



ELP Arbitration: Update



CASE COMMENT: ORISSA HIGH COURT'S JUDGEMENT IN OSRTC v. ABTPL, 2021 SCC OnLine Ori 898

INTRODUCTION

In *Odisha State Road Transport Corporation v. ARSS Bus Terminal Pvt. Ltd.*¹, the Respondent was able to secure a dismissal of a writ filed before the Orissa High Court (**the Court**) under Article 227 of the Constitution of India challenging an order of the arbitral tribunal that had rejected a jurisdictional challenge under Section 16 of the Arbitration and Conciliation Act, 1996 (**the Act**). [The judgement is available here.](#)

BACKGROUND

In December 2009, the Commerce and Transport Department of Government of Odisha invited tenders (**RFP**) for the development of Baramunda Bus Terminal, Bhubaneswar. ARSS Infrastructure Projects Limited (**ARSS Infra**) was selected as the preferred bidder which then set up ARSS Bus Terminals Pvt. Ltd. (**ABTPL**), the Respondent, as an SPV. On March 16, 2011, a Concession Agreement came to be executed between Orissa State Road Transport Corporation Ltd. (**OSRTC**), ABTPL and ARSS Infra (**Concession Agreement**). The Concession Agreement contained an arbitration clause.

After work had begun, the validity of the Concession Agreement was challenged before the Court by means of a Public Interest Litigation (**PIL**) filed by a third party against OSRTC and ABTPL. By an order dated December 20, 2012 (**Writ Order**), the Court quashed the Concession Agreement on various grounds including that it was executed sans the signature of the Governor which was in contravention of Article 299 of the Constitution. The Court also found that the Concession Agreement was in violation of Section 23 of the Indian Contract Act, 1972 (**Contract Act**). The Writ Order was not challenged.

As OSRTC refused to compensate it for work performed, ABTPL invoked the arbitration clause contained in the Concession Agreement. Since OSRTC refused to appoint an arbitrator, ABTPL was constrained to file an application before the Court under Section 11 of the Act for appointment of the arbitral tribunal. OSRTC took the contention that the Concession

¹ Judgment dated 16.07.2021 in W.P. (C) No. 2472 of 2021; 2021 SCC OnLine Ori 898

Agreement being declared *void ab initio*, the arbitration clause therein did not survive. Vide its order dated 15.11.2019, the Court proceeded to appoint the arbitral tribunal (**S. 11 Order**) holding that the arbitration agreement existed for the purposes of appointment of an arbitrator. While the S. 11 Order was challenged by OSRTC through a Special Leave Petition (**SLP**) before the Hon'ble Supreme Court, the said SLP was subsequently dismissed in terms of the order dated June 10, 2020 (**SLP Order**). The Supreme Court did however permit OSRTC to take up the issue through a jurisdictional challenge under Section 16 of the Act.

In the ensuing arbitral proceedings initiated by ABTPL, OSRTC preferred an application under Section 16(2) of the Act challenging the jurisdiction of the tribunal (**S. 16 Application**) on various grounds including (**a**) the Concession Agreement having been declared *void ab initio*, the arbitration agreement did not survive and (**b**) the Concession Agreement not being stamped in accordance with law, the arbitration agreement did not exist. However, the said application of the OSRTC was ultimately rejected by the arbitral tribunal vide its order dated December 11, 2020 (**S. 16 Order**). Aggrieved by the S. 16 Order, OSRTC preferred the present writ petition under Article 227 of the Constitution.

ISSUES

Taking into consideration the respective contentions raised by the parties, the Court framed the following issues to decide the present writ petition:

- i. Whether in view of the Writ Order, the arbitration clause perished along with the Concession Agreement?
- ii. Whether the arbitration agreement was chargeable with stamp duty and if so whether sufficient stamp duty was paid?
- iii. Whether the writ petition under Article 227 was maintainable?

CONTENTIONS OF THE PARTIES

Existence of arbitration agreement

OSRTC contended that since the Concession Agreement was declared *void ab initio* by the Writ Order, the arbitration clause therein perished. It was argued that the Court in the Writ Order had held that OSRTC had no authority to execute the Concession Agreement and the execution thereof was violative of Article 299 of the Constitution of India and Section 23 of the Contract Act. Thus, there was no signature or agreement in writing and therefore the Concession Agreement did not exist at all. It was further contended that the aforesaid findings of the Writ Court extended to and impeached the arbitration clause contained in the Concession Agreement. OSRTC also contended that an arbitration agreement must fulfil the requirements of a contract under the Contract Act. As the Concession Agreement was held to be unenforceable on account of being void under Section 23 of the Contract Act, the arbitration clause therein was also unenforceable. OSRTC contended that the invalidity of the arbitration agreement is governed under the principle of *ex nihilo nil fit*, which means '*nothing comes out of nothing*'.

Relying upon the English case of *Fili Shipping Co. Ltd. and Ors. v. Premium Nafta Products Ltd. and Ors. (Fili Shipping Co. Limited)*,² OSRTC also contended that when the agent had no authority to conclude an agreement on behalf of the principal, both the main agreement and the arbitration agreement contained therein stood impugned. Thereafter, on the basis of the decisions in *Union of India v. Kishorilal Gupta & Bros.*³ (**Kishorilal Gupta**) and *Jaikishan Das Mull v. Luchhimirain Kanoria & Co.*⁴, OSRTC also argued that howsoever comprehensive the terms of the arbitration clause may be, the existence of the contract is a necessary condition for its operation.

OSRTC further contended that the doctrine of severability and separability of the arbitration agreement is only applicable when a determination is required by an arbitral tribunal, save and except where there is already a prior decision by a court quashing the agreement itself.

² (2007) UKHL 40

³ AIR 1959 SC 1362

⁴ AIR 1974 SC 1579

In response to OSRTC's said contentions, ABTPL contended that the Writ Order had not quashed the arbitration agreement but merely the Concession Agreement. ABTPL contended that the S. 11 order and the SLP Order had both rejected the arguments being raised by OSRTC, and which arguments had further been independently rejected by the arbitral tribunal. ABTPL argued that an arbitration agreement is separable from the substantive contract in which it is contained and even if the substantive contract is declared null and void, that would not automatically render the arbitration agreement as null and void. Under the principle of *kompetenz-kompetenz*, which has been duly recognized under Indian law, the arbitration clause is an agreement independent and separate from the Concession Agreement and the same is evident from Section 16(1)(a) and Section 16(1)(b) of the Act of the Act.⁵

Repelling the argument of OSRTC that since the Concession Agreement was signed by a person not having authority under Article 299 of the Constitution, the arbitration agreement would also automatically perish, it was contended by ABTPL that an arbitration agreement only needs to meet the requirements as laid down in Section 7 of the Act which did not require signature as long as the parties were *consensus ad idem*.⁶ Further, Section 7 of the Act provides for arbitration of disputes in respect of defined legal relationship '*whether contractual or not*'. Hence, ABTPL contended that the arbitration agreement could be pressed into service even if there was no contractual relationship remaining. It was also contended by ABTPL that the arbitration agreement was in fact signed by a person having authority to bind OSRTC and was part and parcel of the RFP and unconditionally accepted by both parties.

ABTPL also contended that the decision in *Kishorilal Gupta* was inapplicable as it was rendered under the erstwhile law of arbitration in India and further that in *National Insurance Company Limited v. Boghara Polyfab Private Limited*⁷ (**Boghara Polyfab**) the Supreme Court had itself stated that the relevant part of the ratio in *Kishorilal Gupta* was now subject to S. 16(1)(b) of the Act which states that a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Maintainability of the writ petition

ABTPL contended that by and under Section 16(6) of the Act, OSRTC had an efficacious statutory remedy under Section 34 of the Act available to it and could therefore challenge the S. 16 Order only along with the arbitral award.⁸ ABTPL pressed that all the grounds taken in the writ petition were in reality, statutory grounds available under Section 34 of the Act to challenge the arbitral award and thus the present writ petition under Article 227 was an attempt to disguise an untimely and premature Section 34 challenge. As an efficacious statutory remedy was available, the writ petition ought not to be entertained by the Court.

OSRTC however, relied on the judgements in *Punjab State Power Corporation Ltd. v. Emta Coal Ltd and Anr.*⁹ (**Emta Coal**), *Deep Industries Limited & Anr. v. Oil and Natural Gas Corporation Ltd. & Anr.*¹⁰ (**Deep Industries**), and *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. & Anr.*¹¹ (**Bhaven Construction**) to argue that an order of the arbitral tribunal could be challenged under Article 227 of the Constitution in rare and exceptional cases, where the order was patently illegal and perverse i.e. when there existed a "*patent lack of jurisdiction*". As per OSRTC, the instant case fell under the said category as the tribunal did not appreciate the Writ Order, wherein this Court quashed the main Concession Agreement which contained the arbitration clause.

⁵ In this respect, ABTPL placed reliance upon the decisions in *National Insurance Company Limited v. Boghara Polyfab Private Limited*, (2016) 10 SCC 813, *Ayyasamy v. A. Paramasivam & Others* (2016) 10 SCC 386 and *Sasan Power Limited v. North American Coal Corporation (India) Private Ltd.* (2016) 10 SCC 813.

⁶ *Govind Rubber Limited v. Louis Dreyfus Commodities Asia Private Limited*, (2015) 13 SCC 477; See also *Caravel Shipping Services Private Limited v. Premier Sea Foods Exim Private Limited*, (2019) 11 SCC 461.

⁷ (2016) 10 SCC 813

⁸ In support of the said contention, ABTPL relied upon the decision in *SBP & Co. v. Patel Engineering Ltd and Anr.*, (2005) 8 SCC 618

⁹ 2020 SCC OnLine SC 1165

¹⁰ (2020) 15 SCC 706

¹¹ 2021 SCC OnLine SC 8

ABTPL responded to this argument by presenting an analysis of *Bhaven Construction*, *Deep Industries* and *Emta Coal* and contending that for there to be “*patent lack of jurisdiction*”, OSRTC had to meet the high threshold of there being a lack of jurisdiction which required no argument whatsoever, a case of *mala fides* or perversity. This, as per ABTPL, OSRTC had failed to do.

FINDINGS OF THE COURT

On existence of arbitration agreement

The Court rejected OSRTC’s contention stating that an arbitration agreement need not be signed separately, if it otherwise satisfied Section 7(4)(b) of the Act. The Court found that the arbitration agreement was contained in the RFP and when the bid was accepted and the Letter of Acceptance issued, a legal relationship was created, whether contractual or not. Subsequently, the Concession Agreement was executed which was then found under the Writ Order to be violative of Article 299 of the Constitution as it lacked the signature of the Governor. However, the Writ Order did not quash the arbitration agreement. Further, the Court held that it was not OSRTC’s case that the arbitration agreement was not signed. Instead OSRTC’s argument was that the invalidity attached to the Concession Agreement would impeach the arbitration clause. As the arbitration agreement was in fact executed by person having authority to bind OSRTC, it was valid and existent.

The Court then placed reliance upon ratio of *National Insurance Company Limited v. Bophara Polyfab Private Limited*,¹² *A. Ayyasamy v. A. Paramasivam & Others*,¹³ *Sasan Power Limited v. North American Coal Corporation (India) Private Ltd.*,¹⁴ *Fili Shipping Co. Ltd* and *M/s N.N. Global Mercantile Private Ltd.* and found that an arbitration agreement which formed part of a substantive contract did not automatically perish with the substantive contract itself unless there existed grounds which related directly to the arbitration agreement being void/voidable. While the Writ Order stated that the Concession Agreement was *void ab initio* and opposed to public policy under Section 23 of the Contract Act, the Court found that there existed nothing on record to show that the arbitration clause was *void ab initio*. The Court agreed with ABTPL that although in *Kishorilal Gupta* it had been held that an arbitration agreement in a contract may perish if the contract may be non-est in the sense that it never came legally into existence or it was *void ab initio*, this was modified in light of the discussion in *Bophara Polyfab* which stated that under S. 16(1)(b) of the Act, a decision that the contract is null and void would not entail *ipso jure* the invalidity of the arbitration clause.

The Court agreed that the S. 11 Order and the SLP Order had both found that *prima facie* an arbitration agreement existed. Even the arbitral tribunal had arrived at this decision after great deliberation and thus the Court found no reason to interfere in the S. 16 Order.

On insufficient stamping of the Concession Agreement

The Court rejected OSRTC’s arguments since OSRTC had failed to show *firstly* any specific provision which required the arbitration clause to be stamped separately when it was a part of the Concession Agreement and *secondly* that the stamp duty of INR 100 already paid on the Concession Agreement was insufficient.

On maintainability of the writ petition

The Court perused the petition and found that most of the grounds for the writ were in fact grounds for challenging an arbitral award under Section 34 of the Act. The Court found that as per the decision in *Emta Coal Ltd.*, a petition under Article 227 would be maintainable only when the S. 16 Order suffered from a “*patent lack of inherent jurisdiction*” which required no argument. When lengthy arguments were made in challenging the Impugned Order, it could not be said that the S. 16 Order suffered from a patent lack of inherent jurisdiction. The Court further elaborated that entertaining an application under Article 227 of the Constitution would result in piecemeal trial of the arbitration proceeding and all the grounds raised by OSRTC could have been raised in a petition under Section 34 of the Act after the award was made. Law on maintainability of writs being well settled, the Court held the present writ petition to be not maintainable for the

¹² (2009) 1 SCC 267

¹³ (2016) 10 SCC 386

¹⁴ (2016) 10 SCC 813

existence of an alternative and efficacious remedy. The Court also held that the plea of *mala fides* was in fact taken as an afterthought in the rejoinder by OSRTC.

In view of the reasons mentioned above, the Court dismissed the writ petition as being not maintainable and devoid of merits.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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