



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 6714 OF 2023

Nitin S/o. Devidas Kirpane,
Aged about 45 years, Occ. : Business,
Partner, M/s. Nakshtra Infraproject,
R/o. Plot No.7, 8, 26, 27, Vishnu
Heights, Padmavati Nagar, Kh.No.
39/3, Mouza : Besa, Nagpur (Gramin) **PETITIONER.**

// VERSUS //

Monesh S/o. Vasant Mane,
Aged about 45 years, Occ.: Business,
R/o. Plot No.304, Vishwakarma
Nagar, Nagpur – 27. **RESPONDENT.**

Shri S.S.Sitani, Advocate for Petitioner.
Shri M.R.Joharapurkar, Advocate for Respondent.

CORAM : ANIL S. KILOR, J.
DATED : FEBRUARY 05, 2024

ORAL JUDGMENT :

1. Heard.
2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.
3. This petition takes exception to the order dated 27/08/2023 passed by the Arbitrator on application Exh.46 in the arbitral

proceedings between the petitioner and the respondent, rejecting the application for making amendment in the Statement of Defence.

The brief facts of the present case are as under :

4. The petitioner and the respondent entered into a Partnership Deed dated 25/10/2013 and started the business under the name and style of “M/s. Nakshatra Infra Projects”. Thereafter, a dispute arose between them in the month of January 2017 and accordingly the application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996”) came to be filed for appointment of arbitrator.

5. Thereupon, this Court appointed Shri A.J.Rohee, Sole Arbitrator vide order dated 08/06/2022. Thereafter, the respondent filed Statement of Claim on 18/07/2022. Accordingly, the petitioner filed his Statement of Defence and sought permission to amend the same after receipt of account statement from the Chartered Accountant within seven days.

6. On 03/06/2023 the learned Arbitrator framed the issues. Thereafter, on 10/06/2023 a request was made by the petitioner to recast the issues. The said request was partly allowed and the issues were recasted.

7. Then, on 23/07/2023 the petitioner filed application for amendment in the Statement of Defence which was opposed by the respondent.

8. The learned Arbitrator vide impugned order dated 27/08/2023 disposed of the said application observing that since the prayer for dissolution of the Partnership Firm is made by the Claimant and in the event, the said prayer is allowed, the accounts of the Firm will have to be settled with distribution of its assets between the parties, as provided under Section 44 of the Indian Partnership Act, 1932 and in that event, the grounds raised by the Respondent in this Application giving details of the investment made and borrowing of amount/ raising loan out of the partnership funds, will have to be taken into consideration and rejection of this application will not come in the way of the Respondent in doing so. The said order is under challenge in this writ petition.

9. I have heard the learned counsel for the respective parties.

10. At the outset, the learned counsel for the respondent raised an objection to the tenability of the present writ petition by placing reliance on a judgment of the Constitution Bench of the Hon'ble Supreme Court of India in the case of *SBP & Co. ..vs.. Patel Engineering Ltd.*, reported in **(2005) 8 SCC 618**.

11. In reply, the learned counsel for the petitioner submits that the Arbitral Tribunal is a "Tribunal" and against its order the petition under Article 227 of the Constitution of India would be maintainable in exceptional circumstances. He submits that as the order of the Arbitrator is perverse and further since there is an exceptional circumstance the writ petition is maintainable. For this purpose, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Gregory Patrao and Ors. vs. Mangalore Refinery and Petrochemicals Limited and Ors.*, reported in **(2022)10 SCC 461**, a judgment of the Division Bench of this Court in the case of *Hindustan Petroleum Corporation Limited..vs..Om Construction and Ors.*, reported in **MANU/MH/**

4220/2023 and the judgment of Delhi High Court in the case of *Surender Kumar Singhal and Ors. vs. Arun Kumar Bhalotia and Ors.*, reported in **2021 DHC 1097**.

12. In light of the objection raised to the tenability, it would be appropriate to deal with the same first.

13. In the case of *SBP & Co.* (supra) the Constitution Bench of the Hon'ble Supreme Court of India has held thus:

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.

14. In the case of *Hindustan Petroleum (supra)* after considering the various judgments of the Hon'ble Apex Court and the High Courts, the Division Bench of this Court has observed thus :

“22. Paragraphs 23 to 25 of the Judgement of the Delhi High Court in IDFC First Bank Limited (Supra) are relevant and reads as under:-

"23. While there is no doubt that a remedy under Articles 226 and 227 are available against the orders passed by the Arbitral Tribunal, such challenges are not to be entertained in each and every case and the court has to be 'extremely circumspect."

24. Recently, in Surendra Kumar Singhal v. Arun Kumar Bhalotia, MANU/DE/0561/2021 : (2021) 279 DLT 636, this Court, after considering all the decisions, of the Supreme Court has laid down circumstances in

which such petitions ought to be entertained. The relevant portion of the said judgment reads as under:

"24. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction

under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown; (x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided."

26. In our view, keeping in mind the aforesaid legal position, as also the well settled position in law that the remedy by way of a writ is a discretionary remedy, this Court should not exercise that discretion as a remedy is available to the Petitioner to challenge the said Order dated 12th December 2022 by filing an SLP before the Hon'ble Supreme Court. It is the case of the Petitioner that it has subsequently discovered that the Respondents obtained the said Order fraudulently. Even if that case of the Petitioner is true, it is open to the Petitioner to file an SLP challenging the said Order dated 12th December 2022. The Petitioner is not left without a remedy. For this reason, we are of the view that we should not exercise our writ jurisdiction under Articles 226 and 227 of the Constitution of India in respect of the challenge to the said Order dated 12th December 2022.

27. We are further of the view that, even otherwise, if this Court exercises its jurisdiction under Articles 226 and 227 of the Constitution of India, and starts entertaining Writ Petitions against Orders passed under Section 11 of the Arbitration Act, it will lead to opening the floodgates for such kind of litigation, which definitely needs to be avoided. Further, considering the nature of the case of the Petitioner, there may also be disputed questions of fact which cannot be appropriately examined by us in our writ jurisdiction."

15. From the above referred well settled principles of law, it is evident that, the Writ Petition under Articles 226 and 227 of the Constitution of India against the order of the Arbitral Tribunal is maintainable, however, only in the exceptional circumstances, as enumerated in the case of *Surender Kumar Singhal* (supra).

16. In the present matter, the Tribunal has recorded reasons for rejecting the application for amendment in paragraph Nos.30 and 31, which read thus :

“30. Further, it is obvious that the Arbitration and Conciliation Act, 1996 is a special enactment dealing with arbitral proceeding and as such the strict rules of Code of Civil Procedure, 1908 cannot be said to be strictly applicable to it for the reasons that the arbitral proceeding cannot be treated as a suit or the defense a written statement within the meaning of Code of Civil Procedure, 1908. This view is supported provisions of Section 1911) of the Act of 1996 which specifically states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872. This follows that although the law laid down by the Hon'ble Supreme Court and High Court three citations relied upon by the Respondents, the delay in filing the application, which is unexplained since no reasons are given in it nor apprised when exactly CA submitted the statement of accounts and considering the submission made by the Respondent himself that he will file the application for amendment within seven days from thereon, it is inappropriate to grant any relief to him. It appears that he failed to take any steps and

took it for granted that this Tribunal will be bound to allow any request made by him, when as stated earlier his attitude from the beginning shows that he is trying to delay the proceeding. Even the order passed by this Tribunal to furnish Bank Guarantee is also not complied with by him nor appears to have challenged the said order before the appropriate Forum. I am, therefore, constrained to hold that the Respondent has not come with clean hands to file the present application especially when his counter claim is rejected on the ground of limitation and thereafter the present application is filed, practically contending the same grounds as mentioned in the proposed amendment. As such, the same cannot be allowed. The Claimant in the reply to this application stated that there are delays and latches on the part of the Respondent in preferring this application, which is unexplained as stated earlier. It is also stated that there are no bonafides on the part of the Respondent in preferring this application belatedly, although it is not specifically stated that any prejudice will be caused to him in the event the present application is allowed, which can be impliedly considered on the grounds stated above.

31. From the aforesaid discussion, it is obvious that although in the proposed amendment, the Respondent has specifically stated the investment made by him and the amount borrowed from the Partnership Firm, still the proposed amendment with unexplained delayed is not liable to be allowed. Thus, on the basis of the material on record discussed above, this Arbitral Tribunal is constrained to hold that it is inappropriate to allow the present application. The same is, therefore, liable to be rejected.”

17. Moreover, the learned Tribunal has categorically observed in para 33 that, while disposing of the application for amendment that since the prayer for dissolution of the partnership firm is made by the

claimants and in the event, the said prayer is allowed, the accounts of the Firm will have to be settled with distribution of its assets between the parties, as provided under Section 44 of the Indian Partnership Act, 1932 and in that event, the grounds raised by the Respondent in this Application giving details of the investment made and borrowing of amount/ raising loan out of the Partnership funds, will have to be taken into consideration and rejection of the application will not come in the way of the Respondent in doing so.

18. The above referred observations protect the interest of the petitioner.

19. In the circumstances, as there is no perversity or any exceptional circumstances available in the present matter, I have no hesitation to hold that the writ petition is not maintainable. Accordingly, it is dismissed.

Rule stands discharged. No order as to costs.

(ANIL S. KILOR, J)

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