

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No.1235 of 2021

**Satyendra Nath Ray
Vs.
VCK Share & Stock Broking Services Limited**

For the petitioner	:	Mr. Aniruddha Chatterjee, Mr. Rajarshi Dutta, Mr. V.V.V. Sastry, Mr. Nischay Mall
For the opposite party	:	Mr. Jishnu Chowdhury, Mr. Abhijit Chowdhury, Mr. Aritra Basu
Hearing concluded on	:	15.07.2021
Judgment on	:	19.07.2021

Sabyasachi Bhattacharyya, J:-

1. The short questions which fall for consideration in this case are as follows:

(i) Whether the High Court has the power of judicial review under Article 227 of the Constitution of India over an interlocutory order passed by an Arbitral Tribunal in view of the bar contemplated in Section 5, read with Sections 34 and 37, of the Arbitration and Conciliation Act, 1996; and

(ii) (Subject to the decision rendered on the preceding question,) whether the Arbitral Tribunal refused to exercise jurisdiction vested in it by law in refusing to permit the petitioner to move his application for appointment of handwriting expert at the outset, instead of deciding such issue on merits.

2. At the outset, learned counsel appearing for the opposite party raises an objection regarding maintainability of the instant application under Article 227 of the Constitution of India in view of the specific bar envisaged in Section 5, read with Sections 34 and 37 of the Arbitration and Conciliation Act, 1996 Act (“the 1996 Act”, for short). In support of such submission, learned counsel cites the following judgments:

(a) *SBP & CO. vs. PATEL ENGINEERING LTD. & ANR.* [(2005) 8 SCC 618]

(b) *DEEP INDUSTRIES LIMITED vs. ONGC LTD. & ANR.* [(2020) 14 SCC 706]

(c) *BHAVEN CONSTRUCTION vs. EXECUTIVE ENGINEER, SARDAR SAROVAR NARMADA NIGAM LTD. & ANR.* [2021 SCC OnLine SC 8]

3. Learned counsel further argues that the scheme of the 1996 Act envisages early disposal of arbitral proceedings, as opposed to matters pending in courts, and thus limits challenge against all interlocutory orders, except those specifically enumerated in Section 37 thereof, at the time of challenging the final award under Section 34 of the 1996 Act. Hence, Section 5 the 1996 Act has

specifically barred judicial intervention except as provided in the said Act itself.

4. Thus, the opposite party argues, this court ought not to exercise its superintending powers under Article 227 of the Constitution of India.
5. Learned counsel appearing for the opposite party contends that Section 37 of the 1996 Act does not encompass the present impugned order. On the other hand, since no formal application for appointment of handwriting expert could be filed by the petitioner before the tribunal since the tribunal shut out the petitioner from doing so at the very outset on the ground of not having jurisdiction. Hence, there was no scope of remedy for the petitioner either under Section 37 or Section 34 of the 1996 Act.
6. Learned counsel submits that the proceeding, from which the instant challenge arises, is a statutory arbitration as governed by the National Stock Exchange of India Limited Bye-Laws (for short, “the said Bye-Laws”). A copy of the said Bye-Laws is annexed to the writ petition. Chapter XI of the same deals with “ARBITRATION” and provides for reference to arbitration, which will be governed by the 1996 Act.
7. Clause (4) (a) (ii), sub-clause (b) provides that the Relevant Authority may, from time to time prescribe Regulations for the procedure to be followed by the arbitrator in conducting the arbitral proceedings including, inter alia, terms and conditions subject to which the arbitrator may appoint experts to report on

specific issues and the procedure to be followed in arbitral proceedings upon such an appointment.

8. The said Bye-Law, read in conjunction with Section 26 of the 1996 Act, confers ample jurisdiction on the Arbitral Tribunal to appoint experts to report to it on specific issues to be determined by the arbitral tribunal and require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
9. In the present dispute, since allegations have been raised before the Tribunal regarding the veracity of signatures and authenticity of certain documents, appointment of an expert is an essential pre-requisite to determine such issue. Hence, learned counsel for the opposite party argues, the Arbitral Tribunal committed a gross jurisdictional error in precluding the petitioner even from making an application praying for appointment of expert.
10. Learned counsel contends that in view of the nature of miscarriage of justice and abuse of process of law caused by the impugned order, and since the petitioner does not have any equally efficacious alternative remedy, interference under Article 227 of the Constitution is not only permissible but necessary.
11. The citations relied on by the petitioner's counsel, it is argued, do not lay down an absolute bar to the jurisdiction of the High Courts to interfere even with interlocutory orders of arbitral tribunals, but restricted the criteria for such interference, which are mostly satisfied in the instant case.

- 12.** Learned counsel for the opposite parties cites, in support of his contentions, the following judgments:

(a) *PUNJAB AGRO INDUSTRIES CORPN. LTD. vs. KEWAL SINGH DHILLON* [(2008) 10 SCC 128]

(b) *GARWARE WALL ROPES LIMITED vs. COASTAL MANRINE CONSTRUCTIONS AND ENGINEERING LIMITED* [(2019) 9 SCC 209]

(c) *KRISHENA KUMAR vs. UNION OF INDIA AND OTHERS* [(1990) 4 SCC 207]

(d) *CITYSCOPE DEVELOPERS (P) LTD. vs. AKLA BUILDERS PVT. LTD. & ORS.* [(2000) 2 Cal LJ 539]

- 13.** Upon considering the submissions, cited decisions and materials on record, this court comes to the following decision:

- 14.** In paragraphs 45 and 46 of *SBP & Co. (supra)*, relied on by the opposite party's counsel, the Supreme Court disapproved of the stand adopted by some High Courts that any and every order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. It was further indicated that once the arbitration has commenced in the Tribunal, parties have to wait until the award is pronounced unless a right of appeal is available to them under Section 37 of the 1996 Act.

- 15.** However, the very second paragraph of the report, clarifies that the question which fell for consideration therein was, what is the

nature of the function of the Chief Justice or his designate under Section 11 of the 1996 Act?

16. Paragraph no. 47, where the conclusions of the report were summed up, specifically restricts the adjudication to such question, positing its findings on the premise that the power exercised by the Chief Justice of the High Courts or of India is not an administrative power but a judicial power.
17. Although even the *obiter* observations of the Supreme Court are binding, paragraphs 45 and 46 merely interpreted the restrictions already stipulated in Section 5 of the 1996 Act and restrained judicial intervention in “any” and “every” matter.
18. The crux of the exposition of law in *Deep Industries Ltd. (supra)*, as summed up in paragraph no. 17 thereof, is that the remedy under Article 227 of the Constitution is available against judgments under Section 37 of the 1996 Act, yet the High Court would be extremely circumspect in interfering with the same so that such interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.
19. In *Bhaven Construction (supra)*, also cited by learned counsel for the opposite party, while discussing the scope of interference in arbitral proceedings under Article 227 of the Constitution, the Supreme Court observed that the power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear ‘bad faith’ is shown by one of the parties.

- 20.** On the other hand, in *Punjab Agro Industries (supra)*, cited by the opposite party, the Supreme Court held that *SBP (supra)* does not bar a petition under Article 227 of the Constitution and do not apply to a subordinate court functioning as designate of the Chief Justice, as in the present case. However, the said case was also in the limited context of an order passed under Section 11 of the 1996 Act being a judicial order and is not attracted, in terms, to the matter under consideration before this court.
- 21.** *Garware Wall Ropes Ltd. (supra)*, referred to by learned counsel for the opposite party, was also confined to the scope of Section 11 of the 1996 Act primarily and is not relevant in the present context.
- 22.** There cannot be any quarrel with the proposition laid down in paragraph 19 of *Krishena Kumar (supra)* in so far as the doctrine of precedent is limited to the decision itself and as to what is necessarily involved in it. It does not mean, it was held, that the court was bound by the various reasons given in support of it, especially when they contain “propositions wider than the case itself required”. Abiding by such proposition, the judgments cited by both sides in the present case, within the compass of Section 11 of the 1996 Act, are not binding in the present case.
- 23.** As far as *Cityscope Developers (P) Ltd.*, rendered by a learned Single Judge of this Court is concerned, the immediately preceding proposition was reiterated and it was held that a decision is an authority for what it decides and not what can be logically deduced therefrom; even a slight distinction in the fact or an additional fact

may make lot of difference in the decision making process. Although it was further suggested in the said report that the Arbitral Tribunals come within the purview of Article 227 of the Constitution, such ratio, read in the context of the now-settled position of law, as expounded in some of the Supreme Court decisions cited by the opposite party, has now been restricted to a very limited window as far as judicial intervention under Article 227 is concerned.

- 24.** In the advocate's letter dated June 16, 2021, sent on behalf of the petitioner, objection was taken to the observation in the minutes recorded by the Arbitral Tribunal of its order dated June 15, 2021 which stated that the Tribunal could not pass directions for appointment of handwriting expert on the plea that such directions are beyond the purview of the Arbitral Tribunal.
- 25.** Thus, the Tribunal shut out the petitioner at a nascent stage of the arbitral proceeding, even before determination of the procedure to be followed in the arbitral proceeding, from applying for appointment of a handwriting expert on the flimsy ground that such an order was beyond the purview of the Tribunal.
- 26.** Such ground is categorically negated by Section 26 of the 1996 Act, which specifically confers the power on the arbitral tribunal to appoint expert(s) to report to it on specific issues to be determined by the tribunal and to require a party to give the expert any relevant information or produce, or to provide access to, any relevant documents, etc. for the expert's inspection.

- 27.** Clause 4 (a) (ii), sub-clause (b) under Chapter XI of the said Bye-Laws empowers the Relevant Authority to prescribe Regulations for the procedure to be followed by the arbitrator in conducting the arbitral proceedings, in particular providing for the terms and conditions subject to which the arbitrator may appoint experts to report on specific issues and the procedure to be followed in arbitral proceedings upon such an appointment.
- 28.** Chapter XI of the said Bye-Laws applies the provisions of the 1996 Act to the arbitral proceedings envisaged by the Bye-Laws, which includes Section 26 of the 1996 Act.
- 29.** Hence, the arbitral tribunal, in the present case, patently refused to exercise jurisdiction vested in law in precluding the petitioner from even applying for appointment of handwriting expert, prior to laying down the procedure to be followed by it, as required by Clause 4 (a) (ii) of the said Bye-laws. The tribunal overlooked its powers under Section 26 of the 1996 Act outright in refusing any opportunity to file an application for such appointment, let alone considering on merit the necessity thereof, particularly in view of the specific disputes sought to be raised regarding the veracity of certain documents and signatures relied on by the parties in the arbitral proceedings.
- 30.** Thus, on a meaningful reading of the reports cited by the opposite party on the limited scope of judicial intervention under Section 227 of the Constitution of India, in the light of the bar contemplated under Section 5 of the 1996 Act, which is a

subordinate piece of legislation in the backdrop of the *grundnorm* of the Indian legal infrastructure, that is, the Constitution of India.

31. Not only was the impugned decision of the tribunal to refuse an opportunity to apply for handwriting expert appointment without jurisdiction, the same, particularly at the inchoate stage prior to deciding even the procedure to be followed in conducting the arbitral proceeding, resulted in a gross miscarriage of justice, fit to be interfered under Article 227 of the Constitution of India.
32. That apart, as rightly argued by the petitioner, the remedy under Section 34 of the 1996 Act would be illusory, in the absence of any formal application for appointment of handwriting expert being permitted to be filed, let alone adjudicated, more so since the final award will be devoid of the benefit of the opinion of an expert, which is *prima facie* necessary in the context of issues germane to the arbitral proceeding.
33. Hence, both the questions formulated at the inception of this order are decided in favour of the petitioner.
34. In view of the above considerations, C.O. No. 1235 of 2021 is allowed on contest, thereby setting aside the impugned order dated June 15, 2021 of the Arbitral Tribunal in Arbitration Matter No. NSEKRO/030722/19-20/ISC/IGRP/ARB (Satyendra Nath Roy vs. VCK Share & Stock Broking Services Limited). The petitioner is permitted to apply formally before the Arbitral Tribunal for appointment of a handwriting expert. If such an application is made, the Tribunal shall adjudicate the same on merits, upon

giving opportunity of filing written objection to the opposite party and upon hearing both parties, without being influenced by any of the observations made in this order or the order impugned herein, as expeditiously as possible, keeping in mind the statutory temporal frame-work for disposing of arbitral proceedings.

35. There will be no order as to costs.
36. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)