



## ELP ARBITRATION UPDATE



**JUDICIAL INTERFERENCE IN ARBITRAL PROCESS BY EXERCISING WRIT JURISDICTION UNDER ARTICLE 226 / 227 OF THE CONSTITUTION, CAN ONLY BE IN CASES OF EXCEPTIONAL RARITY, WHEREIN ONE PARTY IS LEFT REMEDILESS UNDER THE STATUTE OR WHERE A CLEAR 'BAD FAITH' IS SHOWN BY ONE OF THE PARTIES**

***Bhaven Construction through Authorized Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Nigam Ltd. & Anr..<sup>1</sup>***

### **FACTS**

- On 13 February 1991, Sardar Sarovar Narmada Nigam Ltd. (**Respondent No. 1**) entered into a contract with Bhaven Construction (**the Appellant**) to manufacture and supply bricks (**Contract**).
- As certain disputes arose between the parties regarding payments, the Appellant issued a notice dated November 13, 1998, seeking appointment of sole arbitrator in terms of Clause 38 of the Contract.
- The Respondent No. 1, by its replies dated November 23, 1998 and January 04, 1999, did not agree to the Appellant's request on two primary grounds:
  - The arbitration was agreed to be conducted in accordance with the provision of the "Indian Arbitration Act, 1940 or any statutory modification thereof". As Gujarat had subsequently passed the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (**the Gujarat Act**), the disputes between the parties were to be adjudicated in accordance with the aforesaid statute.
  - That the arbitration was time barred, as Clause 38 mandated that neither party was entitled to claim if the arbitrator was not appointed before the expiration of thirty days after the defect liability period.
- Nonetheless, the Appellant proceeded to appoint Respondent No. 2 to act as a sole arbitrator. Aggrieved, the Respondent No. 1 preferred an application under Section 16 of the Arbitration and Conciliation Act, 1996 (**the**

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<sup>1</sup> 2021 SCC ONLINE SC 8

**1996 Act**) disputing the jurisdiction of the sole arbitrator (**Section 16 Application**). On October 20, 2001, the sole arbitrator rejected the said Section 16 Application (**Section 16 Order**).

- Aggrieved by the Section 16 Order, Respondent No. 1 preferred a writ petition under Articles 226 and 227 of the Constitution of India (**Constitution**) before the Gujarat High Court. The Single Judge dismissed the said application on the grounds that the said petition was not maintainable and/or the same was not required to be entertained and the only remedy available to the Respondent No. 1 was to challenge the final award under Section 34 of the 1996 Act (**Order of the Single Judge**).
- Aggrieved by the Order of the Single Judge, the Respondent No. 1 preferred Letters Patent Appeal before the Division Bench of Gujarat High Court. By an order dated September 17, 2012 (**Impugned Order**), the Division Bench allowed the said appeal and held that the Contract was a “works contract” and that the Respondent No. 1 had, as early as on November 23, 1998, raised a dispute as to the ‘forum’ in which the dispute was to be adjudicated and also objected to the appointment of the sole arbitrator in view of Clause 38 of the Contract.
- Aggrieved by the Impugned Order, the Appellant approached the Hon’ble Supreme Court of India (**SC**) by way of special leave petition.

### **ISSUES BEFORE THE SUPREME COURT**

In the facts of the case, the core issue which arose for the SC’s consideration was, whether the arbitral process could be interfered under Article 226 / 227 of the Constitution or not.

### **ARGUMENTS ADVANCED BY PARTIES**

- On behalf of the Appellant, it was argued that the Impugned Order erred in interfering with the Order of the Single Judge under Articles 226 and 227 of the Constitution. It was brought to the notice of the SC that presently the final award was pending challenge proceedings initiated by the Respondent No. 1 under Section 34 of the 1996 Act. This clearly showed that the proceedings before the Gujarat High Court were a mere attempt of Respondent No. 1 to bypass the framework laid down under the 1996 Act. The Appellant further argued that Section 16(2) of the 1996 Act mandated that the arbitrator had the jurisdiction to adjudicate the issue of jurisdiction, which could only be challenged further, under Section 34 of the 1996 Act.
- Per contra, on behalf of the Respondent No. 1, it was argued that since the enactment of the Gujarat Act, the applicable arbitration statute was substituted with respect to the disputes arising out of works contract and thus there could be no arbitration envisaged under Clause 38 of the Contract. As such, it was contended that under Articles 226 and 227 of the Constitution, writ jurisdiction of the High Court could be invoked to set aside an arbitration which was a nullity.

### **FINDINGS OF THE COURT**

- Having heard both the parties, the Court held as follows:
  - The 1996 Act is a code in itself. Section 5 of the 1996 Act contains a non-obstante clause<sup>2</sup> which upholds the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and reduce excessive judicial interference. The framework of the 1996 Act clearly portrays an intention to address most issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.
  - The hierarchy in our legal framework mandates that a legislative enactment cannot curtail a constitutional right. Nonetheless, in *Nivedita Sharma v. Cellular Operators Association of India*<sup>3</sup>, the SC held that when a statutory forum was created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. In view of the same, judges should not exercise discretion to allow judicial interference beyond the procedure established under the relevant enactment.

<sup>2</sup> The relevant portion of the said provision reads as: “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.”

<sup>3</sup> (2011) 14 SCC 337

- The power under Articles 226 and 227 needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear ‘bad faith’ is shown by one of the parties.
- The SC relied upon the judgement in *M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited*<sup>4</sup> (**Deep Industries**), wherein after analyzing the various provision of the 1996 Act, it was held that though petitions could be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the 1996 Act, yet the High Court should interfere only where orders are “patently lacking in inherent jurisdiction.”
- In the instant case, Respondent No. 1 was not able to show exceptional circumstance or ‘bad faith’ on the part of the Appellant. The Impugned Order also did not appreciate the limitations under Articles 226 and 227 of the Constitution and held that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a bare reading of the arbitration agreement indicates that the Appellant acted in accordance with the procedure laid down and without any mala fides.
- The Respondent No. 1 also did not take legal recourse against the appointment of the sole arbitrator, and rather submitted itself before the sole arbitrator to adjudicate on the jurisdiction issue as well as on the merits. The Respondent No. 1 thus, has to endure the natural consequences of submitting to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34.
- Section 16 of the 1996 Act mandates that the issue of jurisdiction must be dealt first by the tribunal before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless and has statutorily been provided a chance of appeal (in the nature of proceedings under Section 34). Similar observations have also been made in the case of *Deep Industries*.
- The Gujarat Act was enacted in 1992 with the object to provide for the constitution of a tribunal to arbitrate disputes arising from works contract to which the State Government or a public undertaking was a party. The question whether Contract fell within the ambit of a works contract as defined under Section 2(k) of the Gujarat Act was one of contractual interpretation and required evidence. It is settled law that the interpretation of contracts in such cases shall generally not be done in the writ jurisdiction. Further, the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain the plea of Respondent No. 1 to challenge the Section 16 Order.
- If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the arbitral process would be diminished.<sup>5</sup>
- In view of the above reasoning, the SC held that the High Court erred in exercising its discretionary power available under Articles 226 and 227 of the Constitution vide its Impugned Order. Thus, the appeal was allowed by the SC and the Impugned Order of the High Court was set aside with no order as to costs. However, the SC clarified that the Respondent No. 1 was at liberty to raise its objections regarding jurisdiction in the pending Section 34 proceedings.

### **ANALYSIS**

- In *Deep Industries*, the SC allowed the exercise of writ jurisdiction by the High Courts only in cases where the orders by the arbitrator were ‘patently lacking in inherent jurisdiction’.
- Notably, the judgment in *Deep Industries* has been discussed by a three-judge bench of the SC in its order dated September 18, 2020 in *Punjab State Power Corporation Ltd. v. Emta Coal Ltd. & Anr.*<sup>6</sup> (**Punjab State Power Corporation**).

<sup>4</sup> (2019) SCC ONLINE SC 1602

<sup>5</sup> For instance, the arbitral process is founded upon time-limitation and modelled on the principle of unbreakability. In *P. Radha Bai v. P. Ashok Kumar*, (2019) 13 SCC 445, the SC held that as per the principles of unbreakability of time-limit and certainty and expediency of arbitral awards, any grounds for setting aside the award that emerge after the three month time-limit (under Section 34(3) of the 1996 Act) has expired cannot be raised. For the same reason, the SC further held that extension of Section 17 of the Limitation Act, 1963 would go contrary to the principle of unbreakability.

<sup>6</sup> MANU/SCOR/38257/2020

- In Punjab State Power Corporation, the SC noted that a foray to the writ court from a Section 16 application being dismissed by the arbitrator, could only be made if the order passed was so perverse that the only possible conclusion was that there was a “patent lack in inherent jurisdiction”. The SC then defined “patent lack of inherent jurisdiction” in an order as perversity that must stare in one’s face. In this case, the SC further discouraged the practice of frequently resorting to the expression “patent lack in inherent jurisdiction” in Deep Industries Ltd., to go to courts under Article 227 even in matters which did not exactly suffer from a patent lack of inherent jurisdiction.
- While the positive intent of the present judgement is easily discernible from it, apparently the test for allowing writ jurisdiction in matters related arbitration can arguably involve a) exceptional rarity; b) being left remediless in the 1996 Act and; c) bad faith by the other party. The same could again result in a situation where litigants approach courts for exercise of their writ jurisdiction citing the aforementioned scenarios. However, the present judgment is a reiteration by the SC of the legislative intention to make arbitration fair and efficient.

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