

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 868 OF 2018

The Chief Engineer,
Public Works Department,
Government of Goa,
Altinho, Panaji- Goa 403 0001

The Executive Engineer,
Works Division XII(PHW-SWSP),
Public Works Department,
Government of Goa,
Sanguem – Goa.

... Petitioner

Versus

M/s. Karnatak Cement Pipe Factory,
Engineers and Contractors
A Registered Partnership Firm.
Having its Office at Industrial Estate,
Gokul Road, Hubli – Now at Plot
No.64B, Tarihal Industrial Area,
Tarihal, Hubli- 580026.

... Respondent

Shri Pravin Faldessai, Additional Government Advocate for the petitioner.

Shri P.A. Kholkar, Advocate for the respondents.

CORAM:

NUTAN D. SARDESSAI, J.

RESERVED ON :

31st October, 2018

PRONOUNCED ON :

1st November, 2018.

JUDGMENT :-

1. The parties are put to notice that the matter would be disposed off finally at the admission stage itself.

2. Heard forthwith with the consent of the learned Advocate for the parties.

3. Rule.

4. Shri P.A. Kholkar, learned Advocate waives service of notice on behalf of the respondents.

5. This petition takes exception to the order dated 06/06/2018 passed by the learned Sole Arbitrator pursuant to which he held while deciding an application for extension of time to make an award that the Amendment Act of 2015 was not applicable to the arbitral proceedings at large before him, that the parties were not required to seek the extension of time for making the award and disposed off the application accordingly. The petitioner is invoking the jurisdiction of this Court under Article 227 of the Constitution to challenge the said order.

6. Heard Shri Pravin Faldessai, learned Additional Government Advocate for the petitioner who invited attention to the order passed by the learned Principal District Judge dated 07/10/2017 pursuant to which he had enlarged the time for deciding the arbitral proceedings and after considering the

application under Section 29A of the Arbitration and Conciliation Act, 1996 amended by the Amendment Act of 2015. He next adverted to the order under challenge and besides invited attention to clause 25 of the Agreement dealing with the arbitration and submitted that the Act of 2015 would apply. The finding of the learned Sole Arbitrator was prejudicial to the interest of the petitioner inasmuch as the earlier application for extension of time was granted under the Act of 2015 and besides the petitioner would be prejudiced by any award by the learned Sole Arbitrator particularly in the matter of applicability of interest in the event the arbitral proceedings were held against him. The impugned order had therefore to be set aside and as their right to agitate the applicability of the 2015 Act was foreclosed by the findings rendered by the learned Sole Arbitrator.

7. Shri P.A. Kholkar, learned Advocate for the respondent submitted at the outset that the Writ Petition to challenge the order was not tenable since an Arbitral Tribunal as defined under Section 2(d) of the 1996 Act was not a Court and as defined under Section 2(e) thereof. The placed reliance in **Alka Chandewar v/s. Shamshul Ishrar Khan** [2016(1) Mh.LJ. 52] to buttress his contention and submitted that the remedy of

Writ Petition was not available to the petitioner. He placed reliance on a Full Bench judgment of the Hon'ble Apex Court in **S.B.P. & Co. v/s. Patel Engineering Ltd. and Anr.** [(2005) 8 SCC 618] in the same context, referred to Section 5 of the Arbitration and Conciliation Act and also placed reliance in an unreported judgment of the Hon'ble Apex Court in **Ranjit Projects Pvt. Ltd. V/s. Gujarat State Road Development Corporation Ltd. and Ors.** [Civil Appeal No.12488 of 2017].

8. Shri P.A. Kholkar, learned Advocate for the respondent further referred to Section 26 of the Amendment Act 2015, relied in **Board of Control for Cricket in India v/s. Kochi Cricket Pvt. Ltd. and others** [(2018) 6 SCC 287] apart from advertng to provisions of Sections 7 and 16 of the Arbitration Act 1996. It was his contention that a party could not confer jurisdiction on the Court and in that context placed reliance in **East India Hotel Ltd. and another v/s. Corporation of Calcutta and others** [AIR 1988 Calcutta 104], **Jagmittar Sain Bhagat and others v/s. Director, Health Services, Haryana and others** [(2013) 10 SCC 136] and **Girish Manubhai Parekh v/s. M/s. Continenral Steel Corporation and Ors.** [2009 (2) Arb. L.R. 138] while pressing for the dismissal of the petition both on its maintainability and merits.

9. Shri Pravin Faldessai, learned Additional Government Advocate in reply submitted that there was no basis in the contention on behalf of the respondent that the Writ Petition was not maintainable as it would do violence to Article 226 and 227 of the Constitution of India. Insofar as Section 5 of the Act was concerned, it was his contention that the remedy under Sections 34 and 37 of the Act being alternate remedy did not bar the invocation of the jurisdiction of this Court under Article 227 of the Constitution and as it was necessary for an award to be drawn before it could be challenged under Section 34 of the Act. Therefore the only remedy available to the petitioner was by invoking the jurisdiction of this court under Article 227 of the Constitution. He next contended that the judgment in **Alka Chandewar** (supra), which held on the maintainability of the petition under Article 227 of the Constitution of India was clearly distinguishable and as it was invoking the jurisdiction of the Court under the Contempt of Courts Act which was not the case presently. It was also his contention that the want of judicial intervention in terms of Section 5 of the Act was not an absolute bar and it was in the peculiar circumstances that an aggrieved party could still invoke the jurisdiction of this Court under Article 227 of the Constitution of India. The petition had

therefore to be allowed and the order quashed and set aside.

10. i would consider their submissions, the judgments relied upon, the relevant provisions of the Act of 1996 and the Amendment Act of 2015 apart from Clause 25 of the Arbitral Agreement and decide the fate of the petition.

11. The 1996 Act had been enacted to consolidate and amend the law relating to the domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Section 2(d) defines an "arbitral Tribunal" to mean a sole arbitrator or a panel of arbitrators while "Court" is defined under Section 2(e) meaning in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; In this context it is necessary to advert to the judgment in

Alka Chandewar (supra), relied upon by Shri Kholkar, learned Advocate for the respondent to substantiate his contention that an arbitral Tribunal was not a Court and therefore the order passed by the learned Sole Arbitrator was not amenable to the writ jurisdiction of this Court under Article 227 of the Constitution of India.

12. In **Alka Chandewar** (supra), a learned Single Judge of this Court was dealing with the proceedings under the Contempt of Courts Act, 1971 when it held at paragraph 14 that " Though the Court is not separately defined under the Contempt of Courts Act, it is considered as a "Court" within the meaning of the Court defined under Section 2(e) of the Arbitration and Conciliation Act, 1996. Under Section 2(d) of the Act, the "Arbitral Tribunal" is defined as "a sole arbitrator or a panel of Arbitrators". Under Section 2(e) of the Act, a "Court" is defined as follows: Section 2(e): "Court" means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes". Thus,

this clearly shows that an Arbitral Tribunal is not a Court and thus the meaning of the Court for the purpose of the Contempt of Courts Act is to be restricted to the definition of a Court under section 2(e) of the Act stricto sensu and therefore the violation of the orders of Arbitrator unless it is specified cannot be subjected under the Contempt of Courts Act.” This was held while dealing with the contempt in arbitral proceedings. This judgment as rightly submitted by Shri Pravin Faldessai, learned Additional Government Advocate is clearly distinguishable and does not buttress the case of Shri Kholkar, learned Advocate for the respondent that the arbitral Tribunal is not a Court within the meaning of Section 2(e) of the 1996 Act.

13. However in **S.B.P. & Co** (supra), a Full Bench of the Hon'ble Apex Court observed at paragraph 44 and 45 as below:

“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 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.”

14. Section 5 of the Act deals with the extent of judicial intervention and opens with the non-obstante clause that notwithstanding anything contained in any other law for the time being in force, in matter governed by this Part, no judicial authority shall intervene except where so provided in this Part. In other words, the extent of judicial intervention is very limited and restricted to the areas contained in that part. Moreover, in **Ranjit Projects Pvt. Ltd.** (supra), an application was made to amend the claim before the Arbitral Tribunal which came to be dismissed by it vide the order dated 13/11/2016 and on the application for recall, the Tribunal recalled the order by its order dated 27/12/2016 and allowed the amendment. The respondent then applied to the Arbitral Tribunal under Section 16 of the Act stating that the amended claim was beyond the scope of the arbitral proceedings and seeking to set it aside on this ground alone which came to be dismissed by the Tribunal on the premise that the amended claim was within the scope of reference and it had the competence and jurisdiction to decide it.

15. In **Ranjit Projects Pvt. Ltd.** (supra), the respondents in the meantime had challenged the order of the Tribunal dated 27/12/2016 in which the High Court stayed the further proceedings in the arbitration and set down the special application for hearing giving rise to the challenge before the Hon'ble Apex Court. In that context, the Hon'ble Apex Court was of the view that the High Court had erred in interfering with, at this juncture, and staying the proceedings under Article 227 of the Constitution of India. Section 5 of the 1996 Act clearly interdicts judicial intervention except where so provided in this part. No doubt this does not mean that the proceedings under the Constitution can be interdicted, but all the same that the High Court will keep Section 5 in mind while exercising discretion under Article 227 in the midst of an arbitral proceedings. The High Court in their opinion was in error in interdicting the arbitral proceeding at this stage and set aside the order. This judgment too substantiates the contention of Shri Kholkar, learned Advocate for the respondent that the invocation of the jurisdiction of the High Court under Article 227 of the Constitution of India is not available to the petitioner considering also the extent of judicial intervention as contemplated under Section 5 of the 1996 Act.

16. Section 26 of the Amendment Act of 2015 clearly provides that the Act shall not apply to the pending arbitral proceedings and reads as "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act." The Hon'ble Apex Court in the context of interpretation of Section 36 held in **BCCI** (supra), at paragraph no.39 as below:

"Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the

intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."

17. It was the contention of Shri Pravin Faldessai, learned Additional Government Advocate for the petitioner that in terms of Clause 25 of the Agreement, the provisions of the subsequent amendment too applied to the arbitral proceedings between the parties by reading the proviso to the said clause dealing with the settlement of disputes by arbitration reading as "subject as aforesaid, the provisions of the Arbitration Act 1940 or any statutory modification or enactment thereof and the rules made thereunder and the time being in force shall apply for the arbitration proceedings under this clause." This was

mainly to buttress his contention that the parties who were signatories to this Agreement bound themselves to be covered under the Act of 1940 as also to the subsequent enactments and therefore the 2015 Act applied to their case. Shri Kholkar, learned Advocate for the respondent on the contrary submitted that there was no written agreement as required in terms of Section 7 sub section 3 of the 1996 Act which mandates an arbitration agreement to be in writing. However in the absence of any singular dispute on the availability of clause 25 dealing with the settlement of dispute by arbitration, such a plea is not available to the respondents and to canvas that there was no written agreement between the parties when they were signatory to the said tender documents.

18. Section 34 of the 1996 Act contemplates an application for setting aside an arbitral award and sub-section 2 thereof provides that an arbitral award may be set aside by the Court only if the conditions contemplated therein are fulfilled. Section 37 provides what are the appealable orders and reads thus :

“37. Appealable orders.— (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—(a)

granting or refusing to grant any measure under section 9; (b) setting aside or refusing to set aside an arbitral award under section 34. (2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.— (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or (b) granting or refusing to grant an interim measure under section 17. (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

19. It would be apparent from a reading of these two provisions that an alternate remedy is available to the petitioner under Section 34 to set aside the arbitral award and to challenge the appealable orders by recourse to Section 37 thereof. The question is whether these alternate remedies are not adequate and efficacious remedies available to the petitioner as to avail of the remedy under Article 227 of the Constitution of India. No doubt to challenge an award under Section 34 of the 1996 Act, an award must be passed by the learned Arbitrator. It may appear at the first flush on a reading of Section 37 of the 1996 Act in particular that the impugned order is not capable of challenge thereunder. However considering the Full Bench judgment of **S.B.P. and Company**

(supra), it is always available to the petitioner to challenge the impugned order while assailing the award under Section 34 of the 1996 Act. Therefore, the contention of Shri Pravin Faldessai, learned Additional Government Advocate that the remedy available under Section 34 and 37 of the 1996 Act would not bar his remedy under Article 227 of the Constitution cannot stand the test of scrutiny.

20. In **East India Hotels Ltd.** (supra), a Division Bench of the Calcutta High Court held at paragraph No.43 that the fact that the appellant No.1 had earlier applied for and obtained licences under Section 443 makes no difference to the legal position as by conduct of a person jurisdiction cannot be conferred on a statutory authority which does not have such jurisdiction under the statute.

21. In **Jagmittar Sain Bhagat** (supra), the Hon'ble Apex Court reiterated at paragraph No.9 the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. Such an issue can be

raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply.

22. In **Girish Parekh** (supra), another Single Judge of this Court (Anoop V. Mohta,J.) held at paragraph No.16 that taking an overall view of the scheme of Section 16, one thing is very clear that an Arbitrator has power to decide the application with regard to the existence of an arbitration agreement and objection in respect of jurisdiction. The Arbitrator having once taken decision and rejected the objection with regard to the jurisdiction and observed further that there is existence of arbitration agreement between the parties and proceed accordingly, such order cannot be challenged except by the remedy as available under Section 34 and or Section 37 of the Arbitration Act. It further reiterated the well settled proposition culled out in S.B.P. and Company that once the matter reaches the sole arbitrator, the High Court would not interfere with the

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.

23. Considering the authorities placed before this Court, I have no hesitation to hold that the petition filed by the petitioner is not maintainable as an alternate efficacious remedy is also available to the petitioner in due course of time under Section 34 of the Act to assail the order of the learned Arbitrator.

24. In the result, I pass the following :

O R D E R

The petition is dismissed with no order as to costs.

2. Ad-Interim stay stands vacated.

NUTAN D. SARDESSAI J.

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