

# Dispute Resolution Hotline

May 26, 2011

## EXISTENCE OF AN ARBITRATION CLAUSE IS NOT A BAR TO THE HIGH COURT WRIT JURISDICTION

Supreme Court of India ruled that existence of an arbitration clause is not a bar to the writ jurisdiction of the High Courts and the Supreme Court.

### INTRODUCTION:

The Supreme Court of India ("Supreme Court") in the case of *Union of India & Ors. ("Petitioners") v Tania Construction Pvt. Ltd ("Respondent")*<sup>1</sup> recently ruled that existence of an arbitration clause is not a bar to the writ jurisdiction of the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively.

### FACTS:

The Respondent, filed writ petition before the Patna High Court, against the Petitioners, *inter alia*, for the issuance of a writ in the nature of Certiorari for quashing the order dated 18th August, 2008, passed by the Deputy Chief Engineer (Construction), Ganga Rail Bridge, East Central Railway, Dighaghat, Patna, calling upon the Respondent to execute the enlarged/extended quantity of the contract work pursuant to a Tender. The Respondent further prayed for a writ in the nature of Mandamus directing the Petitioners herein to let it complete the reduced quantity of work relating to the construction of the Rail Over-Bridge at Bailey Road, which did not include the additional work in respect of the extended portion of the Viaduct and to close the contract and, thereafter, to make payment for the contract work which it had executed pursuant to the aforesaid Tender.

The Single Judge bench of Patna High Court accepted the case made out by the Respondent, holding that there was no breach of the agreement entered into between the Petitioners and the Respondent, since it was the Petitioners themselves who had altered the agreement by separately tendering the extended work. The High Court observed that consequently the entire work could not be thrust upon the Respondent and the Railways was free to get the Viaduct constructed separately by any other contractor, as it had contemplated earlier. The High Court further observed that since the Respondent was ready to do the balance work from the left-over tender, the rescinding of the entire work by the Railways and to re-tender the entire block could not certainly be at the risk and cost of the Respondent. The High Court also observed that the Respondent could not be saddled with the cost of work which it had never undertaken to execute. On such findings, the Writ Petition was allowed and the Railways were advised to expeditiously clear the payments of the Respondent in respect of the work already completed by it.

The matter was then taken in appeal to the Division Bench of the High Court by the Petitioners. The Division Bench by its judgment and order dated 29th July, 2009, upheld the judgment of the learned Single Judge and dismissed the Appeal. It is against the said order of the Division Bench dismissing the appeal filed by the Petitioners filed a Special Leave Petition in the Supreme Court.

### ISSUES:

It was contended by the Petitioners based on Section 5<sup>2</sup> of the Arbitration and Conciliation Act, 1996 ("the Act"), that the agreement between the parties provided for arbitration in respect of all disputes and differences of any kind arising out of or in connection with the contract whether during the progress of work or after its completion and whether before or after the termination of the contract. It was urged that in view of the said arbitration clause, the Writ Court was not competent to decide the issue involved in the dispute which had been raised by the Respondent.

The Respondent submitted that this contention of the Petitioners was devoid of substance on account of the various decisions of the Supreme Court holding that an alternate remedy did not place any fetters on the powers of the High Court under Article 226 of the Constitution. In support of his aforesaid submissions the Respondent relied and referred to the decisions of the Supreme Court in *Harbanslal Sahnia vs. Indian Oil Corporation Ltd. [(2003) 2 SCC 107]*<sup>3</sup> and *Modern Steel Industries vs. State of U.P. and others [(2001) 10 SCC 491]*.<sup>4</sup>

Reference was also made to the decision of this Court in *Whirlpool Corporation vs. Registrar of Trade Marks [(1998) 8 SCC 1]*; *National Sample Survey Organisation and Another vs. Champa Properties Limited and Another [(2009) 14 SCC 451]* and *Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Another [(2010) 3 SCC 321]*, where similar views had been expressed.

### JUDGMENT:

On the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, the Supreme Court held that it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court. Relying of the various cases relied by the respondent the court came to the conclusion that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

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ANALYSIS

Though the argument of the Petitioners revolved around the statutory provisions under Sec. 5 of the Act, the reasoning of the Court was centered on an examination of the nature of the bar created to Writ Remedy by the availability of an alternative efficacious remedy.

The Court appears to have assumed that a limitation on writ jurisdiction by the existence of an arbitration clause is only to the extent that an Arbitration Clause qualifies as alternative efficacious remedy and not of a statutory bar to Writ Jurisdiction.

1 [2011 (4) SCALE 745]

2 Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." Further, Section 8 (1) states: "A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration

3 The Supreme Court observed in this case that that the Rule of exclusion of writ jurisdiction by availability of an alternative remedy, was a rule of discretion and not one of compulsion and there could be contingencies in which the High Court exercised its jurisdiction inspite of availability of an alternative remedy.

4 The Supreme Court here held that the High Court ought not to have dismissed the writ petition requiring the Appellant therein to take recourse to arbitration proceedings, particularly when the *vires* of a statutory provision was not in issue.

- Prateek Bagaria & Vyapak Desai

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