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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8131 OF 2023
WITH
INTERIM APPLICATION NO. 14144 OF 2023
IN
WRIT PETITION NO. 8131 OF 2023

Saloni Business **Park** Pvt Ltd and Ors ... Petitioners/Applicants

vs.

Trafigura **India** Private Limited and ... Respondents
Another

Mr. Nikhil Sakhardande through VC, Mr. Siddhesh Bhole a/w.
Mr. Yakshay Chheda a/w. Ms. Anushree Koparkar i/b. SSB Legal
and Advisory, for the Petitioners/Applicants.

Mr. Karl Tamboly a/w. Cyrus Jal, Yohaann Limathwalla, Ahsan
Allana i/b. JSA for Respondent No.1.

CORAM : GAURI GODSE, J.

DATED : 23rd FEBRUARY, 2024

PC:-

1. This petition takes an exception to the order dated 17th April 2023, passed by the sole Arbitrator in arbitration proceedings between the petitioners and respondent no. 1. By the impugned order, the learned Arbitrator has allowed the claimant i.e. respondent no. 1 herein to bring on record additional evidence. The

said permission is granted subject to condition. According to the said condition, the claimant is directed to pay the costs of the petitioners towards the arbitration hearings from the date of the order, regardless of the outcome of the arbitral proceedings.

2. Learned counsel appearing for the petitioners submitted that the claimant had taken a conscious decision not to produce the documents though they were in possession of the claimant. He submits that the claimant has come up with the case that inadvertently the documents were not produced. He, therefore, submitted that there is bad faith on the part of the claimant in making such an application at the fag end of the final arguments. He submitted that if the impugned order is not interfered with by this court, the petitioners would be rendered remediless, as they would not be able to challenge the said order after the conclusion of the arbitration proceedings. He submitted that since the application was made at the fag end of the arguments, the application should not have been allowed by the learned Arbitrator. In support of his submissions, he relied upon the decision of the Hon'ble Supreme Court in the cases of *Deep Industries Limited V/s Oil and Natural Gas Corporation Limited and Another*¹, *Bhaven Constructions V/s Executive Engineer, Sardar Sarovar Narmada Nigam Limited and*

¹ (2020)15 SCC 706,

Another² and Bagai Construction V/s Gupta Building Material Store³.

3. By relying upon the principles laid down in the said decisions, learned counsel for the petitioners submitted that this is a fit case to invoke powers under Articles 226 and 227 of the Constitution of India and set aside the impugned order, as serious prejudice is caused to the petitioners. He submitted that in the arbitration proceedings, the petitioners have opened their arguments and now if the claimant is allowed to produce any additional evidence and documents, the same will cause prejudice to the petitioners.

4. Learned counsel for respondent no. 1 (“the claimant”) submitted that the petition may not be entertained in view of section 5 of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act”). He also placed reliance on section 19 of the Arbitration Act which deals with the determination of the Rules of procedure to be decided by the tribunal, that will be binding upon the parties. He submitted that no specific Rules were agreed to be followed before the Tribunal for conducting its proceedings. He submitted that the claimant’s case was that, though the documents were with the claimant, inadvertently, the same were not produced at an early

² (2022)1 SCC 75

³ (2013) 14 SCC 1

stage. He submitted that the learned Arbitrator has taken into consideration all the submissions of both parties and has recorded a finding that there is no ulterior motive to delay the proceedings on the part of the claimant. Thus, by keeping in mind the well-settled principles of natural justice learned Arbitrator has rightly allowed the application of the claimant subject to condition as noted in the operative part of the order.

5. Learned counsel for the claimant further submitted that the learned Arbitrator has also observed that no prejudice will be caused to the petitioners as they will have an opportunity to cross-examine the claimant's witness on the additional evidence produced and they will also be entitled to lead their evidence if so desired. In support of his submissions, learned counsel for the claimant relied upon the decision of the Hon'ble Supreme Court in the case of ***SBP & Co. V/s Patel Engineering Ltd***⁴ and particularly paragraphs 45 and 46 of the said decision. He submitted that in view of the settled principle of law regarding a limited scope of intervention in orders passed by the Arbitral Tribunal and in view of the settled principle of law laid down by the Hon'ble Supreme Court in the said decision, this petition may not be entertained. He submitted that there was no prejudice caused to the petitioners as observed by the learned

4 [2(2005) 8SCC 618]

Arbitrator in the order.

6. In response to the decision relied upon by the learned counsel for the petitioners, he submitted that in fact, the observations made by the Hon'ble Supreme Court in the decisions of *Deep Industries Limited* and *Bhaven Construction* also support the submissions made on behalf of the claimant. He thus, submitted that there is no case made out for intervention by invoking powers under Articles 226 and 227 of the Constitution of India. He also submitted that there was no bad faith on the part of the claimant in producing evidence at the belated stage. He submitted that the learned Arbitrator has considered the said submissions and observed that there was no ulterior motive on the part of the claimant in delaying the proceedings.

7. I have considered the submissions made on behalf of both parties. Perused the record. In the impugned order, the learned Arbitrator has categorically observed that the conduct of the claimant does not show that any deliberate attempt was made to delay the proceedings. He has rightly observed that strict laws of procedure and evidence as applicable in Civil Suit shall not apply to the arbitral proceedings. The observations made by the learned

Arbitrator that there was no ulterior motive on the part of the claimant to delay the proceedings and produce the documents at the belated stage does not warrant any intervention by this court.

8. Though the learned counsel for the petitioners sought to argue that there was bad faith on the part of the claimant, he was unable to point out, how the claimant was to gain any benefit by delaying the proceedings and filing documents at a belated stage. Learned Arbitrator has observed that the conduct of the claimant does not show that any deliberate attempt was made to delay the proceedings. It is not disputed that the proposed documents sought to be produced by way of additional evidence are part of the pleadings of the claimant. Learned Arbitrator has thus, observed that the petitioners would be entitled to cross-examine the claimant's witness on the additional evidence and also lead their own evidence. To strike a correct balance, the learned Arbitrator has imposed conditions directing the claimant to pay the costs of the petitioners till the closure of the proceedings. Learned Arbitrator has clarified that such cost will be borne by the claimant regardless of the outcome of the arbitral proceedings.

9. Learned counsel for the claimant rightly relied upon the

decision of the Hon'ble Supreme Court in the case of ***SBP & Co.*** and particularly paragraphs 45 and 46 which read as under:

“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 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, 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.”

10. The said observations of the Hon’ble Supreme Court are reiterated in the subsequent decision of the Hon’ble Supreme Court in the case of ***Deep Industries Limited*** as referred to in paragraph 19. By relying upon the observations in the decision of ***Deep Industries***, the Hon’ble Supreme Court in the decision of ***Bhaven Construction*** has held that in the absence of any bad faith or any exceptional circumstances, the high court should not have used its inherent power under Article 227 of the Constitution to interject the arbitral process. The Hon’ble Supreme Court in the said decision has further held that if courts are allowed to interfere with arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished. In both the cases of ***Deep Industries*** and ***Bhaven Construction***, the issue involved was the jurisdiction of the Arbitral Tribunal. So far as the decision in the case of ***Bagai***

Construction, relied upon by the learned counsel for the petitioner is concerned, I do not find the same is of any assistance to the argument made on behalf of the petitioners. The said decision deals with the Civil Suit where strict rules of the Civil Procedure Code as well as the Evidence Act are applicable.

11. The relevant observations of the Hon'ble Supreme Court in the cases of **SBP & Company**, **Deep Industries**, and **Bhaven Construction**, clearly set out the principles about the scope of intervention by the Court under Articles 226 and 227 of the Constitution of India in the orders passed by the Arbitral Tribunal. It is observed that such power needs to be exercised in extreme rarity and exceptional circumstances, which mandate the exercise of powers under Articles 226 or 227 of the Constitution. In the case of **Deep Industries Limited**, the Hon'ble Supreme Court has observed that Article 227 of the Constitution is a constitutional provision that remains untouched by the non-obstante clause of Section 5 of the Act. The Hon'ble Supreme Court has further by relying on paragraphs 45 and 46 of the decision in the case of **SBP & Co** observed that the object of the Arbitration Act of minimal judicial intervention should always be kept in the forefront when an Article 227 Petition is being disposed of against the proceedings decided

under the Arbitration Act.

12. The present case that arises out of arbitration proceedings has to be dealt with by following the aforesaid well-established principles of law and keeping in mind the limited scope of judicial intervention as indicated under section 5 of the Arbitration Act. Further, it is also necessary to refer to section 19 which permits the Arbitral Tribunal to determine the rules of procedure. In the present case, it is not the case of the parties that any rules of procedure were decided for the arbitral proceedings that will bind the parties. I see no prejudice to the petitioners if the claimant is permitted to lead additional evidence. As observed by the learned Arbitrator, the petitioners are entitled to cross-examine the claimant's witness and also examine their witness. The proposed documents form part of the pleadings. There is no error or illegality in the reasons recorded by the learned Arbitrator, warranting invocation of powers under Articles 226 or 227 of the Constitution of India. In the arbitration proceedings, the strict rules applicable to the civil proceedings cannot be applied to the parameters for deciding the challenge to the orders passed by the Arbitral Tribunal during the pendency of the arbitral proceedings.

13. In my view, for the reasons recorded above and the well-settled

principles of law referred to in the aforesaid decisions, there is no ground to invoke powers under Articles 226 and 227 of the Constitution of India. Hence, for the reasons recorded above, the petition is dismissed.

14. Interim Application No. 14144 of 2023 is allowed and the petitioners are permitted to carry out amendment in terms of the Schedule of amendment attached to the application. Amendment to be carried out within four weeks.

15. At this stage, learned counsel for the petitioners requests to continue the order of stay granted by this court to enable the petitioners to approach the Apex Court. Ad-interim relief already granted in this petition shall continue for four weeks from today.

(GAURI GODSE, J.)

This Order is corrected/modified as per speaking to minutes order dated 18th March 2024.