

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

Civil Revision Petition No.1570 of 2019

ORDER: (Per Sri Justice M.S.Ramachandra Rao)

The petitioner in this Civil Revision Petition has questioned the interim order dt.25.06.2019 passed in Interlocutory Application No.1 of 2019 in Arbitration Application No.1 of 2017 passed by the Sole Arbitrator, Sri M. Santha Raju, District Judge (Retd.) [for short, ‘the Arbitrator’].

2. By virtue of the said order, the request of the respondent to permit it to adduce oral evidence in support of its claim was allowed by the learned Arbitrator, though it had earlier filed a Memo reporting no oral evidence, on the ground that the said memo was filed unwittingly and permitting the petitioner to cross-examine the witnesses of the respondent.

3. At the threshold, this Court asked the counsel for petitioner to satisfy the Court about the maintainability of the Revision under Article 227 of the Constitution of India challenging the interim order passed by the learned Arbitrator and drew his attention to Section 5 of the Arbitration and Conciliation Act, 1996 which states as follows :

“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.”

4. The counsel for petitioner contended that this Court had considered the matter in **Gaurav Sanghi vs. Prajavani Boradcasting Pvt. Ltd., Hyderabad and others¹** and **Harpeet Singh Chhabra and others vs. Suneet Kaur Sahney and others²**.

5. In **Gaurav Sanghi** (1 supra), the 1st respondent appointed an Arbitrator on the ground that despite service of notices containing names of three persons, the petitioner did not chose to select one among them, and therefore, the 1st respondent was entitled to appoint any one of its choice as Sole Arbitrator. An application was filed under Section 16 of the Act by the petitioner in the Revision before the Arbitrator challenging his competence. The Arbitrator instead of deciding the said issue adjourned the application under Section 16. The said order of the Arbitrator was challenged in a Revision filed under Article 227 of the Constitution of India. The Division Bench entertained the Revision *without going into the question whether the Revision was maintainable* in the first instance and directed the Arbitrator to decide his competence to adjudicate the matter. Therefore, this decision is not of much assistance to the counsel for petitioner.

¹ 2017 (4) A.L.D. 485 (D.B.)

² 2019 (2) A.L.D. 62 (D.B.)

6. In **Harpeet Singh Chhabra** (2 supra), an order dt.29.12.2017 had been passed by the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, terminating the mandate of an Arbitrator and directing the parties to approach the High Court for appointment of an Arbitrator under Section 15(2) of the Act. This was questioned by the petitioners initially by filing an appeal under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 on 05.03.2018. Though the appeal was numbered, later the petitioner in the case realized that the appeal would not lie and sought conversion of the appeal into a Revision under Article 227 of the Constitution of India contending that filing of the appeal was a *bona fide* mistake. This was opposed by the other party in the case contending that under Section 8 of the Act, no Revision should be entertained against an interlocutory order of a Commercial Court including the order on the issue of jurisdiction and any such challenge, subject to the provisions of Section 13 of the Act, should be raised in an Appeal against the decree of the Commercial Court. The Division Bench, in this decision, held that the High Court can entertain a Civil Revision Petition under Article 227 of the Constitution of India; and that Section 8 of the Act did not take away the supervisory power of the High Court under Article 227 of the Constitution of India.

It is important to note that in the said case, an order passed by a 'Court' constituted under the Act was challenged by way of Revision

under Article 227 of the Constitution of India and not an interim order passed by an Arbitrator. Therefore, the said decision also cannot come to the assistance of petitioner.

7. The counsel for petitioner also relied upon the decision of the Supreme Court in **Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd.**³ in support of his plea that a Revision under Article 227 of the Constitution of India is maintainable challenging the interim order passed by the Arbitrator. In the said decision, the question was whether the Madras High Court should exercise jurisdiction under Section 11(6) of the Act despite the fact that the agreement contained a clause that venue of Arbitration should be Bhubaneswar.

There is no discussion in the said judgment about the applicability of Article 227 of the Constitution of India at all and the said decision also cannot help the petitioner.

8. On the contrary, the counsel for respondent cited the Division Bench decision of this Court in **Varuna Investments vs. Asian Infrastructure Pvt. Ltd., Singapore and another**⁴. In that case, the question was whether a Writ Petition under Article 226 of the Constitution of India or a Revision under Article 227 of the Constitution of India are maintainable challenging an order passed

³ 2019 (6) A.L.D. 13 [S.C.]

⁴ 2014 (4) A.L.D. 63 [D.B.]

under Section 9 of the Arbitration and Conciliation Act, 1996 by a Court.

The Division Bench held that a Writ Petition under Article 226 of the Constitution of India cannot be maintained since parties to the Commercial transaction were two foreigners and none of them can be said to be a 'State' within the meaning of Article 12 of the Constitution of India or 'other authorities' within the meaning of Article 226 of the Constitution of India. It further held that even Article 227 of the Constitution of India cannot be invoked to interfere with the order passed under Section 9, because there is an effective alternative remedy under Section 37 providing remedy to challenge orders passed under Section 9 of the Act.

9. In S.B.P. and Co. vs. Patel Engineering⁵, a Seven-Judge Bench of the Supreme Court observed at para Nos.45 and 46, as follows :

“45. 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. 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 its 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 he 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

⁵ (2005) 8 S.C.C. 618

all, a 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. Such an intervention by the High Courts is not permissible.

46. The object of minimising 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 or under Article 226 of the Constitution 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. (emphasis supplied)

10. Thus, the Supreme Court has clearly held that the policy of the Legislature is to minimize judicial intervention while a matter is in the process of being arbitrated upon, and 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.

11. This principle was also reiterated in **Lalitkumar V. Sanghavi (Dead) Through LRS Neeta Lalit Kumar Sanghavi and another vs. Dharamdas V. Sanghavi and others**⁶. In that case, the Supreme Court held that a Writ Petition under Article 226 of the Constitution of

⁶ (2014) 7 S.C.C. 255

India cannot be maintained challenging an interim order passed by an Arbitral Tribunal.

12. It is no doubt true that the power of judicial review is a basic feature of the Constitution of India and the same cannot be altered or taken away by a statute, but an Arbitral Tribunal is a creature of a private contract between the parties and is not a statutory tribunal which can be subject to the supervisory jurisdiction under Article 227 of the Constitution of India.

13. In view of the decision of the Supreme Court in **S.B.P. and Co.** (5 supra), which is binding on us, we are of the opinion that the instant Civil Revision petition under Article 227 of the Constitution of India filed by the petitioner challenging the interim order passed by the learned Arbitrator is not maintainable, and the same is accordingly dismissed, leaving open all the contentions raised by petitioner in the said application to be urged in an appropriate proceeding by the petitioner after the Award is passed by the learned Arbitrator. No order as to costs.

14. As a sequel miscellaneous petitions pending if any, in this Civil Revision Petition, shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date: 20-12-2019
Ndr

