

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 7th September, 2015

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W.P.(C) No.2839/2015 & CM No.5102/2015 (for stay).

**M/S. EVOLVE MARKETING SERVICES
PVT LTD..**

.....Petitioner

Through: Mr. Krishnamohan K. Menon, Adv.

Versus

M/S. AIRCEL LTD. & ANR.

..... Respondents

Through: Mr. Rohit Jain, Adv. for R-1.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The petitioner, engaged in an arbitration with the respondent no.1 M/s Aircel Limited, under Arbitration and Conciliation Act, 1996 and under the aegis of the respondent no.2 Delhi International Arbitration Centre, Delhi High Court Campus, New Delhi (DAC), has filed this petition under Articles 226 and 227 of the Constitution of India impugning the order dated 20th December, 2014 of the sole Arbitrator of dismissal of application dated 10th September, 2014 of the petitioner. Axiomatically, reliefs of (i) allowing the application dated 10th September, 2014 of the petitioner; (ii) directing the respondent no.1 M/s Aircel Limited to deposit 50% share of the fees of arbitration with the respondent no.2 DAC; (iii) refund of the said amount to

the petitioner; and, (iv) a direction to the Arbitrator to strike off the record of the reply filed by the petitioner, are claimed.

2. Notice of the petition was issued to the respondent no.1 M/s Aircel Ltd. only. The counsel for the respondent no.1 M/s Aircel Ltd. has appeared.

3. I have at the outset enquired from the counsel for the petitioner as to how this petition under Articles 226 and 227 of the Constitution of India with respect to arbitral proceedings is maintainable.

4. The only argument forthcoming is that the petitioner though aggrieved has no other remedy. It is contended that, (i) as per the Rules of the respondent no.2 DAC the parties to the arbitration had to deposit 100% of the fee in advance; (ii) the petitioner deposited its share of 50% of the fees totaling to Rs.6,26,765/-; (iii) though the respondent no.1 M/s Aircel Ltd. was required to deposit Rs.6,26,765/- plus Rs.5,000/-, but did not deposit; (iv) the rules of the respondent no.2 DAC require the petitioner to deposit the same; (v) though the petitioner represented to the respondent no.2 DAC but without any avail; and, (vi) the petitioner then filed application dated 10th September, 2014 supra but the learned Arbitrator vide impugned order dated 20th December, 2014 dismissed the application.

5. The petition is entirely misconceived. It is the settled position in law that the writ petitions with respect to the arbitral proceedings are not maintainable. The seven Judge Bench of the Supreme Court in ***S.B.P. and Co. Vs. Patel Engineering Ltd.*** (2005) 8 SCC 618 held that there is no warrant for the approach adopted by some of the High Courts that any order passed by an Arbitral Tribunal during arbitration would be capable of being challenged under Article 226 or 227 of the Constitution of India. It was held, (i) that Section 37 of the Arbitration Act makes certain orders of the Arbitral Tribunal appealable; (ii) under Section 34, the aggrieved party has an avenue for ventilating his grievance against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act; (iii) that the party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal - this appears to be the scheme of the Act; (iv) the Arbitral Tribunal is after all the creature of a contract between the parties i.e. Arbitration Agreement even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties; but that would not alter the status of the Arbitral Tribunal; it will still be a forum chosen by the parties by agreement; that thus

the orders passed by the Arbitral Tribunal are incapable of being corrected by the High Court under Article 226 or 227 of the Constitution and such an intervention by the High Courts, is not permissible; (v) that the object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal; and, (vi) therefore it is necessary that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless of course a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

6. A Division Bench of this Court in *Awasthi Construction Co. Vs. Govt. of NCT of Delhi* MANU/DE/5926/2012, faced with the same issue was shown a judgment of the High Court of Patna in *Senbo Engineering Limited v. State of Bihar* AIR 2004 Patna 33 and noticed that the High Courts of Bombay and Allahabad also have held the writ remedy to be available against an order of the Arbitral Tribunal against which no remedy was available but differed from the same. The same view has been reiterated by the subsequent Division Benches in *ATV Projects India Ltd. Vs. Indian Oil Corporation Ltd.* 200 (2013) DLT 553 and in *Dhanraj Bajaj and Company vs. Navodaya*

Vidayala Samiti MANU/DE/2288/2014.

7. The Supreme Court in ***Lalitkumar V. Sanghavi Vs. Dharamdas V. Sanghavi*** (2014) 7 SCC 255 held that the view taken by the Bombay High Court, that against an order of the Arbitral Tribunal jurisdiction of the High Court under Article 226 of the Constitution can be invoked, is not in accordance with law laid down in ***S.B.P. and Co.*** supra.

8. It is immaterial that the arbitration in the present case is under the aegis of respondent No.2 DAC. Moreover, the petitioner, by agreeing to arbitration under the aegis of respondent No.2 DAC, consented / is deemed to have consented to the Rules of DAC and as per which, on one of the parties not paying its share of costs, the other party has to pay the same.

9. There is thus no merit in the petition. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 07, 2015

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(corrected & released on 21st October, 2015)