



2026:AHC:54617

HIGH COURT OF JUDICATURE AT ALLAHABAD
ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 129 of 2025

Shri Pramhans Enterprises

.....Applicant(s)

Versus

Ms Varanasi Aurangabad Nh-2 Tollway Private
Limited

.....Opposite
Party(s)

Counsel for Applicant(s) : Kirti Kumar Nirkhi, Rahul Agarwal,
Sarvesh Mani Pandey, Shobhit Saxena,
Vikas Kumar Pandey
Counsel for Opposite Party(s) : Kaushalendra Nath Singh

Court No. - 33

HON'BLE VIKAS BUDHWAR, J.

1. Sri Rahul Agrawal, learned counsel for the applicant as well as Sri Sumit Khare, holding brief of Sri Indranath Singh, learned counsel for the respondents, are present.
2. Reply affidavit filed today is taken on record.
3. A joint submission has been made by learned counsel for the parties that since affidavits have been exchanged and they do not propose to file any further affidavits, the application may be decided on the basis of material available on record, thus with consent of the parties. the application is being decided finally at the admission stage.
4. The case of the applicant is that applicant is running partnership firm in the name of Paramhans Enterprises having its office of 4/1834 Kadopur Ramnagar Bhatti, P.S. Ramnagar, District Varanasi. The firm is engaged in the business of contractual activities including clearing and grubbing road land, earthwork in embankment, construction of embankment with material, construction of subgrade, proving and laying GSB, proving and laying WMM, Road marking, maintenance of roads etc.

5. According to the applicant, the respondents, namely M/s Varanasi Aurangabad NH-2 Tollway Private Limited issued work orders for construction and maintenance of roadways. It is asserted that the applicant executed the work to the satisfaction of the respondents. However, the respondents withheld an amount of Rs. 58,82,594/- against invoices raised by the applicant.

6. It is further the case of the applicant that after repeated requests, the matter was partly settled and the respondents issued a settlement letter dated 25.04.2022, wherein it was acknowledged that out of the withheld amount of Rs. 58,82,594/-, a sum of Rs. 12,08,780/- was released on 14.02.2022 and the remaining amount of Rs. 46,73,814/- was to be cleared. Despite such acknowledgment and assurances, the remaining amount was not released. Subsequently, on 22.11.2022, the respondents issued a communication stating that further payment was withheld on account of alleged non-compliance of GST requirements and called upon the applicant to execute an indemnity bond in favour of the respondent.

7. As disputes arose between the parties and in terms of Clause 10 of the agreement providing for arbitration the applicant issued a notice dated 06.01.2025 invoking arbitration. As the respondents failed to act upon the said notice, the present application under Section 11(4) of the Arbitration and Conciliation Act, 1996 has been filed for appointment of an arbitrator.

8. Learned counsel for the applicant submits that once the agreement contains an arbitration clause and disputes have arisen between the parties, the applicant is entitled to appointment of an arbitrator. It is further submitted that withholding of legitimate dues gives rise to an arbitrable dispute. Reliance has been placed upon the judgment of the Hon'ble Supreme Court in M/s Duro Felguera S.A. vs. M/s

Gangavaram Port Limited.

9. Per contra, learned counsel for the respondents submits that the dispute is not arbitrable as it relates to GST liability which falls within the domain of taxation laws and involves sovereign functions. It is contended that such disputes cannot be adjudicated by an arbitral tribunal. Reliance has been placed on a judgment dated 06.12.2022 in ***ARB.P. No. 746 of 2022, Spectrum Power Generation Limited vs. Gail (India) Limited.***

10. I have considered the submissions advanced by learned counsel for the parties and perused the record.

11. Facts are not in dispute to the extent that work orders were issued, work was executed and part payment has been made. The controversy essentially revolves around withholding of the balance amount on the ground of GST- related compliance. Facts are not in issue. It is not disputed that work orders were issued by the respondents in favour of the applicant for execution of works. It is further not in dispute that an agreement/contract was executed between the respondents on one hand and the applicant on the other on 25.04.2022.

12. Clause 10 of the said agreement dated 25.04.2022 reads as under:-

"In the event of any disputes arising out of this order, the parties hereto agree that the matter shall be referred to the CEO, Soma Indus Varanasi Aurangabad Tollway Pvt. Ltd. (SIVATPL) for his decision. If the dispute is not settled amicably at CEO Level, the same shall be referred for arbitration by a 'Sole Arbitrator' agreed upon by both the parties. The arbitration will be governed by the Arbitration and Conciliation Act, 2005."

13. The bare looking of the Clause 10 of the agreement/contract dated 25.4.2022 would go to show that in

the event of any dispute arising out of the contract, the parties shall first attempt to resolve the matter amicably through the Chief Executive Officer of Soma Indus (Project) Private Limited and in case the dispute is not settled, the same shall be referred to arbitration by a sole arbitrator mutually agreed upon by the parties, in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Thus, the existence of the arbitration agreement between the parties is not in dispute. The only objection raised on behalf of the respondents is that the disputes are not arbitrable as they are inseparably connected with taxation issues, particularly GST liability.

14. In order to address the said objection, it is necessary to examine the stand taken by the respondents. The respondents contend that under the work orders, the applicant is under an obligation to comply with GST requirements and that the withheld amount pertains to non-compliance of GST. It is further submitted that an arbitral tribunal is not vested with jurisdiction to adjudicate upon taxation matters, including issues relating to input tax credit (ITC), reimbursement, or indemnification of tax liability. The issue relating to arbitrability has been considered by the Hon'ble Supreme Court in Vidya Drolia vs. Durga Trading Corporation (2021) 2 SCC (1) following was observed:-

"50. Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject-matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as

distinguished from commercial activities, economic adventures and welfare activities. Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.

138. In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab (P) Ltd. (National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267: (2009) 1 SCC (Civ) 117] The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of

2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

15. Further, the Delhi High Court in Spectrum Power Generation Limited vs. Gail (India) Limited has considered a similar issue involving contractual disputes relating to GST liability and has observed that where the dispute arises out of contractual obligations, even if it has some connection with taxation, the same may still be arbitrable. The paragraph nos. 16 and 17 of the said judgement may be read as under:-

"16. However, it is relevant to bear in mind that the petitioner

here does not assail, question or dispute a tax that may have been imposed upon it by the State in exercise of its sovereign or statutory powers. The issue which is essentially raised is whether the GST/VAT liability which came to be placed upon GAIL could be passed onto the petitioner or it be held liable to reimburse GAIL to the aforesaid extent under the agreement. The challenge is raised solely on the anvil of Article 10.6. The petitioner asserts that it was only liable to bear such taxes as may have been shouldered by GAIL while purchasing gas from any supplier or any tax that may have been levied or stood attracted at the time when natural gas was sold to the petitioner. Viewed in the aforesaid light, it is manifest that the issue does not relate to the taxing power of the State or any action taken or an order made in exercise thereof.

17. The contention that the dispute raised is non-arbitrable on the aforesaid ground is thus negated. The Court arrives at this conclusion and has chosen to return the findings aforesaid since the challenge which was raised neither gave rise to a disputed or a debatable issue. It would also not fall foul in the category of a good or a reasonably arguable case. The contention urged is wholly specious and would thus not merit the referral being either stalled or deferred."

16. From the law laid down in the aforesaid decisions, it is evident that disputes relating to sovereign functions such as imposition or levy of tax are non-arbitrable. However, disputes arising out of contractual obligations between parties, even if they involve issues of tax reimbursement or compliance, do not fall within the category of non-arbitrable disputes.

17. In the present case, neither party is questioning the validity or legality of levy of GST. The dispute is essentially with regard to payment of the contractual dues, which has been withheld by the respondents on the ground of alleged non-compliance of GST obligations by the applicant.

18. In the opinion of this Court, such a dispute is contractual in nature and is, therefore, arbitrable. It is always open to the respondents to raise their defence or counterclaim before the arbitral tribunal with regard to GST compliance or any consequential liability. Moreover, at this stage, while exercising jurisdiction under Section 11(4) of the Arbitration and Conciliation Act, 1996, this Court is not required to go into the merits of the dispute. The scope is limited to examining the existence of an arbitration agreement and whether the dispute is prima facie arbitrable.

19. In *Duro Felguera S.A. vs. Gangavaram Port Limited*, the Hon'ble Supreme Court has observed in paragraph no. 13 as under:-

"13. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected."

20. Therefore, the arbitration application is **allowed**.

21. Accordingly, this Court proposes the name of Hon'ble Mr. Justice Shishir Kumar (Retd.) for being appointed as an arbitrator. His address is '**Flat No. B/210, 10th floor, Sunshine Heights 21/1, Calvin Road, Dr. Ram Manohar Lohia Marg, Prayagraj**' Mobile no. '**9415235116**'.

22. Let the consent of Hon'ble Mr. Justice Shishir Kumar (Retd.) be obtained by the office in terms of the provisions

contained in Section 11(8) read with Section 12(1) of the Act by sending a letter to him.

23. In case, the proposed arbitrator does not give his consent or makes disclosure in terms of Sub-section (1) of Section 12, the application will be listed before the Court for limited purpose for proposing name of arbitrator. The arbitrator shall be entitled to fee and expenses as per IVth Schedule of the Act.

(Vikas Budhwar,J.)

March 17, 2026
Sushma