

Writ Jurisdiction & Arbitration

Review of a recent Supreme Court
judgment

INTRODUCTION

High Courts usually refrain from exercising jurisdiction in contractual matters particularly where there is an availability of an alternative remedy. The alternative remedy may also include invocation of an arbitration clause in a commercial contract.

However, availability of an alternative remedy, including existence of an arbitration agreement in a contract, does not prohibit the High Courts from entertaining a writ petition in appropriate cases. This article examines a recent Supreme Court decision in *Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power And Industrial Solutions Limited & Anr.*¹ where the Court upheld the decision of the Allahabad High Court and elucidated established principles warranting exercise of writ jurisdiction even in circumstances where the contract between the parties may have an arbitration clause.

BRIEF FACTS

The Respondent/CG Power and Industrial Solutions Limited (“CG Power”) entered into a framework agreement with the Petitioner/ Uttar Pradesh Power Transmission Corporation Ltd. (“UPPTCL”) for construction of 765/400 KV Substations on turnkey basis, at Unnao, Uttar Pradesh. In terms of the Framework Agreement, the work was split, and covered by four separate contracts. The first contract was for design, engineering, manufacture, testing at works and supply of all required equipment and materials with accessories and auxiliaries; the second contract covered erection, testing and commissioning at site including unloading, handling etc.; the third contract covered all civil works including materials for commissioning and handing over of the Substations and the fourth contract covered operations and maintenance for three years.

CG Power duly performed the first contract under the framework agreement and the bills were also cleared by the UPPTCL. Subsequently, in an audit report, the Accountant General pointed out that labour cess under Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996 (“BOCW Act”) should have been deducted on the part of UPPTCL, from the bills of the contractor. CG Power objected to the same contending that the first contract being a contract for supply of equipments and materials, the same is not covered by BOCW Act and therefore labour cess should not be deducted.

Regardless of the contentions raised by CG Power, UPPTCL discharged the Performance Guarantees furnished by CG Power partially, not discharging the amount to the extent for covering labour cess on the first contract. UPPTCL also issued a letter to CG Power requesting payment of labour cess on pending bills, and in case any amount remained outstanding, such amount was to be deducted by encashment of the Performance Bank Guarantee which was kept to secure the payment of labour cess.

The Allahabad High Court set aside the UPPTCL’s letter mandating payment of labour cess, holding that in the absence of any order for levy and assessment under the BOCW Act recovery could not be made UPPTCL pursuant to an audit objection of CAG. Thereupon, UPPTCL challenged the High Court’s judgment.

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¹ Supreme Court, dated 12.05.2021, 2021 SCC Online SC 383.

ANALYSIS OF THE SUPREME COURT'S DECISION

The Supreme Court upheld the decision of the High Court and dismissed the Special Leave Petition. The Court noted that the first and second contracts which cover all works other than civil works do not involve any construction. The statutory scheme of the BOCW Act excludes a supply contract from within its ambit. Therefore, the first contract would not attract cess under the BOCW Act.

It noted that there is no provision in the contracts between the parties that enables UPPTCL to withhold any amount from the bills raised by the CG Power on UPPTCL towards any taxes, cess or any other statutory dues of the contractor. It held that the UPPTCL's actions in demanding payment of cess including through invocation of bank guarantees solely on the basis of a CAG audit, without any adjudication, is impermissible.

The Supreme Court relied upon its earlier judgment in *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*² wherein it had exercised writ jurisdiction, in spite of existence of an arbitration clause in the agreement, to set aside Indian Oil Corporation's order terminating dealership of the appellant therein. In that case exercise of writ jurisdiction was held to be warranted on the reasoning that there was a breach of fundamental rights and principles of natural justice as the appellant's dealership was terminated for an irrelevant and non-existent cause.

The principles of law in that case were reiterated by the Supreme Court to hold that the High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy particularly:

- "(1) where the writ petition seeks enforcement of a fundamental right;*
- (2) where there is failure of principles of natural justice or*
- (3) where the impugned orders or proceedings are wholly without jurisdiction or*
- (4) the vires of an Act is under challenge."*

The Court noted that in spite of an arbitration clause in the contract, the Court is not debarred from exercising writ jurisdiction in the present case. It noted that UPPTCL acted beyond its jurisdiction and authority in forcibly extracting labour cess from CG Power by withholding dues in respect of other contracts and/or invoking a performance guarantee solely on the basis of a CAG audit even when there was no statutory assessment or levy for the payment of labour cess.

It is also noteworthy that in another previous decision (*Union of India (UOI) and Ors. v. Tania Construction Pvt. Ltd.*³), the Supreme Court had also affirmed exercise of writ jurisdiction by the Patna High Court in spite of the existence of an arbitration clause, to quash the order of Deputy Chief Engineer on the ground that the contractor in the case cannot be made to execute works which it had never agreed to undertake in the first place.

The decision of the Hon'ble Supreme Court in *Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power And Industrial Solutions Limited & Anr.* affirms this established principle and provides parties with an efficacious remedy, particularly where invocation of arbitration clause may not be an appropriate remedy in cases involving breach of fundamental rights, failure of principles of natural justice, redressal against orders passed without jurisdiction and where vires of a legislation itself are under challenge.

² (2003) 2 SCC 107.

³ (2011) 5 SCC 697.