

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 284 OF 2018

Indian Oil corporation Ltd.,
Thr. Its Senior Manager

... Petitioner

V e r s u s

Laxmi Auto Care Centre,
Thr. Its Partner Sarvottam Narayan Kamat

... Respondent

Shri Nigel Da Costa Frias, Advocate for the Petitioner.

Shri S. G. Desai, Senior Advocate with Shri Pavithran AV,
Advocate for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Order on : 14 March 2018
Order Pronounced on : 23 March 2018

ORDER

The Writ Petition is taken up for final disposal at the admission stage itself by consent of the learned Counsels appearing for the parties.

2. Heard Shri Nigel Da Costa Frias, learned Counsel appearing for the Petitioner and Shri S. G. Desai, learned Senior Advocate appearing for the Respondent.

3. Shri Nigel Da Costa Frias, learned Counsel

appearing for the petitioner submitted that there was a deed of lease in respect of the property in question between the petitioner and the respondent dated 19.03.2002 and a separate agreement with the respondent appointing them as the dealers in respect of the petrol pump located in the said property. The dealership agreement was terminated in June 2015 and there was a challenge to the termination of the dealership agreement in a Writ Petition pursuant to which liberty was granted to the petitioner to approach the arbitrator. The respondent in the meantime filed an application under section 9 of the Arbitration and Conciliation Act 1996 (Act, for short hereinafter), before the District Court which came to be dismissed. The matter was referred to arbitration to a learned Single Judge of this Court and the arbitral proceedings ended with an award dated 01.09.2017 pursuant to which the learned sole Arbitrator held that the dealership agreement was rightly terminated by the respondent i.e. the petitioner herein for violation of the clauses mentioned therein and thereby declining the relief sought by the claimant i.e. the respondent herein as per their statement of claim.

4. Subsequently, the respondent had moved this Court for the appointment of a sole Arbitrator by their

application under section 11(5) of the Act. A notice was issued to the petitioner dated 20.02.2016 pursuant to which the respondents adverted to the dealership agreement dated 19.03.2002 entered into between the petitioner and the respondent appointing them as a dealer for a period of five years commencing from that date. The lease deed and the dealership agreement were inter connected and derived strength from each other and the extinction of one would mean the extinction of the other. The respondent had also taken a plea in their notice that they were called upon by letter dated 14.02.2015 why the dealership agreement should not be terminated; that the termination notice was illegal, arbitrary and bad in law and in violation of natural justice and adverted to the Writ Petition filed by them being Writ Petition No.587/2015 in which they were secured by an ad-interim order dated 27.09.2015. The petition had been disposed off by an order dated 22.12.2015 by granting liberty to the parties to proceed to appoint an Arbitrator in terms of law and gave the liberty to the respondent to take appropriate steps in terms of section 9 of the Act and for the appointment of an Arbitrator in terms of law. They had accordingly moved an application under section 9 of the Act.

5. He also invited further reference to the notice

pursuant to which the respondent had invoked the arbitration clauses both in the lease deed dated 19.03.2002 and the dealership agreement dated 19.02.2002 and sought for the consent/concurrence of the petitioner in the appointment of the named persons as Arbitrator. The learned Single Judge by his order dated 30.06.2017 had found that the respondent herein had raised a dispute based on the lease agreement and proceeded to appoint a former Judge of this Court as the sole Arbitrator to adjudicate the disputes between the parties.

6. Shri Nigel Da Costa Frias, learned Advocate for the petitioner submitted that an application was filed by the petitioner before the Arbitrator raising preliminary objections in terms of section 16 of the Act and pressed for the dismissal of the petition before him. The respondent herein had filed their reply and pressed for the dismissal of the application with exemplary costs. The learned sole Arbitrator had on a consideration of the arguments canvassed on behalf of the petitioner herein and the respondent and considering the contention on behalf of the respondent that both the agreements i.e. the lease agreement and the dealership agreement were interconnected and derived strength from each other and the extinction of one would be the extinction of the other observed that this in his opinion was a dispute

between the parties which needed to be arbitrated and in that view of the matter proceeded to dismiss the application raising preliminary objections as regards the jurisdiction of the Tribunal giving rise to the petition at the instance of the petitioner. It was his contention further that the respondent had not pointed out which clause of the lease deed was violated. He adverted to the various clauses of the lease deed and submitted that it was clear from the clauses that the petitioner could appoint dealers and the respondent could have no say in the matter. The respondent had failed to show any violation of the lease deed. He placed reliance in **Rahul Yadav vs. Indian Oil Corporation Limited & Ors.** [2015 (9) SCC 447] and submitted that there was no arbitrable dispute which had arisen between the parties. The learned Arbitrator had wrongly invoked its jurisdiction and had not gone into the submission that there were no arbitrable disputes between them. The various clauses of the lease deed were not examined nor the notice and the order passed by the sole Arbitrator was unreasoned and justified interference in this petition.

7. Shri S. G. Desai, learned Senior Advocate appearing for the respondents adverted to the scheme of the Act in terms of section 16 of the Act and the machinery

provided thereunder and submitted that there was no basis to invoke the jurisdiction of this Court under Article 226 of the Constitution of India and the petition was therefore not maintainable. He relied on a Seven Judge decision in **SBP & Co. vs. Patel Engineering** [(2005) 8 SCC 618] in support of his proposition. It was his contention next that the first award had been challenged by the respondent in an application under section 34 before the Principal District Judge and a notice had been issued to the petitioner herein. He also relied on **BASF Styrenics Pvt. Ltd. vs. Off Shore Industrial Construction** [2002 (2) Mh.L.J. 873] which had considered the Judgment in SBP Co. (supra) and reiterated what was held therein. On facts it was his case by adverting to the schedule of the lease deed that the respondent's dealership was 'B' type and which was in operation from 01.01.1978 till 2002 before it could enter into the dealership agreement with the petitioner. The dispute referred to in the said deed was another type of dispute and therefore there was no basis in the contention on behalf of the petitioner that there was no arbitrable dispute at large before the learned sole Arbitrator.

8. Shri Desai, learned Senior Counsel next contended that the dealership agreement and the lease agreement co-existed and that the termination of one led to the termination

of the other. He distinguished the Judgment in **Rahul Yadav** (supra) as not being under the Act but under the Public Premises Act and pressed for the dismissal of the petition. He further placed reliance in **M/s. Steel Authority of India Ltd. vs Indian Council of Arbitration & Ors.** [2013 (139) DRJ 79], a judgment of the Delhi High Court which again dealt with section 16(2) of the Act apart from relying in **SPB & Co.** (supra) and finally placed reliance in a latter judgment of the Apex Court in **Mahanagar Telephone Nigam Limited vs. Applied Electronics Limited** [2017 (2) SCC 37] which again had considered the Judgment in **SBP & Co** (supra) and pressed for the dismissal of the petition.

9. Shri Nigel Da Costa Frias in reply submitted that the judgment in **SBP** (supra) was distinguishable and that section 16 had not fallen for consideration in the same matter. The Arbitrator had also not ruled on its jurisdiction and therefore it did not advance the case of the respondent. He placed further reliance in **Punjab Agro Industries Corpn. Ltd. vs. Kewal Singh Dhillon** [(2008) 10 SCC 128] and finally in the Judgment of **Whirlpool Corporation vs. Registrar of Trade Marks** [1998 AIR SCW 3345] and contended that it was unfounded that the petition was not maintainable. There was no basis in the plea on behalf of the

respondent that there was interconnection between the lease deed and the dealership agreement and in that context adverted to the dealer agreement which did not make any reference to the lease deed. The respondent had approached the Court with unclean hands and therefore the petition be allowed.

10. Shri S. G. Desai, in further reply reiterated his reliance in SBP & Co. (supra), distinguished the judgment in **Punjab Agro** (supra) being in the context of section 11 and not section 16 of the Act. He further canvassed that the learned Arbitrator had clearly ruled that the preliminary objections to the maintainability of the arbitral proceedings was not tenable and thus there was no basis to contend that the Arbitrator had decided the matter as to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

11. **Rahul Yadav** (supra) though dealt with the issue of petrol pump dealership and the lease agreement and on its interpretation, it did not at all deal with section 16 of the Act and therefore is clearly distinguishable and does not apply to the facts of the present case.

12. In **SBP & Co.** (supra), the seven Judge Bench of the Hon'ble Apex Court clearly dealt with section 16 of the Act and held that section 16 deals with the competence of an arbitral tribunal, to rule on its jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. A person aggrieved by the rejection of his objection by the tribunal on its jurisdiction or the other matters referred to in that Section, has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under section 37 of the Act. The Hon'ble Apex Court observed at paragraph 45 thus :

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 and 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 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.”

The Hon'ble Apex Court summed up their conclusions at paragraph 47(vi) that once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of section 37 of the Act or in terms of section 34 of the

Act. The Hon'ble Apex Court observed at Para 46 thus :

“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.”

13. In **BASF Styrenics** (supra), the Division Bench of the Bombay High Court held while interpreting section 16 of the Act that the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of section 16 after the arbitration proceedings are over and the award is made. If, on

the other hand, it holds that it has no jurisdiction, an order can be challenged under Sub-section (2) of section 37 of the Act. This judgment further held at paras 7 to 10 as below :

"7. So far as the Act is concerned, Section 16 confers jurisdiction on arbitral Tribunal. Sub-section (1) specifically declares that the arbitral tribunal may rule on its own jurisdiction, including an objection with respect to the existence or validity of the arbitration agreement, etc. Sub-section (2) states that the plea that the arbitral tribunal does not have jurisdiction shall be raised at a particular stage.

8. Sub-sections (5) and (6) are relevant and they read as under :--

"(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."

9. Section 37 provides for appeals, and Sub-section (2) of the said Section expressly and specifically states that an appeal shall lie against an order accepting

the plea referred to in sub-sections (2) and (3) of Section 16, which state that where the Arbitrator has come to the conclusion that it has no jurisdiction.

10. In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of Section 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under Sub-section (2) of Section 37 of the Act."

14. **M/s. Steel Authority** (supra) specifically dealt with section 16 of the Act, followed the view taken by the Hon'ble Supreme Court in SBP CO. (supra) at paragraphs 45, 46 and 47 and held that it clinched the issue while considering sub-section (2) of section 16 of the Act which provides that a plea that the arbitral tribunal does not have jurisdiction shall

be raised not later than the submission of the statement of defence. It considered sub-section (3) of the aforesaid section which provides that 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. It considered sub-section (5) being relevant for the purpose of the petition that the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) where the arbitral tribunal takes a decision rejecting the plea and continue with the arbitral proceedings. In that context, it considered two issues of law which arose for consideration in the petition, (i) whether the Arbitral Tribunal is mandatorily required to take a decision on the plea referred to in sub-section (3) of the Act before it proceeds further in the matter or it can decide such a plea at a later stage while making the arbitral award; and (ii) If the Arbitral Tribunal decides to go ahead with the arbitral proceedings, without taking a decision on such a plea or if it rejects the said plea whether such an order of the Tribunal can be interfered with in exercise of writ jurisdiction under Article 226/227 of the Constitution of India.

15. The judgment in **SBP & Co.** (supra) of the Seven

Judge Bench of the Hon'ble Apex Court clearly clinches the issue in favour of the respondent that the High Court should be loathe to exercise its jurisdiction under Article 226 or 227 of the Constitution of India concerning the exercise of jurisdiction by the arbitral Tribunal in exercise of its powers under section 16(2) of the Act. **Punjab Agro** (supra) primarily dealt with section 11 of the Act and would therefore not advance the case of the petitioner to seek the intervention of this Court in exercise of its power under Article 226 and 227 of the Constitution of India. Hence the departure.

16. **Whirlpool Corporation** (supra), held that the power to issue prerogative writs under Articles 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose". Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious

remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The jurisdiction of the High Court entertaining a Writ Petition under Article 226 of the Constitution, inspite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

17. The Judgment in **Whirlpool** (supra) is clearly distinguishable inasmuch as the petitioner has not been able to show that there has been any breach of the principles of natural justice or that there has been a violation of its fundamental rights or the order is patently perverse as to cause injustice to the party.

18. Considering the Judgment in **SBP Co.** (supra) as

also that in **BASF Styrenics** (supra) and clearly distinguishing that in **Rahul Yadav** (supra) and finding applicability of M/s. Steel Authority and that in **Mahanagar Telephone** (supra), there is much force in the contention of Shri Desai, learned Senior Advocate that the petitioner could not invoke the jurisdiction of this Court under Article 226 of the Constitution of India. The Judgment in **Whirlpool** (supra) will also not come to the aid of the petitioner since none of the predicates contained therein apply to the case of the petitioner.

19. Besides Section 16 of the Act deals with the competence of the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Sub-section (2) is relevant which reads that 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. Sub-section (3) takes within its sweep 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. Sub-section (5) is material which

requires the arbitral tribunal to 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 and lastly in terms of sub-section (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 learned sole Arbitrator having clearly ruled on its jurisdiction and held that the preliminary objections to its jurisdiction were not tenable, therefore the only course of option available to the petitioner was to await the outcome of the award in terms of section 34 of the Act and thereafter to offer a challenge in terms of section 34 before the appropriate authority. This is the law which is clearly laid down by the Hon'ble Apex Court in **SBP Co.** (supra) while considering the scope and ambit of section 16 which fell for consideration before it unlike the contention of Shri Nigel Da Costa Frias, learned Advocate for the petitioner. There is therefore no necessity to go into the factual aspects on the deed of lease and the dealership agreement when the sole Arbitrator had clearly ruled that both these agreements were inter connected and derived strength from one another and the extinction of one would mean the extinction of another. On that premise, the learned sole Arbitrator had found that this was a dispute which needed

to be arbitrated and held on its jurisdiction while proceeding to reject the objections to the jurisdiction of the arbitral tribunal. In the circumstances therefore, it is not at all necessary to go into the factual aspects of the petition when the law is clear on the point.

20. In view thereof, the petition challenging the order of the sole Arbitrator is not maintainable and hence i pass the following order :

ORDER

The petition is dismissed with no order as to costs.

NUTAN D. SARDESSAI J.