$~60(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM(M) 812/2022 & CM APPL. 35671/2022, CM APPL.35672/2022, CM APPL.35673/2022

SIDDHAST INTELLECTUAL PROPERTY INNOVATIONS PVT. LTD. .... Petitioner

Through: Mr. Anukul Raj, Ms. Nikita Raj and Mr. Anubhav Deep Singh, Advs.

versus

CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADEMARKS AND ANR ..... Respondents

Through: Mr. Praveen Kumar Jain, Mr.Naveen Kumar Jain, Mr. Sachin Kumar Jain, Ms. Rashmi Kumari, Mr. Rahul Lakhera and Ms. Shalini Jha, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

% 22.08.2022

1. The order dated 3rd June 2022, under challenge in the present proceedings, initiated under Article 227 of the Constitution of India, has been passed by a learned sole arbitrator, in seisin of disputes between the parties, disposing of two applications, one filed by the petitioner, as the claimant before the learned arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") and the second by the respondents under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC).

2. The petitioner, in its application under Section 16[1] of the 1996 Act, sought rejection of the counter-claim filed by Respondent 1. Respondent 1, in its application under Order I Rule 10 of the CPC, sought impleadment of M/s. Questel SAS as Respondent 2 in the arbitral proceedings. The impugned order rejects the petitioner's request for dismissal of the counter-claim of Respondent 1 and allows Respondent 1's request for impleadment of M/s. Questel SAS as Respondent 2 in the counter-claim in the arbitral proceedings.

3. Inasmuch as the present petition is, in my considered opinion, not maintainable under Article 227 of the Constitution of India, it is not necessary to enter into the merits of the impugned order.

4. On the issue of whether interlocutory orders passed in arbitral proceedings are amenable to challenge under Articles 226 and 227 of the Constitution of India, a Bench of seven Hon'ble Judges of the

[1] **16. Competence of arbitral tribunal to rule on its jurisdiction**.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34

Supreme Court has held thus, in ***SBP & Co v. Patel Engineering Ltd***[2]

> "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 of India. 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 of India. Such an intervention by the High Courts is not permissible.
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> 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 of the Constitution of India or under Article 226 of the Constitution of India 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."

5. The *ratio decidendi* that emerges from para 45 of ***SBP***[2] is clear

[2] **(2005) 8 SCC 618**

and unequivocal. Challenges to orders/awards passed in arbitral proceedings have either to be under Section 37 or under Section 34(1)[3] of the 1996 Act. Challenges under Section 37 would fall under sub section (2)[4] of Section 37, which permits challenges against orders passed at the interlocutory stage in the arbitral proceedings either where a plea under Section 16(2) or (3) of the 1996 Act is allowed or where a prayer for grant of interim measure under Section 17 is allowed or refused. In the first case, the appeal would lie under Section 37(2)(a), whereas in the second, the appeal would lie under Section 37(2)(b). Interlocutory orders passed in arbitral proceedings are otherwise immune from challenge under the 1996 Act.

6. Para 45 of ***SBP***[2] clarifies that, where the interlocutory order does not fall within one of the aforesaid two instances envisaged by Section 37(2), a party aggrieved by an interlocutory order passed in arbitral proceedings has to wait till the arbitral proceedings conclude, whereafter the party, in the event that it is aggrieved by the award that is ultimately passed, could include, in its challenge to the said award,

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[3] **34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

[4] **37. Appealable orders.**—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;
(b) granting or refusing to grant any measure under section 9;
(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—
(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

its grievances against the interlocutory order which was passed during the course of the arbitral proceedings. In that sense of the matter, ***SBP***[2] does not regard the party, aggrieved by the interlocutory order to be remediless, as the party has a remedy, albeit against the final award by the learned arbitrator.

7. Mr. Anukul Raj, learned Counsel for the petitioner, sought to distinguish ***SBP***[2] by referring to para 44 of the report, which read thus:

> "**44.** Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Page 1822 Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act."

8. To my mind, para 44 of the report in ***SBP***[2] cannot derogate, in any manner, from the sweep of the enunciation of the law in para 45

of the said report. While it is true that judgments of Courts are not to be read divorced from the facts before the Court, it is equally true that where the Supreme Court *declares the law*, such declaration of the law binds all authorities lower in the judicial hierarchy, both under Article 141 as well as under Article 144 of the Constitution of India. Where the law is declared in an omnibus manner by the Supreme Court and is clearly intended to apply to all as an enunciation of the true legal position, it would be fallacious on the part of a judicial authority, lower in the judicial hierarchy, to seek to limit the sweep of the enunciation of the law on the basis of the facts which were before the Supreme Court. All the more so would this principle apply in the case of ***SBP***[2], given the fact that the said decision was by a Constitution Bench of no less than seven Hon'ble Judges of the Supreme Court.

9. The issue of amenability, to writ proceedings under Articles 226 and 227 of the Constitution of India, of interlocutory orders passed by arbitral tribunals, once again arose for consideration before a Bench of three Hon'ble Judges of the Supreme Court in ***Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd***[5]**.** As in the present case, the challenge before the High Court, in ***Bhaven Construction***[5] was to an order passed by the learned arbitrator under Section 16 of the 1996 Act. Sardar Sarovar Narmada Nigam Ltd (SSNNL) preferred an application before the learned arbitrator, in that case, under Section 16 of the 1996 Act, questioning the jurisdiction of the learned arbitrator to arbitrate on the dispute. The learned arbitrator rejected the application on 20th October 2001. Writ proceedings,

[5] **(2022) 1 SCC 75**

challenging the said order were initiated by SSNNL under Articles 226 and 227 of the Constitution of India before the High Court of Gujarat *vide* Special Civil Application 400/2002. The writ petition was dismissed by a learned Single Judge, against which SSNNL preferred the Letters Patent Appeal which was allowed by the Division Bench of the High Court *vide* order dated 17th September 2012. Bhaven Construction approached the Supreme Court against the order dated 17th September 2012 of the Division Bench under Article 136 of the Constitution of India.

10. One of the pivotal issues that arose for consideration was, therefore, whether the order passed by the learned arbitrator, in that case, under Section 16(2) of the 1996 Act, could be challenged under Articles 226 and 227 of the Constitution of India. Paras 17 to 23 and 27 of the report in ***Bhaven Construction***[5] merit reproduction and read thus:

> "**17.** Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as
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> > "34***. Application for setting aside arbitral award***.-*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)".*
> >
> > (emphasis supplied)
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> The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In ***Nivedita Sharma v. Cellular Operators Association of India***[6], this Court referred to several judgments and held: (SSC p. 343, para 11)

> "11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - ***L. Chandra Kumar v. Union of India***[7]. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."
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> (emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe ***M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited***[8], wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under: (SCC p. 714, paras 16-17)

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[6] **(2011) 14 SCC 337**
[7] **(1997) 3 SCC 261**
[8] **(2019) SCC Online SC 1602**

> "16. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [See Section 37(2) of the Act].
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> 17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the *High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction*.
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> (emphasis supplied)"

20. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

21. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modeled on the 'principle of unbreakability'. This Court in ***P. Radha Bai v. P. Ashok Kumar***[9], observed: (SCC p. 459, paras 36-37)

[9] **(2019) 13 SCC 445**

"36.3. Third, Section 34(3) reflects the principle of unbreakability. Dr Peter Binder in International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2nd Edn., observed:

> 'An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Article 33 does the time-limit of three months begin after the tribunal has disposed of the request. This exception from the three-month time-limit was subject to criticism in the working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time-limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of Article 33.'

According to this "unbreakability" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-month time-limit has expired cannot be raised.

37. Extending Section 17 of the Limitation Act would go contrary to the principle of "unbreakability" enshrined under Section 34(3) of the Arbitration Act.

(emphasis in original)"

If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished.

22. The High Court did not appreciate the limitations under Articles 226 and 227 of the Constitution and reasoned that the Appellant had undertaken to appoint an arbitrator unilaterally, thereby rendering the Respondent No. 1 remediless. However, a plain reading of the arbitration agreement points to the fact that the Appellant herein had actually acted in accordance with the procedure laid down without any mala fides.

> **23.** Respondent No. 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, the Respondent No. 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and the Respondent No. 1 has already preferred a challenge under Section 34 to the same. Respondent No. 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.
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> **27.** In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."

11. ***Bhaven Construction***[5], therefore, augments and reasserts the principle enunciated in ***SBP***[2]. ***Bhaven Construction***[5], too, in clear and unmistakable terms, holds that, even while no statutory provision could be permitted to derogate from the constitutional power of High Courts, vested in them by Article 227 of the Constitution of India, nonetheless, the power vested in them by the said provision is discretionary in nature and "needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties." Thus, save and except for cases where there are allegations of bad faith, interlocutory arbitral orders against which the party would have no other remedy, alone would form subject matter of challenge under Articles 226 and 227 of

the Constitution of India.

12. I have had occasioned to opine on this aspect recently in ***Easy Trip Planners Ltd. v. One 97 Communications Ltd***[10]**.** I venture, with humility, to reproduce paras 14 to 19 of the report in the said case, thus:

> "**14.** The afore-extracted passages from Bhaven Construction do not, in any manner, in my view, militate against what is stated in paras 45 and 46 of ***SBP***[2] .
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> **15.** ***Bhaven Construction***[5] envisages the availability of a remedy under Articles 226 and 227 of the Constitution of India in rare and exceptional cases, which, essentially, are delimited to two exigencies; the first, where the order suffers from ―bad faith, and, the second, where, if the challenge is not permitted, the party would not be rendered remediless. Where, therefore, a remedy, against the order under challenge, is otherwise available to the party, in rare and exceptional cases and within the narrow confines of the jurisdiction that the said provisions confer, High Courts could exercise jurisdiction under Articles 226 and 227.
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> **16.** The degree of circumspection that ***Bhaven Construction***[5] expects of the writ court is, however, unmistakable even from the said decision. The governing principle is, apparently, that the arbitral litigant should not be left rudderless in the arbitral ocean. It is predicated on the right to legal redress, which is, to all intents and purposes, fundamental. ***Bhaven Construction***[5], therefore, is more in the nature of a cautionary note, and is not intended to provide a haven for launching a challenge, in writ proceedings, against every interlocutory arbitral order.
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> **17.** The obvious reason why ***Bhaven Construction***[5] would not help the petitioner is because, even as per ***SBP***[2], the party is not remediless in ventilating its grievances against the interim order passed by the Arbitral Tribunal. The remedy would, however, lie against the interim award or the final award that the arbitral tribunal would choose to pass. It would always be open to the aggrieved

[10] **2021 SCC OnLine Del 2186**

litigant to vent its ire against the interim order as one of the grounds on which it seeks to assail the interim or final arbitral award, under Section 34. Till then, however, ***SBP***[2] requires the litigant to bide his time.

18. It is only, therefore, that the remedy available to the litigant is deferred to a later stage of proceedings, so as to ensure that the arbitral stream continues to flow unsullied and undisturbed by any eddies that may impede its path.

19. ***Bhaven Construction***[5], therefore, reinforces, in its own way, ***SBP***[2]."

13. The impugned order dated 3rd June 2022 passed by the learned arbitrator in the present case cannot, in any manner, of speaking, be said to be such as could not be challenged, inter alia, under S.34(1) of the 1996 Act, with the challenge, if any, to the final award which may come to be passed in the arbitral proceedings. The order is, clearly, not one of the categories of the orders which are susceptible to challenge under Section 37(2) of the 1996 Act.

14. Mr. Anukul Raj, learned Counsel for the petitioner, very fairly did not seek to contend that the impugned order was immune from challenge at the Section 34 stage. He, however, did cogitate on the issue of whether, if such an interpretation is to be accepted, any interlocutory arbitral order would at all exist, which could be challenged under Article 227 of the Constitution of India.

15. That, however, is a deliberation, which could be left for another day. This Court is bound by the law enunciated in ***SBP***[2] and ***Bhaven Construction***[5]. Following the said decisions and reserving the right of the petitioner to raise all grievances, raised in this petition, at the

appropriate stage, this petition is dismissed as not maintainable. All miscellaneous applications are also disposed of.

C.HARI SHANKAR, J

AUGUST 22, 2022
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