

Sr. No. 211

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CWP No. 9446 of 2016(O&M)
Date of decision: 01.12.2016**

State of Punjab and another

.....Petitioners

versus

M/s Agros Impex(I) Pvt. Ltd. and others

.....Respondents

Coram: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Pankaj Mulwani, DAG, Punjab.

Mr. Jagdeep Anand, Advocate
for respondents No. 1 to 3.

Rakesh Kumar Jain, J.(Oral)

This petition is filed for issuance of a writ in the nature of certiorari quashing the order dated 31.03.2016 passed by the members of the arbitral tribunal dismissing the application filed by the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996(for short, 'the Act').

Shorn of unnecessary details, the dispute between the parties was referred to a tribunal of three members. The petitioners filed an application under Section 16 of the Act, challenging the jurisdiction of the tribunal to hear and adjudicate the matter. Two members of the tribunal dismissed the application whereas the 3rd member allowed the same.

At the threshold, counsel for the respondents has submitted that the present petition is not maintainable in view of statutory remedy of appeal available to the petitioner under Section 16(6) of the Act. In support of his submission, he has relied upon two division bench judgments rendered in the case of *Lexicon Finance Ltd. vs. Union of India*

and other ILR 2002 Karnataka 2050 and Satish Chander Gupta & Sons vs. Union of India and others 2003(1) ARBLR 589(P&H).

Counsel for the petitioners, however, submits that Section 16 (6) of the Act will not come into play until and unless an arbitral award is passed, because at this stage only an application has been dismissed which was filed under Section 16(1) of the Act.

I have heard both the counsel for the parties and perused the available record.

In order to appreciate the rival contentions it would be relevant to refer to the provisions of Section 16 of the Act which are reproduced as under:-

“16.Competence of arbitral tribunal to rule on its jurisdiction.- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-----

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed , or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

The question raised by counsel for respondents No. 1 to 3 is about the remedy having been chosen by the petitioner in order to challenge the majority decision taken by the arbitral tribunal dismissing the application filed under Section 16(1) of the Act. The matter is no more *res integra* because of the repeated view taken by the Karnataka High Court and this Court in the aforesaid two decisions. In the case of *Lexicon Finance Ltd.(supra)* there was a challenge to the constitutional validity of Section 16(5) of the Act. While holding the said provisions to be ultra vires the following observations have been made in respect of the remedy available to the aggrieved party against an order passed under Section 16(5) of the Act. The relevant observations reads as under:-

“A bare reading of the section reveals that if the objection regarding jurisdiction is rejected by the Tribunal, the Tribunal shall continue with the arbitral proceedings and make an arbitral award. If the party is aggrieved by such an arbitral award, he has been provided with a remedy by way of an application under

Section 34 of the Act for setting aside such an arbitration award as is clear from Section 16(6) of the Act. Therefore, an arbitral award passed by an Arbitral Tribunal could be challenged under Section 34 of the Act not only on the grounds set out in Section 34(2) of the Act but also on the ground that the Tribunal had no jurisdiction or that the Tribunal has exceeded its authority as contemplated under Section 16(2) and (3) of the Act. If the plea referred to in Sub-section (2) or (3) of Section 16 is accepted by the Tribunal then under Section 37(2) of the Act an appeal is provided against such finding. Therefore, the legislature in its wisdom has provided for appropriate remedies under the Act both when the plea regarding jurisdiction is accepted by the Tribunal and rejected by the Tribunal. The aggrieved party has a statutory remedy. Merely because after the plea is rejected the person raising the said objection is made to contest the proceedings on merits and only when an arbitral award is passed on merits he is permitted to challenge the said award both on the question of jurisdiction and on merits under Section 34, that would not render Section 16(5) of the Act inequitable and violative of principles of natural justice. It does not violate the fundamental right of the petitioner as contended by him. The learned Counsel for the petitioner has not been able to show any other ground to declare Section 16(5) of the Act as ultra vires. Merely because he is expected to be subject to the jurisdiction of the Tribunal and go through the entire trial, it would not render such provision arbitrary or oppressive or unconstitutional. As stated, Section 34 of the Act gives a party adversely affected by an arbitral award the right to approach the Arbitral Tribunal and any order passed under Section 34 is appealable under

Section 37 of the Act. Such being the fact situation, this Court cannot go into the merits of the case. The contentions of the learned Counsel for the petitioner have no substance.”

In the case of Satish Chander Gupta(supra), the petitioner had approached the Court to declare the proceedings under the Act as unworkable and ultravires of the Constitution of India. While disposing of the writ petition, the following observations have been made by this Court, which requires to be noticed:-

“15. Under Section 16 of the Act, a specific provision has been made whereby an arbitral tribunal had been made competent to determine and rule on its own jurisdiction including ruling on any objection with respect to there existence or validity of the arbitration agreement. Again under Sub-section 5 of the Section 16 of the Act, if an arbitral tribunal makes a decision on its own jurisdiction and rejects the plea/objection taken by a party to its jurisdiction then it would continue with the arbitral proceedings and make an arbitral award. Under Sub-section 6 of Section 16 of the Act, also, any party aggrieved by such an arbitral award can make an application for setting aside such an arbitral award in accordance with Section 34 of the Act.

16. Under the provisions of Section 34 of the Act an application for setting aside the arbitral award can be filed by the party aggrieved by the award. Sub-section 2 of Section 34 of the Apt provides that an arbitral award may be set aside by the court on various grounds contained therein, like, a party being under some incapacity; the party making the application having not been given proper notice of the appointment of an arbitrator or of the arbitral

proceedings or being otherwise unable to present his case; the arbitral award dealing with a dispute which was not contemplated by or not falling within the terms of the submission to arbitration agreement or being beyond the scope of the submission to the arbitration; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the same was not in accordance with that part namely Part I of the Act. Also in a situation when the court found that the subject-matter of the dispute was not capable of settlement by arbitration under the law for the time being in force or the arbitral award was in conflict with the public policy of India still the arbitral award was liable to be quashed by the Court.

17. From the perusal of the various provisions of the Act and analysis thereof, we find that under the provisions of [Section 34\(2\)\(a\)\(v\)](#) of the Act, an arbitral award could be challenged before the court by the party aggrieved against the same on the ground that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this part namely part I of the Act. We have already noticed that part I of the act comprises of [Sections 12, 13 and 16](#) also. [Section 13\(5\)](#) of the Act specifically provides a right to the party aggrieved to challenge the final award if his initial challenge to the Arbitration had not been successful. Similarly under the provisions of Sub-section 5 of Section 16 of the Act another right has been provided to the aggrieved party, who had challenged the jurisdiction of the arbitral tribunal. Both under Sub-section 5 of Section 3

and sub Section 6 of Section 16 of the Act such a right has to be exercised by the aggrieved party by filing an application for setting aside the arbitral award in accordance with Section 34 of the Act. When we read the aforesaid provisions of Section 13 and Section 16 of the Act in conjunction with Clause (v) of Section 34 (2)(a) of the Act, we find that the award could be challenged by the aggrieved party not only in regard to the composition of arbitral tribunal or arbitral procedure being contrary to the agreement but also if the award was not in accordance with Part I of the Act. If we read the aforesaid provisions together, as stated above, then we find that they are all harmoniously construable and there is absolutely no anomaly nor any conflict or contradiction left, nor are these workable, as had been suggested by learned counsel for the petitioner.”

After going through the aforesaid observations in the cases referred above, I am also of the considered opinion that the order passed on the application filed under Section 16(1) of the Act has to be challenged under Section 34 of the Act and the writ petition is not maintainable because writ petition would be maintainable if there is no statutory remedy available under the statute but once the statutory remedy is available by way of an appeal, the extraordinary jurisdiction of this Court cannot be invoked under Article 226 of this Court. Consequently, the present petition is dismissed on this ground alone.

[Rakesh Kumar Jain]
Judge

1st December, 2016

Shivani Kaushik

Whether Speaking/reasoned

Yes/No

Whether Reportable

Yes/No