

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11618 OF 2015

M/s. Indus Fila Limited

.. Petitioner

vs.

M/s. Bhagyashri Textiles Pvt. Ltd.

.. Respondent

Mr. Sandeep Ladda for the Petitioner.

CORAM : M. S. SONAK, J.

DATE : 12 JANUARY 2016.

P.C. :-

1] The challenge in this petition is to the order dated 5 September 2015 made by the Arbitral Tribunal holding that bar under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) shall not come in the way of Arbitral Tribunal in continuing with the arbitration proceedings.

2] To the query as to whether a petition under Articles 226 and 227 of the Constitution of India ought to be entertained against any order passed by the Arbitral Tribunal during arbitration proceedings, Mr. Sandeep Ladda, learned counsel for the Petitioner submitted that in case this Court does not interfere at this stage, then the very purpose of enacting Section 22 of the SICA would stand frustrated. Further, the learned counsel submitted that as against the impugned order, the Petitioner cannot invoke the provisions contained in

Sections 34, 37 or 16 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) and therefore, if the present petition is not entertained, the Petitioner would be without any legal and effective remedy. Mr. Ladda, attempted to distinguish the Hon'ble Apex Court in case of *S.B.P. & Co. vs. Patel Engineering Ltd. & Anr.*¹, by submitting that the issue involved therein was whether an order made under Section 11 of the Arbitration Act is an administrative order or a quasi judicial order and the observations with regard to interference by the Court under Articles 226 and 227 of the Constitution of India, were in the nature of *obiter dicta* .

3] The Hon'ble Apex Court in case of *Patel Engineering Ltd.* (*supra*) at paragraphs 44 and 45, has observed thus:

44. *It is seen that some High Courts have proceeded on the basis 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. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. 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. The arbitral tribunal is after all, the creature of a contract between the parties, the*

1 Appeal (Civil) No. 4168 of 2003 decided on 26 October 2005

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. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

45. 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 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate 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.”

4] In the present case, the impugned order has been made by the Arbitral Tribunal during the pendency of arbitration proceedings. If, the learned counsel for the Petitioner is right in his submission that the proceedings continued in breach of the provisions of Section 22 of the SICA are without jurisdiction, then as a corollary any award that may be made by the Arbitral Tribunal will also suffer the same fate. The Petitioner, in such a situation will obviously to be entitled to resort to the substantive remedy available under Section 34 of the Arbitration Act to question the ultimate award that may be made in the matter. Therefore, the submission of the learned counsel for the

Petitioner that the Petitioner will be remedy-less, cannot be accepted. The Hon'ble Apex Court, upon consideration of the scheme of Arbitration Act, has disapproved the approach of this Court exercising extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India against the orders made by the Arbitral Tribunal during the pendency of arbitration proceedings. There is no force in the contention of Mr. Ladda that the observations in paragraphs 44 and 45 of the judgment in case of *Patel Engineering Ltd. (supra)* are merely in the nature of *obiter dicta*. In any case, even the *obiter dicta* of the Hon'ble Apex Court is entitled to greatest weight and therefore, is required to be followed.

5] None of the observations in this order may be construed as any opinion on the question of either applicability or effect of Section 22 of the SICA, upon the arbitration proceedings. Such issues are kept open for adjudication by the appropriate forum at the appropriate stage.

6] This petition is accordingly dismissed. There shall however, be no order as to costs.

(M. S. SONAK, J.)