respect to counter claims was vehemently opposed by Petitioner No. 2. Much deliberations took place on this issue and after hearing both the sides, the Sole Arbitrator by way of order dated 12th March, 2024, declined to change the agreed fee structure, holding that, after agreeing to share the payment of fees with respect to the counter claim, Respondent No. 1 cannot be allowed to back out of this understanding. Therefore, the Sole Arbitrator directed Respondent No. 1 to deposit its share of Arbitral fee and administrative charges as already communicated through email dated 25th September, 2023 and suspended the proceedings till the said deposits are made.

2.5. In this background, Respondent No. 1 filed an application before DIAC expressing their inability to deposit their share of the Arbitral fee in respect of counter claim and accordingly requested for separate assessment of fees in terms of the claim and counter claim. Thereafter, Respondent No. 3 - DIAC passed the *ex-parte* impugned order dated 22nd March, 2024. The Petitioners contend that DIAC, does not have jurisdiction to adjudicate such



a request without calling Petitioner No. 2 to participate for the hearing. Furthermore, it is also submitted that once the issue of fee had been conclusively decided by the Sole Arbitrator *vide* order dated 12th March, 2024, the Coordinator, DIAC had no power to pass a separate reassessment order.

2.6. Thus, the Petitioners challenge the impugned order dated 22nd March, 2024 passed by the Coordinator, DIAC on the grounds that it is *per-se* bad in law and in contravention of the well-settled legal principles enshrined under Section 38(1) of the Arbitration Act. In addition to the above order, the Petitioner also challenges the following orders passed by the Sole Arbitrator:

- (a) Order dated 27th March 2024, whereby the order dated 12th March, 2024 passed by the Sole Arbitrator was recalled;
- (b) Order dated 24th May, 2024, whereby an adjournment request made by counsel for Petitioner No. 2, on the grounds of personal exigency and health, was declined by the Sole Arbitrator and Petitioner No. 2 was proceeded with *ex-parte*.
- (c) Order dated 5th July, 2024 wherein it is observed that an application for review and recall of the order dated 24th May, 2024 has been filed by Petitioner No. 2 and after hearing the parties, the Sole Arbitrator reserved its order on the said application.
- (d) Order dated 9th July, 2024, whereby the review application filed by the Petitioners was rejected by the Sole Arbitrator.

2.7. Petitioners contend that Respondent No. 1 has been concealing material facts from the Arbitral Tribunal, in order to falsely claim inability to pay their share of the Arbitral fees, with respect to the counter claim of the Petitioner. Petitioners rely on the balance sheet of Respondent No. 1 for



FY 2022-23, to submit that Respondent No. 1 is certainly a solvent firm, clocking revenue to the tune of around Rs. 20 crores and therefore the grounds urged for variation of the Arbitral fee, are entirely erroneous and misconceived.

3. The Court has heard the contentions of the parties. At the outset, the Court called upon the counsel for the parties to argue on the maintainability of the present writ petition under Article 226 and 227 of the Constitution.

4. To support the maintainability of the petition, the Petitioners' counsel places reliance on the case of ***Bhaven Construction v. Executive Engineer, Sardar Sarovar***⁴, wherein the Supreme Court has observed that this Court can exercise jurisdiction in relation to matters relating to Arbitration Act in exceptional circumstances. This power is to be exercised in cases of exceptional rarity where one party is left remediless under the statute or there is clear bad faith shown by one of the parties. The Petitioner urges that the facts of the present case squarely fit the criteria for exercise of this Court's jurisdiction under Article 226 of the Constitution of India.

5. However, in the opinion of the Court, the present writ petition is grossly misconceived. There is no doubt that a writ under Article 226 and 227 is maintainable against the orders passed by an Arbitral Tribunal, however, such challenges are not be entertained in every case and the Court has to proceed with extreme circumspect so as to not infringe upon or diminish an Arbitral Tribunal's power to govern its own process. In the case of ***Surender Kumar Singhal and Ors. v. Arun Kumar Bhalotia***⁵, this Court, after carefully considering the judgments of the Supreme Court, laid down

⁴ (2022) 1 SCC 75

⁵ 2021 SCC OnLine Del 3708



the circumstances in which writ petitions against the orders of an Arbitral Tribunal, should be entertained. The relevant portions of the said judgment are as follows:

“24. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.”

6. Thus, only under exceptional circumstances or when there is bad faith or perversity established, can a writ petition under Article 226 and 227 of the Constitution can be entertained against the orders of an Arbitral Tribunal.



7. In the opinion of this Court, the orders referred to in the preceding paragraphs, which form the subject matter of challenge in the present writ petition, do not fall under the category of exceptional cases where the Court can exercise its jurisdiction under Article 226 and 227 of the Constitution. The impugned orders in the present writ petition are all procedural case management orders passed by the Arbitral Tribunal, which relate to scheduling of arbitration proceedings and fixation of Arbitral fees and administrative charges, which are subject matters which squarely fall within the jurisdictional domain of the Arbitral Tribunal.

8. Further it is observed that in the order dated 5th July, 2024, while dealing with the review application of the Petitioner, the Sole Arbitrator has noted the entire proceedings of the case since its inception and summarised the same in a tabular form. The same is not extracted in the present order for the sake of brevity, however, it is suffice to observe that the Sole Arbitrator has noted each and every arbitration proceedings, which reveal that several adjournment requests were made by the Petitioners. In fact, Senior Counsel for the Petitioners, Mr. Abhinav Mukerji, has candidly accepted that the counsel representing the Petitioners had sought adjournments before the Arbitral Tribunal on six occasions.

9. In the opinion of the Court, the Arbitral Tribunal is the sole authority to devise its own procedure for expeditious disposal of the proceedings under Section 19 of the Arbitration Act, which reads as follows:

“19. Determination of rules of procedure. –

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.



(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

10. The rationale and intent behind the Arbitration and Conciliation Act, 1996, is to establish an alternate form of dispute resolution for expeditious disposal of disputes between the parties. Therefore, if the Arbitral Tribunal, after detailed consideration of the facts of the case, did not find it to be a fit case for review of the order passed on account of the Petitioner’s own default, there cannot be any basis for this Court to intervene in such a decision.

11. As regards, the Arbitral fee to be paid in terms of the counter claim, the Sole Arbitrator has noted that the same was computed strictly in accordance with the scheme of the Arbitration Act read with the Delhi International Arbitration Centre (Administrative Cost and Arbitration Fees) Rules 2018. Therefore, this aspect should not engage this Court under Article 226 of the Constitution of India. In terms of the observation made by the Coordinator, DIAC in the impugned order dated 22nd March, 2024, it would suffice to note that the first proviso to Rule 3(ii) of the aforesaid Rules provides for such a situation where the DIAC can assess the arbitration fees separately for the claims and counter claims. Therefore, it cannot be said that the same is *per se* bad in law.

12. Moreover, there is nothing on record to suggest that the Arbitral Tribunal has denied equal opportunity to both the parties. The Arbitral Tribunal has only insisted on the adherence to the timelines. The impugned



orders are a consequence of a Petitioners lack of diligence towards the arbitration proceedings. Thus, the Arbitral Tribunal's decision to reject the review application, cannot be held as perverse or lacking inherent jurisdiction. No exceptional circumstances or perversity has been demonstrated in the present writ petition, to warrant the exercise of the extraordinary jurisdiction of this Court under Article 226 or 227 of the Constitution of India.

13. In light of the above, the present petition is dismissed with cost of Rs. 25,000/-, to be paid to the Respondent No. 1. Although not strictly required, it is nonetheless clarified that all rights and contentions of the Petitioners with respect to any alleged violation of the provisions of the Arbitration Act in relation to the ongoing arbitration proceedings, will be open to challenge by the Petitioner under Section 34 of the Arbitration Act at the appropriate stage, in accordance with law.

14. Accordingly, the present writ petition is dismissed along with pending application(s).

SANJEEV NARULA, J

JULY 25, 2024/nk