

**IN THE HIGH COURT OF JHARKHAND AT RANCHI**

**W. P. (C) No. 3609 of 2022**

1. The State of Jharkhand
  2. Road Construction Department, Govt. of Jharkhand represented through its Secretary having its office at: Project Building, P.O. Dhurwa, P.S. Dhurwa, Town & Dist: Ranchi, State: Jharkhand
  3. The Executive Engineer, Road Construction Department, Road Division, Jamshedpur, P.O. & P.S: Jamshedpur, District: Singhbhum East
- ... .. **Petitioners**

Versus

1. Society for Affordable Redressal of Disputes (An initiative of NHAI and NHBF) having its registered office at: G-5 & 6, Sector 10, Dwarka, New Delhi-110075.
2. M/s. S. P. Singla Constructions Private Limited a private limited company incorporated under the Indian Companies Act having its registered office at: 1006-1007, 10<sup>th</sup> Floor, Pearls Best Height-I, Netaji Subhash Place, Pitampura, New Delhi-110034.

... .. **Respondents**

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**CORAM: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY**

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For the Petitioners	: Mr. Rajiv Ranjan, A.G. : Mr. Sachin Kumar, A.A.G. II : Ms. Surbhi, Advocate
For the Resp. No. 2	: Mr. Shresth Gautam, Advocate : Mr. Shaishir Divatia, Advocate : Mr. Rajarshi Singh, Advocate

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**05/03.01.2023**

1. Heard the learned counsel for the parties.
2. This writ petition has been filed for the following reliefs: -

*“for issuance of writ of certiorari to quash and cancel the appointment of Hon’ble Mr. Justice V. B. Gupta, Former Judge, High Court of Delhi as sole arbitrator to arbitrate the alleged dispute between the petitioner Road Construction Dept Govt. of Jharkhand on the one hand and the respondent no. 2 on the other as also to quash the communique dated 28.06.2022 sent by the Learned Sole*

*Arbitrator fixing 16.07.2022 as the date of preliminary hearing in the matter.”*

3. Learned Advocate General appearing on behalf of the petitioners has submitted that there was an agreement between the Petitioners and the respondent no.2 containing arbitration clause. However the disputes between the parties were settled through a settlement where the offer made by the respondent no 2 was accepted by the petitioners and consequently the agreement including arbitration clause were closed and ceased to exist by virtue of the settlement. The learned Advocate General further submits that after the settlement, a notice invoking arbitration clause was issued, to which the petitioners had objected, but in spite of that, the matter has been referred for arbitration. The learned Advocate General submits that the reference to arbitration was not through any proceeding under Section 11 of the Arbitration and Conciliation Act,1996 but the respondent no 2 had taken steps for referring the matter for arbitration. The learned Advocate General has submitted that neither any arbitration clause exists after the settlement nor there is any arbitrable dispute in existence and therefore, the entire proceeding before the learned Arbitrator is vitiated. The learned Advocate General has further submitted that the proceeding before the learned Arbitrator has commenced, but the present writ petition has been filed in view of the fact that the invocation of arbitration and the arbitral proceeding itself is not maintainable.

4. The learned Advocate General has relied upon the judgment passed by the Hon'ble Supreme Court reported in *(2021) 5 SCC 671 (Pravin Electricals Private Limited vs. Galaxy Infra and Engineering Private Limited)* to submit that the court has the jurisdiction to look into the existence of arbitration agreement and also existence of any dispute for arbitration. The learned Advocate General has further submitted that the judgment rendered in the case of *Vidya Drolia* has been elaborately considered in the aforesaid judgment. The learned counsel has referred to paragraph 138, 139 and 140 of the judgment passed in the case of *Vidya Drolia* which has been quoted in

the aforesaid judgment passed in the case of *Pravin Electricals Pvt. Ltd (supra)* and submits that the aforesaid aspects of the matter regarding existence of arbitration agreement and existence of arbitrable dispute can be considered by this Court in writ jurisdiction, as no proceeding was ever taken up under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996.

5. The learned Advocate General has further relied upon the judgment passed by the Hon'ble Bombay High Court in Arbitration Application No. 295/2021 in the case of *Vishwajit Sud & Co. vs. L & T Stec JV, Mumbai* decided on 26<sup>th</sup> July, 2021 and has referred to paragraph 19 and 20 of the said judgment to submit that the legal position is that the settlement would discharge the contract by mutual agreement which is a process akin to entering into a contract to discharge the contract by mutual agreement. Such eventuality is well-known in common law as substituted agreement. The learned Advocate General reiterates that in view of the settlement agreement entered into between the parties, neither any dispute, nor any arbitration agreement exists, therefore, the present writ petition be allowed.

6. Learned counsel appearing on behalf of the Respondent No. 2, on the other hand, has opposed the prayer of the petitioner and has submitted that the writ petition itself is not maintainable. The learned counsel submits that the petitioner has a remedy under Section 16 of the Arbitration and Conciliation Act, 1996 for raising any point regarding the arbitrability of the dispute as well as the existence of the arbitration agreement and the Arbitration and Conciliation Act, 1996 has taken care of such issues which are to be decided by the Arbitrator before whom the arbitration proceeding has commenced.

7. The learned counsel has also submitted that though no counter-affidavit has been filed in the present case, but the petitioner has raised certain objections before the learned Arbitrator, but at the same time had prayed for adjournment to await the decision of this Court in this writ petition. The learned counsel has also submitted that such objection regarding existence of arbitration agreement and existence

of arbitrable dispute can be decided by the learned Arbitrator as a preliminary issue and he has no objection to that procedure, but the present writ petition is not maintainable as such issues cannot be decided by this Court in writ jurisdiction.

**8.** In response, learned Advocate General has submitted that in case, this Court is not inclined to decide the aforesaid issues argued by the petitioners in writ jurisdiction, then appropriate observation may be made, so that the points regarding the jurisdiction of the Arbitrator on account of non-existence of arbitration agreement and non-existence of arbitrable dispute may be decided by the learned Arbitrator as a preliminary issue.

**9.** To this, learned counsel for the respondent No. 2 has no objection.

**10.** After hearing the learned counsel for the parties and considering the facts and circumstances of this case, this Court is of the considered view that the present writ petition is not maintainable. This Court finds that it is not in dispute that arbitration proceeding has commenced and notices have already been issued by the learned Arbitrator and the next date before the learned Arbitrator is on 05.01.2023 for certain compliances by the petitioners. This Court is of the considered view that all the points regarding the existence of arbitration agreement or the jurisdiction of the learned Arbitrator or the existence of any arbitrable dispute are to be considered and decided by the learned Arbitrator strictly in accordance with the provisions of Arbitration and Conciliation Act, 1996 and such issues cannot be decided in writ jurisdiction.

**11.** The aforesaid judgments, which have been cited by the learned Advocate General, are relating to appointment of Arbitrator upon an application seeking appointment of arbitrator under Section 11 or referring to arbitration under section 8 of the Arbitration and Conciliation Act, 1996. It is not in dispute that at the time of appointment of arbitrator or referring the matter to arbitration, the court has appropriate jurisdiction to consider certain limited *prima-facie* points, but the present case is not a proceeding under section 11

or section 8 of Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator/ reference to arbitration but is a writ petition raising certain issues when the arbitration proceeding has already commenced. In such circumstances, this Court is of the considered view that the judgments relied upon by the learned Advocate General does not apply to the facts and circumstances of this case and accordingly, no relief, as prayed for by the petitioners, can be granted in the present proceeding.

**12.** It has been held in the judgement passed by the Hon'ble Supreme Court in the judgement reported in *(2012) 5 SCC 214 (Kvaerner Cementation India Limited versus Bajranglal Agarwal and another)* in para 3 and 4 as follows: -

*“3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.*

*4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.”*

**13.** It is sufficient to observe that if any petition in terms of Section 16 of the Arbitration and Conciliation Act, 1996 has been filed or is filed in accordance with the provisions of Section 16, such issue regarding the existence of arbitration agreement or the jurisdiction of the learned Arbitrator etc. which are covered under Section 16 of the Arbitration and Conciliation Act, 1996 be decided as a preliminary issue in accordance with the provisions of the aforesaid Act of 1996.

This observation is being made with the consent of the learned counsel appearing on behalf of the respondent No. 2.

**14.** With the aforesaid observations, this writ petition is disposed of.

**15.** Pending interlocutory application, if any, is closed.

**(Anubha Rawat Choudhary, J.)**

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