

THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN

and

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

C.R.P.No.758 of 2019

ORDER: (per Hon'ble Sri Justice Raghvendra Singh Chauhan)

This case has raised very interesting legal issues, namely:-

- (i) Whether a decision taken by the arbitral tribunal under Section 16(5) of the Arbitration and Conciliation Act, 1996 ('the Act', for brevity) can be challenged by filing a petition under Section 34 of the Act during the pendency of the arbitral proceeding or not?
- (ii) Can such a decision under Section 16(5) of the Act be challenged under Article 227 of the Constitution of India or not?
- (iii) Whether a party aggrieved by such a decision taken under Section 16(5) of the Act necessarily has to wait till the final award is passed or not?
- (iv) Whether it is only while challenging the final award under Section 34 of the Act that aggrieved party can raise a plea with regard to the lack of jurisdiction of the arbitral tribunal or not?

M/s. Trend World, and its Proprietor, the petitioners, are aggrieved by the order dated 16.02.2019 passed by the learned Arbitrator, whereby the learned Arbitrator has dismissed the plea raised by the petitioners with regard to the jurisdiction of the arbitral tribunal. The present petition has been filed by the petitioners under Article 227 of the Constitution of India.

Mr. Imran Khan, the learned counsel for Mrs. Ayesha Osman, the respondent No.1 has raised a preliminary objection

with regard to maintainability of the petition under Article 227 of the Constitution of India. In order to buttress his plea, he has relied upon the case of **M/s. S.B. P. and Co. v. M/s. Patel Engineering Ltd. And Anr**¹.

Secondly, the only remedy available to the petitioners against the order rejecting their plea questioning the jurisdiction, is to wait till the final award is passed by the learned Tribunal. However, the petitioners cannot challenge the said decision either by filing the present petition, or by filing a petition under Section 34 of the Act. In order to buttress this plea, the learned counsel has pleaded that Section 16 of the Act will have to be read in toto. Section 16(5) of the Act empowers the learned Tribunal not only to reject the plea raised by party with regard to its jurisdiction, but also to proceed further with the adjudication of the dispute and to pronounce the award. Section 16(6) uses the word “such an arbitral award”. Therefore, according to the learned counsel, the word “such an arbitral award” refers only to the final award passed by the learned Tribunal. Therefore, the only remedy available to the petitioners is to challenge the final award passed by the learned Tribunal under Section 34 of the Act.

On the other hand, Mr. Sushanth Reddy, the learned counsel for the petitioners, has pleaded that Section 2(c) of the Act defines the word “award” as including “an interim award”. An interim award, perforce, is an award which decides a preliminary or other issue. During the pendency of a proceeding, the issue of jurisdiction is generally taken up as a preliminary issue. The same can be decided by the learned Tribunal during the pendency

¹ AIR 2006 SC 450

of the arbitral proceeding. Therefore, a decision taken under Section 16(5) of the Act would be “an interim award”. Hence, the word “such an arbitral award” refers to a decision taken in Section 16(5) of the Act i.e. a decision rejecting the plea raised by the party with regard to the jurisdiction of the Tribunal. Hence, Section 16(6) of the Act should be interpreted to mean that a decision taken under Section 16(5) of the Act will tantamount to “an interim award”, and the “interim award” can be challenged under Section 34 of the Act.

Thirdly, in case the interpretation of Section 16(6) of the Act were to be that only the final award can be challenged, it will lead to an anomalous situation. For, the party challenging the jurisdiction of the arbitral tribunal, would unnecessarily have to shell out money for payment of the fees of the Arbitrator, for the payment of the fees of the counsels, for the stay of the counsels, and for the stay of the party. Having invested so much of money, the party may be required to challenge the same under Section 34 of the Act. In case the party were to succeed on the issue of jurisdiction of Tribunal, it would nullify the very award. Thus, a party cannot be expected to go through the rigmarole of an arbitral proceeding only to realize, at the end, that the arbitral proceeding was an exercise of futility.

Lastly, if the interpretation given by Mr. Imran Khan were to be accepted, it would not only make the definition of the word “Award”, as including “an interim award” otiose, but would also make Section 16(5) of the Act redundant. Any interpretation that creates an anomalous situation, or makes provision of law otiose should be avoided. Therefore, the learned counsel firstly pleads

that this petition is maintainable under Article 227 of the Constitution of India, or in the alternative, the petitioners should be granted the liberty to approach the competent court under Section 34 of the Act after the final award is passed.

Heard the learned counsel for the parties, examined the impugned order, and considered the case law cited at the Bar.

Section 2(c) of the Act defines the word “arbitral award” as including “an interim award”.

Section 16 of the Act is 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.

A bare perusal of the provision clearly reveals that Section 16(2) permits a party to raise the issue of jurisdiction of the

arbitral tribunal even if the party has participated in the appointment of an arbitrator. Sub-Section (5) further states that “the arbitral tribunal thus has the power to reject the plea and once having rejected the plea, it shall proceed with making of an “arbitral award””. Most importantly, Section 16(6) of the Act clearly states that a party aggrieved by “such an arbitral award” may make an application for setting aside “such an arbitral award” in accordance with Section 34 of the Act.

The issue is with regard to the use of the word “such” with the word “arbitral award”. Obviously, the word “such” refers to the use of the word “arbitral award” in Section 16(5) of the Act. Thus the word “such” would, obviously, refer to the final award passed by the arbitrator. Therefore, the use of the words “such an arbitral award” would not include the decision of the arbitral tribunal while rejecting the plea raised by a party with regard to its jurisdiction.

The case of **M/s. Patel Engineering Ltd. And Anr** (supra) has dealt with the scope and ambit of Section 16 of the Act. While the majority opinion held that the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act, including the jurisdictional issue, His Lordship Hon’ble Mr. Justice C. K. Thakker has elaborately dealt with the scope and ambit of Section 16 of the Act.

His Lordship is of the opinion as under:

94. Now, let us consider [Section 16](#) of the Act. This section is new and did not find place in the old Act of 1940. Sub-section (1) of that section enables the Arbitral Tribunal to rule on its own jurisdiction. It further provides that the jurisdiction of the tribunal includes ruling on any objections with respect to existence or validity of the arbitration agreement. Sub-sections (2), (3) and (4) lay down procedure of raising plea as to the

jurisdiction of the Arbitral Tribunal and entertaining such plea. Sub-section (5) mandates that the Arbitral Tribunal 'shall decide' such plea and, 'where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitration proceedings and make an arbitral award'. Sub-section (6) is equally important and expressly enacts that a party aggrieved by arbitral award may invoke [Section 34](#) of the Act for setting aside such award. The provision appears to have been made to prevent dilatory tactics and abuse of immediate right to approach the court. If an aggrieved party has right to move the court, it would not have been possible to preclude the court from granting stay or interim relief which would bring the arbitration proceedings to a grinding halt. The provisions of [Section 16](#) (6) read with [Section 5](#) now make the legal position clear, unambiguous and free from doubt.

Furthermore, His Lordship has opined as under:-

As already indicated by me earlier, Sub-section (1) of [Section 16](#) does not merely enable the Arbitral Tribunal to rule on its own jurisdiction, but requires it to continue arbitral proceedings and pass an arbitral award. [Sub-section (5)] It allows the aggrieved party to make an application for setting aside the award in accordance with [Section 34](#). [Sub-section (6)]. Thus, in my judgment, [Section 16](#) can be described as 'self-contained Code' as regards the challenge to the jurisdiction of Arbitral Tribunal. As per the scheme envisaged by Parliament, once the Arbitral Tribunal rules that it has jurisdiction, it will proceed to decide the matter on merits and make an award. Parliament has also provided the remedy to the aggrieved party by enacting that he may make an application under [Section 34](#) of the Act. In the circumstances, the proceedings cannot be allowed to be arrested or interference permitted during the pendency of arbitration proceedings.

It is, indeed, trite to state that a clever litigant can raise the issue with regard to the jurisdiction of the tribunal, may insist that it should be decided as a preliminary issue and may challenge the finding under [Section 34](#) of the Act, if the interpretation were to be given to [Section 16\(6\)](#) of the Act that a decision by the tribunal on the issue of jurisdiction is an interim award. Thus, appealable under [Section 34](#) of the Act. However, in the opinion of the Hon'ble Supreme Court, in the case of **M/s. Patel Engineering**

Ltd. And Anr (supra), such a remedy would be used as a dilatory tactic to forestall the proceedings of the arbitral tribunal.

Therefore, the only possible interpretation under Sub-Section (6) of Section 16 is that if the plea with regard to the jurisdiction were rejected by the arbitral tribunal, the arbitral tribunal is empowered to proceed further and to pass the final award. It is this final award which shall be challenged under Section 34 of the Act. Therefore, during the pendency of the proceedings before the arbitral tribunal, a party, who is aggrieved by the decision made under Sub-Section (5) of Section 16 of the Act necessarily has to wait till the final award is passed, for it to challenge the same. During the pendency of the proceedings, the party cannot challenge the interim decision under Section 34 of the Act.

The second issue before this court is that since a party is not permitted to challenge the decision and is required to wait till the final award is passed, does the party have any remedy under Article 226 and 227 of the Constitution of India or not? The said issue is no longer *res integra* as it has been decided by the Apex Court in the case of **M/s. Patel Engineering Ltd. And Anr** (supra). The Apex Court has clearly held as under:-

Section 5 restricts judicial intervention. The said section is material and reads thus;

"5. Extent of judicial intervention. -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

The Apex Court has further observed as under:-

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 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.

Therefore, this court would not be justified in invoking its jurisdiction under Article 227 of the Constitution in order to interfere with the impugned order.

In short, while the petitioners may be aggrieved by the impugned order, under Section 16(6) read with Section 34 of the Act, they are required to wait till the final award is passed. Once the final award is passed, the petitioners would be entitled to raise all the objections to the legal validity of the award, including the

objection with regard to the jurisdiction of the arbitral tribunal. However, during the pendency of the arbitral proceedings, the petitioners are unjustified in trying to invoke the writ jurisdiction/revisional jurisdiction of this court.

For the reasons stated above, this court is not inclined to interfere with the impugned order.

The Civil Revision Petition is hereby dismissed. No order as to costs.

(Raghvendra Singh Chauhan, J)

(T.Amarnath Goud, J)

02nd April, 2019
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