Ruchira Papers Ltd vs Newcon Engineers Private Ltd on 27 July, 2022

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 11150/2022
RUCHIRA PAPERS LTD ..... Through: Mr.Atul and Mr.Aayush,

versus

NEWCON ENGINEERS PRIVATE LTD ..... Respondent
Through: Ms.Niki Kantawala, Mr.Satyender Chakar, Ms.Ishika Parihar and Ms.Amaya M. Nair, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 27.07.2022 CM APPL. 32764/2022(for exemption) Allowed, subject to all just exceptions.

The application shall stands allowed.

W.P.(C) 11150/2022

1. Heard learned counsels for parties.

2. This writ petition assails an order dated 31 May 2022 passed by the Arbitral Tribunal recording that consideration of the objection taken under Section 16 of the Arbitration and Conciliation Act, 1996 [„the 1996 Act] is presently deferred awaiting the respondents filing their replies to the statement of claim.

3. The plea in respect of Section 16 of the 1996 Act was taken on the allegation that the arbitration clause did not constitute a part of the contract. On the other hand learned counsel for the respondent contended that the tender document(s) and work order constituted a valid contract between the parties and the arbitration clause contained in the tender document(s) would thus form part of the contract. Noticing the rival contentions which were addressed, the Arbitral Tribunal has taken the view that the issue would have to await the filing of a reply by the petitioner here.

4. A preliminary objection was taken to the maintainability of the writ petition with learned counsel placing reliance upon the judgment rendered by a Division Bench of the Court in Awasthi

Construction Co. v. Govt. of NCT of Delhi & Anr.1 and submitting that the extraordinary jurisdiction of the Court conferred by Article 227 of the Constitution is not liable to be invoked and the Arbitral Tribunal should be left free to proceed in the matter in accordance with law. According to learned counsel for the respondent, the very scheme underlying the 1996 Act, mandates minimum interference in the course of arbitral proceedings and consequently the invocation of the extraordinary jurisdiction of the Court under Articles 226 and 227 of the Constitution would not be warranted.

Learned counsel for the petitioner, on the other hand, has placed reliance on the judgment rendered in Surender Kumar Singhal and Others v. Arun Kumar Bhalotia and Others2 to contend that taking note of the judgment of the Supreme Court in Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.3 the learned Judge ultimately, while dealing with an identical challenge, had entertained the writ petition and interfered with the order passed by the Arbitrator.

5. It become pertinent to note that the Supreme Court in Bhaven 2012 SCC OnLine Del 5443 2021 SCC OnLine Del 3708 Construction has enunciated the following salient principles which would govern the invocation of the extraordinary constitutional power conferred upon this Court while interfering with the order(s) passed by the Arbitral Tribunal. This would be evident from the following observations as entered in that decision: -

> "13. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.
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> 14. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfil the basic ingredients provided under Section 7 of the Arbitration Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.
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> 16. In this context, we may state that the appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent 1 mounting a judicial challenge at that stage. Respondent 1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.
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> 17. Thereafter, Respondent 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Articles 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as

> "34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and sub-section (3)".

(emphasis supplied) The use of term "only" as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

(2022) 1 SCC 75

18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In Nivedita Sharma v. COAI [Nivedita Sharma v. COAI, (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court referred to several judgments and held :

> (SCC p. 343, para 11) "11. We have considered the respective arguments/submissions.

There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation -- L. Chandra Kumar v. Union of India [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(emphasis supplied) It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe Deep Industries Ltd. v. ONGC [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706] , wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analysed as under : (SCC p. 714, paras 16-17) "16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].

17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

20. In the instant case, Respondent 1 has not been able to show exceptional circumstance or "bad faith" on the part of the appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by Respondent 1 in a separate Section 34 application, which is pending.

21. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modelled on the "principle of unbreakability". This Court in P. Radha Bai v. P. Ashok Kumar [P. Radha Bai v. P. Ashok Kumar, (2019) 13 SCC 445 : (2018) 5 SCC (Civ) 773] , observed : (SCC p. 459, paras 36-37) "36.3. Third, Section 34(3) reflects the principle of unbreakability. Dr Peter Binder in International Commercial Arbitration and Conciliation in Uncitral Model Law Jurisdictions, 2nd Edn., observed:

> „An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Article 33 does the time-limit of three months begin after the tribunal has disposed of the request. This exception from the three month time-limit was subject to criticism in the working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time-limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of Article 33. According to this "unbreakability" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three month time-limit has expired cannot be raised.

37. Extending Section 17 of the Limitation Act would go contrary to the principle of "unbreakability" enshrined under Section 34(3) of the Arbitration Act."

(emphasis in original) If the courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished.

22. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering Respondent 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the appellant herein had actually acted in accordance with the procedure laid down without any mala fides.

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24. The Division Bench further opined that the contract between the parties was in the nature of a works contract as it held that the manufacturing of bricks, as required under the contract, was only an ancillary obligation while the primary obligation on the appellant was to supply the bricks. The Division Bench, therefore, held that the Gujarat Act holds the field, and not the Arbitration Act.

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26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the court examines the same under Section 34. Respondent 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706] , this Court observed as follows : (SCC p. 718, para 22) "22. One other feature of this case is of some importance. As stated hereinabove, on 9-5-2018, a Section 16 application had been dismissed by the learned arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34."

27. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilising its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned order [Sardar Sarovar Narmada Nigam v. Bhaven Construction, 2012 SCC OnLine Guj 6499] of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."

6. The Court notes that while the learned Judge in Surender Kumar Singhal has noticed the decision of the Supreme Court in Bhaven Construction, it chose to interfere with the order passed by the Arbitral Tribunal since in that particular case, the Tribunal had taken a view that the plea of Section 16 of the 1996 Act would be considered prior to the passing of the final award. In that sense, the decision in Surender Kumar Singhal is clearly distinguishable.

7. Just a few days back, a learned Judge of the Court has succinctly explained the legal principles which would apply in Easy Trip Planners Vs. One97 Communications Ltd. [CM (M) 707/2022] as under: -

15. Bhaven Construction envisages the availability of a remedy under Articles 226 and 227 of the Constitution of India in rare and exceptional cases, which, essentially, are delimited to two exigencies; the first, where the order suffers from bad faith, and, the second, where, if the challenge is not permitted, the party would not be rendered remediless. Where, therefore, a remedy, against the order under challenge, is otherwise available to the party, in rare and exceptional cases and within the narrow confines of the jurisdiction that the said provisions confer, High Courts could exercise jurisdiction under Articles 226 and 227.

16. The degree of circumspection that Bhaven Construction expects of the writ court is, however, unmistakable even from the said decision. The governing principle is, apparently, that the arbitral litigant should not be left rudderless in the arbitral ocean. It is predicated on the right to legal redress, which is, to all intents and purposes, fundamental. Bhaven Construction, therefore, is more in the nature of a cautionary note, and is not intended to provide a haven for launching a challenge, in writ proceedings, against every interlocutory arbitral order.

17. The obvious reason why Bhaven Construction would not help the petitioner is because, even as per SBP, the party is not remediless in ventilating its grievances against the interim order passed by the Arbitral Tribunal. The remedy would, however, lie against the interim award or the final award that the arbitral tribunal would choose to pass. It would always be open to the aggrieved litigant to vent its ire against the interim order as one of the grounds on which it seeks to assail the interim or final arbitral award, under Section 34. Till then, however, SBP requires the litigant to bide his time.

18. It is only, therefore, that the remedy available to the litigant is deferred to a later stage of proceedings, so as to ensure that the arbitral stream continues to flow unsullied and undisturbed by any eddies that may impede its path.

19. Bhaven Construction, therefore, reinforces, in its own way, SBP.

20. In view thereof, reserving liberty with the petitioner to seek remedies as may be available to him in law at the appropriate stage, this petition is dismissed as not maintainable."

8. As was noticed in the opening parts of this order, the Arbitral Tribunal here has not refused to entertain the plea as raised under Section 16 of the 1996 Act. It has on a consideration of the rival contentions which were addressed merely taken the position that it would stand deferred pending the petitioner filing a reply to the statement of claim. That exercise of discretion by the Arbitral Tribunal cannot be said to be one which would fall in the category of "bad faith" and warrant interference by the Court.

9. Accordingly, the challenge as raised in the writ petition fails. The writ petition shall consequently stand dismissed.

10. The Court only observes that it shall be open to the Arbitral Tribunal to decide the objection taken under Section 16 of the 1996 Act once a reply is filed to the statement of claim and in accordance with law.

YASHWANT VARMA, J.

JULY 27, 2022/bh