

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 798/2020

Inox Leisure Limited
..VS..
Indo Pacific Project Ltd.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Ms. G. Venkatraman, Advocate for the petitioner
Shri D.V. Chauhan, Adv with Shri A.S. Dhabadgao, Adv for respondent

CORAM : N.B. SURYAWANSHI, J.
ORDER RESERVED ON : 11/02/2020
ORDER PRONOUNCED ON : 20/02/2020

1] This petition challenges the order passed by the Arbitral Tribunal in the arbitration proceedings between the petitioner and respondent thereby rejecting the proposed amendment set out in para nos. 9A and 9B of the amendment application dated 06/12/2019. Learned advocate for the respondent raised the point of maintainability of the writ petition.

2] The petitioner is the original respondent and the respondent is the original claimant in the arbitration proceedings. This Court, vide order dated 16/04/2019 passed in application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the said Act") was pleased to appoint Hon'ble Mr. Justice A.P. Deshpande (Retd.) as the sole arbitrator to adjudicate the dispute between the claimant and respondent. After constitution of the Arbitral Tribunal, the claimant filed statement of claim on 05/10/2019 and the petitioner – respondent filed statement of defence and

counter claim on 15/11/2019. Before filing of the statement of defence, the petitioner – respondent filed an application under Section 17 of the said Act seeking interim relief wherein the petitioner – respondent reserved its liberty to challenge the jurisdiction of the learned arbitrator. On 06/12/2019, the petitioner – respondent preferred an application under Section 23 of the said Act seeking amendment of its statement of defence thereby raising objection to the jurisdiction of the learned Arbitral Tribunal to decide the dispute on various grounds. The respondent – claimant filed reply to the said amendment application. The learned Arbitral Tribunal, after hearing both the parties, was pleased to reject the said amendment application by placing reliance on Section 16 (2) of the said Act. The said rejection is challenged in this petition.

3] Learned advocate for the petitioner vehemently submitted that in the application under Section 23 of the said Act, amendment can be denied on the ground of delay. Hence, the learned Arbitral Tribunal was not justified in rejecting the application seeking amendment. It is submitted that the learned Arbitral Tribunal has committed an error in rejecting the application for amendment by placing reliance on Section 16 (2) of the said Act and the learned Arbitral Tribunal has not taken into consideration Section 16 (4) of the said Act. By referring to Section 37 of the said Act, learned advocate for the petitioner submits that the orders passed under Sections 16 (2) and 16 (3) of the said Act are appealable. However, since the amendment application of the petitioner is rejected, the petitioner cannot challenge the said order by filing appeal under Section 37 of the said Act though the order is purportedly passed under Section 16 (2) of the said Act. It is

submitted that the petitioner is rendered remedy-less and hence is entitled to invoke the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. It is argued that the learned arbitrator ought to have decided the application for amendment on the principles governing amendment of pleadings.

4] On the other hand, learned advocate for the respondent – claimant questions the maintainability of the present writ petition by placing reliance in the ratio of the Hon'ble Supreme Court in *SBP & Co. vs. Patel Engineering Ltd. & Anr.* **(2005) 8 SCC 618**. By referring to para nos. 45 and 46 of the said judgment, he states that the present writ petition is not maintainable and the petitioner can raise the ground of rejection of the amendment application in a proceedings under Section 34 of the said Act at appropriate stage. He would submit that the rejection of the application for amendment is an interlocutory order and the interlocutory orders passed by the arbitrator cannot be subjected to challenge under Articles 226 and 227 of the Constitution of India. To support this argument, he placed reliance in *Space Wood Office Solution Pvt. Ltd., Nagpur vs. Anupam Rai Construction, Nagpur* **2019 (5) Mh.L.J. 356**. He further relies upon the ratio in *Deep Industries Limited vs. ONGC Ltd. & Anr.* **2019 SCC OnLine SC 1602**.

5] In reply, by placing reliance in *L. Chandra Kumar vs. Union of India & Ors.* **1997 (2) Mh.L.J. 198 (SC)**, learned advocate for the petitioner submitted that the power to exercise judicial superintendence over decisions of all Courts and Tribunals is part of basic structure of the Constitution and hence the contention that this Court should not exercise the

jurisdiction under Articles 226 and 227 of the Constitution of India is unacceptable.

6] I have extensively heard the learned advocates for both the parties on the point of maintainability of the present writ petition. I have gone through the authorities cited by both the learned advocates in support of their respective contentions.

7] The question of maintainability of the petition under Articles 226 and 227 of the Constitution of India against an interlocutory order passed by the arbitrator in the arbitral proceedings is no more *res-integra*. The Constitution Bench of the Hon'ble Supreme Court has settled the legal position in SBP & Co. (supra), 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 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. Such an intervention by the High Courts is not permissible.

46. 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](#) 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.”

8] The ratio in SBP & Co. (supra) is followed by this Court. In W.P. No. 6985/2015, the learned Single Judge (Coram : Rohit B. Deo, J.) relying on the above ruling dismissed the challenge to the order of the Arbitral Tribunal by which the objection to the jurisdiction of the Tribunal was rejected, by imposing exemplary costs. In W.P. No. 316/2019, the learned Single Judge (Coram : A.S. Chandurkar, J.) rejected the challenge raised to the interlocutory orders passed by the Arbitral Tribunal.

9] Learned advocate for the petitioner – respondent further placed reliance on the judgment of Division Bench of this Court in Dowell Leasing & Finance Ltd. vs. Radheshyam B. Khandelwal & Ors. **2007 SCC OnLine Bom 655** to contend that the petition under Articles 226 and 227 of the Constitution of India is maintainable to challenge the orders passed by the arbitrator.

10] In the above decision, the respondent therein had filed an arbitration reference against the petitioner and respondent nos. 2 and 3 under Bye-Laws of Bombay Stock Exchange, Mumbai. An arbitration award was passed and that award was challenged by the petitioner before the High Court which was set aside. Thereafter, the arbitration reference was filed against the petitioner by the respondent no. 1 therein. An application under Section 16 of the said Act was filed contending that there was no agreement between the petitioner and the respondent therein. The said objection was upheld and the reference was dismissed with costs. The said order was styled as an award. An appeal was filed by the respondent against the said order under the Bye-Laws of the Bombay Stock Exchange which was allowed, the award was set aside and the matter was remitted back to the Tribunal to be decided on merits. Against the said order, writ petition was filed before the Division Bench. In these facts, the learned Division Bench of this Court held that the writ petition was maintainable as the reliefs sought in the petition was to declare Bye-Law No. 274-A and Regulation No. 15.23 as ultra vires Article 14 of the Constitution of India, as being irreconcilable with Bye-Law No. 260 and as being further ultra vires the provisions of the said Act with a further declaration that the said Bye-Laws are unconstitutional and unenforceable and to strike down the same. In these facts, the learned Division Bench entertained the writ petition. This decision is distinguishable on facts and in my considered view is of no help to the petitioner.

11] It cannot be disputed that the impugned order passed by the Arbitral Tribunal is an interlocutory order which cannot be challenged in a writ petition filed under

Articles 226 and 227 of the Constitution of India in view of Constitution Bench judgment of the Hon'ble Supreme Court. In this view of the matter, the present writ petition is not maintainable and the same is **dismissed** as such. All the contentions raised by the respective parties are kept open including the challenge raised to the impugned order, for being raised after the award is passed.

JUDGE

ANSARI