IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).6726-6729 OF 2019
(Arising out of SLP(C) No(s). 1436-1439 of 2019)

M/S. TULSI NARAYAN GARG,
SARAWAGI MOHALLA, SHEOPUR
THROUGH ITS PROPRIETOR
TULSI NARAYAN GARG .....APPELLANT(S)

VERSUS

THE M.P. ROAD DEVELOPMENT
AUTHORITY, BHOPAL & OTHERS .....RESPONDENT(S)

O R D E R

Rastogi, J.

1. The instant appeals are directed against the common judgment dated 26th February, 2018 and order in review petitions dated 7th September, 2018 of the High Court of Madhya Pradesh filed at the instance of the present appellant quantifying the liquidated damages assessed by the officer of the respondents to be recoverable pending adjudication before the Arbitral Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran

Adhiniyam, 1983(hereinafter being referred to as "Adhiniyam, 1983").

2. The facts in brief culled out from the record and relevant for the purpose are that the appellant is a proprietorship firm registered as Class 'A' contractor. In response to the notice inviting tender for construction and maintenance of rural road under the Pradhan Mantri Gram Sadak Yojna for package no. 3712 and package no. 3714 consisting of two roads(i.e. constructed one way relating to Vijaypur to Chota Kheda way (2 km) and second, relating to Sonthava to Advad way (7.750 km) change 5240 meter in DPR slab culvert and protection wall, tender was awarded to the appellant and in furtherance, the work order was issued on 6th October, 2008 and pursuant thereto, agreement no. 11 and agreement no. 12 was executed between the appellant and the first respondent. As per the work order, the date of completion was twelve months, i.e. till 21st October, 2009. The first respondent, invoking clause 52 of the work agreement nos. 11 and 12, terminated the agreement for slow progress of work on 7th October, 2013 and 27th October, 2014 respectively.

3. The first respondent invoking clause 44.1 and 53.1 of the agreement served a notice to the appellant on 9th October, 2015 for determining the liquidated damages that came to be challenged by the appellant by filing of a Writ Petition No. 7003 of 2015 before the High Court of Madhya Pradesh. In the first instance, that writ petition came to be disposed of vide order dated 6th September, 2016 with liberty to the appellant to challenge order of termination before the Arbitral Tribunal under the provisions of the Adhiniyam, 1983. In terms of the liberty afforded, the appellant filed a reference petition against the termination of agreement and damages claimed by the first respondent before the Madhya Pradesh Arbitral Tribunal under Section 7 of the Adhiniyam, 1983 and as informed to this Court that is still pending adjudication before the Arbitral Tribunal.

4. Pending adjudication before the Arbitral Tribunal, the first respondent issued notice to the appellant dated 17th March, 2017 for package 3712 and package 3714 to recover alleged damages. In furtherance thereof, respondent no. 2(General Manager of the 1st respondent) issued the communication in which he asked respondent no. 3(Collector, Sheopur, M.P.) to take steps in

respect of agreement no. 11 and agreement no. 12 towards alleged liquidation damages as arrears of land revenue for the aforesaid packages that came to be challenged by the appellant by filing the Writ Petition Nos. 4087 and 4088 of 2017 and it was specifically stated in Para XIX of the petition indicating that what has been claimed by the respondents as liquidated damages is sub judice before the Arbitral Tribunal and action taken by the respondents pending arbitral proceedings is unwarranted.

5. After hearing the parties, petitions came to be dismissed by the High Court vide judgment impugned dated 26th February, 2018 on the premise that General Manager of the 1st respondent has initiated the proceedings under clause 53.1 of the agreement and once the liquidated damages have been quantified by the authority, the action cannot be faulted with for initiating the recovery proceedings distinguishing the judgment of the full Bench of the Madhya Pradesh High Court on which the reliance was placed by the appellant in ***B.B. Verma and another* Vs. *State of M.P. and another*** AIR 2008 MP 202(FB) which is a subject matter of challenge in the instant appeals.

6. The main thrust of the submission of learned counsel for the appellant is that when the alleged liquidated damages quantified by the General Manager of the 1st respondent are pending adjudication before the Arbitral Tribunal, the further action which has been initiated for making recovery pursuant to the notice served as an arrears of land revenue is unwarranted and in support of his submission, reliance has been placed not only on the full Bench judgment of the High Court of Madhya Pradesh but also on the Order of this Court passed in Civil Appeal No. 5169 of 2016 dated 13th May, 2016 and taking assistance thereof, learned counsel submits that the recovery proceedings initiated by the respondents pursuant to the damages quantified invoking clause 53.1 of the contract pending adjudication are unjustified and such action initiated deserves to be quashed and set aside. However, what being claimed by the respondents will always be open to be examined by the Arbitral Tribunal and obviously the outcome will be binding on the parties subject to their rights available under the law.

7. Per contra, learned counsel for the respondents, on the other hand, while supporting the finding of the impugned

judgment submits that once the adjudication has been made by the General Manager of the Authority after the show cause notice being served and liquidated damages having been quantified, no error was committed by the respondents in initiating the recovery proceedings and the judgment on which the appellant has placed reliance of which a reference has been made has no application in the instant cases and this what the High Court has observed in the impugned judgment needs no interference.

8. We have considered the submissions made by the parties and with their assistance perused the material available on record.

9. It is not disputed that the termination of the agreement no. 11 and agreement no. 12 and consequential liquidated damages claimed by the respondents have been questioned by the appellant in reference petitions filed under Section 7 of the Adhiniyam, 1983 on 5th October, 2016 and 20th March 2017 respectively and both the references are pending adjudication before the Arbitral Tribunal where the dispute in reference to the claim of liquidated damages of the respondents is yet to the

adjudicated. It will be appropriate, at this stage, to take note of the clauses of the agreement relevant for the present purpose which are extracted as under:-

> "24. Dispute Redressal System
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> If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works thereunder, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of 45 days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Work is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.
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> 25. Arbitration
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> Either party will have the right of appeal against the decision of the competent authority, nominated under Clause 24, to the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983 provided the amount of claim is more than Rs. 50,000/-.
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> 44. Liquidated Damages
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> 44.1 The Contractor shall pay liquidated damages to the Employer at the rate per week or part thereof stated in the Contract Data for the period that the Completion Data is later than the Intended Completion Date. Liquidated damages at the same rate shall be withheld if the Contractor fails to achieve the milestones prescribed in the Contract Data. However,

in case the Contractor achieves the next milestone the amount of the liquidated damages already withheld shall be restored to the Contractor by adjustment in the next payment certificate. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages shall not affect the Contractor's other liabilities.

53. Payment upon Termination

53.1 If the contract is terminated because of a fundamental breach of contract by the contractor, the Engineer shall issue a certificate for value of the work done and materials ordered less liquidated damages, if any, less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed as indicated in the Contract Data. If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be recovered from the security deposit and performance security, if any amount is still left un-recovered it will be a debt payable to the Employer."

10. In terms of the clauses 44.1 read with 53.1 of the agreement, it emerges that if there are liquidated damages to be payable upon termination of contract by the contractor, inbuilt redressal system has been provided under Clause 24 which, in the instant cases, was invoked through the General Manager of the 1st respondent and the party aggrieved thereof can certainly approach to the Arbitral Tribunal constituted under the Adhiniyam, 1983 in terms of clause 25 of the agreement.

11. Indisputedly, in the instant cases, for both the two agreement nos. 11 and 12, the general manager of the 1st respondent quantified the liquidated damages as alleged and that has been the subject matter of challenge raised by the appellant in the reference petitions filed before the Arbitral Tribunal under Section 7 of the Adhiniyam, 1983 which is still pending adjudication and once the remedial mechanism provided under the Adhiniyam, 1983 has been availed by the appellant which is pending adjudication, the respondents were not justified in initiating the recovery proceedings without awaiting the outcome of the arbitral proceedings. It is the settled principles of law that a party to an agreement cannot be an arbiter in his own cause.

12. This exposition of law has been considered by this Court in ***State of Karnataka*** **Vs.** ***Shree Rameshwara Rice Mills Thirthahalli*** 1987(2) SCC 160. Relevant para 7 is extracted as under:-

> **"7.** On a consideration of the matter we find ourselves unable to accept the contentions of Mr Iyenger. The terms of clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The

> crucial words in clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If is was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12."
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> (emphasis supplied)

13. Taking assistance of the judgment of this Court, the full Bench of the Madhya Pradesh High Court also in the case reported in ***B.B. Verma and another***(supra) observed that the

Government or its officers were not justified to initiate recovery proceedings which is disputed by the contractor as payable under the contract by the State Government pending decision of the Arbitral Tribunal constituted under the Adhiniyam, 1983. It goes without saying that when the contractor disputes the damages claimed by the Authority or any Officer in its behalf, such an amount cannot be said to be due under the contract and cannot be recovered as arrear of land revenue until adjudicated in the pending reference before the Arbitral Tribunal.

14. In ***Virendra Sharma*** **Vs.** ***State of Madhya Pradesh and Ors.*** (Civil Appeal No. 5169 of 2016 decided on 13th May, 2016), in the similar circumstances, this Court has considered the terms and conditions of the contract of which a reference has been made where the contract was terminated on the ground that the contractor could not complete the work within the stipulated period and the department suffered huge losses. When the demand was raised by the department that was challenged by the contractor invoking arbitration and pending adjudication, the recovery which was invoked by the respondents was not

considered to be legally sustainable in law. The extract of the order is as under:-

O R D E R

> "Leave granted.
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> Admitted facts are that the appellant was awarded a contract by the respondents. The contract was terminated on the ground that the appellant could not complete the work within the stipulated period. The Superintendent Engineer also arrived at a conclusion that because of the alleged breach of contract by the appellant, Department had suffered loss and the amount of such loss be returned. The appellant did not agree with the same and as per the procedure prescribed in the contract, invoked arbitration.
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> Admittedly, the matter is before the Arbitrator and no adjudication has taken place. It has yet to determine as to whether the decision of the Superintendent Engineer that the Department has suffered the loss, is correct or not.
>
> In these circumstances, inasmuch as the amount becomes due and payable only after adjudication, we are of the view that the recovery of the said amount cannot be made invoking the procedure of Land Revenue Act. The recovery orders are, accordingly, set aside. It would, however, be open to the Department to take further steps only after the Award is rendered by the Arbitrator depending upon the outcome thereof.
>
> The appeal stands disposed of."

15. We are also of the considered view that once the dispute is pending adjudication before the Arbitral Tribunal constituted

under the Adhiniyam, 1983 in terms of clause 25 of the agreement, the respondent, in the facts and circumstances, was not justified to raise demand on termination of contract claiming liquidated damages and the respondent cannot become an arbiter in its own cause and unless the dispute is settled by a procedure prescribed under the law, the respondents would not be held to be justified in initiating recovery proceedings invoking the procedure under the Land Revenue Act.

16. The submission of the learned counsel for the respondents that the liquidated damages were determined by the General Manager of the 1st respondent after adjudication in terms of clause 24 of the agreement and accordingly, the respondents were justified in initiating recovery proceedings is without substance for the reason that clause 24 of the agreement provides an inbuilt mechanism but the decision of the competent authority is to be examined invoking clause 25 for arbitration by the Arbitral Tribunal on a reference if made under Section 7 of the Adhiniyam, 1983.

17. Indisputedly, in the instant cases, the reference petition is pending before the Arbitral Tribunal in reference to the liquidated damages claimed by the respondents. As long as the dispute

remained pending adjudication, it was not justified on the part of the respondents to initiate recovery proceedings invoking the procedure under the Land Revenue Act without awaiting the outcome of the arbitral proceedings.

18. Consequently, the appeals succeed and are accordingly allowed. The judgments of the High Court impugned dated 26th February, 2018 & 7th September, 2018 are hereby quashed and set aside. It is further made clear that what has been observed by us is only for the purpose of disposal of the instant appeals and the Arbitral Tribunal may not be influenced/inhibited by the observations made and decide the pending reference petition independently in accordance with law. No costs.

19. Pending application(s), if any, stand disposed of.

.....J.
(N.V. RAMANA)

.....J.
(INDIRA BANERJEE)

.....J.
(AJAY RASTOGI)

NEW DELHI
30th August, 2019