IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK

C.O. 2545 of 2022
CAN 1 of 2022
CAN 2 of 2023
M.D. Creations & Others
versus
Ashok Kumar Gupta

For the Petitioners	:	Mr. Rahul Karmakar, Advocate Mr. S. K. Podder, Advocate, Mr. Sounak Mukherjee, Advocate
For the Opposite Party	:	Mr. Farhan Gaffar, Advocate Ms. Sagufta Saba Yasmin, Advocate Mr. Pathik Bandhu Banerjee, Advocate
Heard on	:	28.02.2023, 01.03.2023
Judgment on	:	09.06.2023

Bivas Pattanayak, J. :-

1. This revisional application is filed under Article 227 of the Constitution of India challenging order dated 2 August 2022 passed by sole arbitrator in *Ashok Kumar Gupta versus M.D creations and others (arising out of AP No. 320 of 2021)* dismissing the prayer of the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996.

2. The brief fact of the case is that the opposite party-claimant is the owner in respect of a commercial space being shop No.4 lying and situated within premises No. 28/2, Shakespeare Sarani, Kolkata - 700017 measuring more or less 600 Sq ft. The petitioner no.2 and 3 carries a partnership business of ready-made garments and accessories under the name and style of *M.D*

Creations (Petitioner no.1). The petitioners where inducted by the opposite party-claimant in the aforesaid premises for carrying on their business of ready-made garments under a leave and license agreement which was renewed from time to time since 30th May 2016 and lastly renewed on 27th June 2019. Invoking the arbitration clause in the agreement dated 27th June 2019, the opposite party filed an application under Section 11 of the Arbitration and Conciliation act, 1996 which was allowed vide order dated 7th October 2021 passed in AP No. 320 of 2021 and sole arbitrator was appointed. The opposite party-claimant filed statement of claim before the arbitrator as well as an application under Section 17 of the Arbitration and Conciliation Act. The petitioners also filed their statement in defence along with counter claim. In the proceedings before the learned arbitrator the petitioners filed an application under Section 16 of the Arbitration and Conciliation Act raising objection to the jurisdiction of the arbitrator and for dismissal of the arbitral reference and alternatively for impounding of agreement dated 27th June 2019 and sending the said agreement for stamping and registration before the concerned authority. Upon considering the materials on record and hearing the parties the application of the petitioners under Section 16 of the Act was dismissed.

3. Being aggrieved by and dissatisfied with the impugned order of the learned arbitrator, the petitioners have filed the present revision.

4. Mr Farhan Gaffar, learned advocate for the opposite party submitted that the impugned order under challenge passed by learned arbitrator in connection with an application under Section 16 of the Act relating to

jurisdictional competency of the arbitrator can be a subject matter of challenge under Section 34 of the Act and therefore cannot be assailed by filing application under Article 227 of the Constitution of India. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Mcdermott International INC versus Burn Standard Co. Limited and others*** reported in ***(2006) 11 SCC 181.*** He further submitted that since the petitioners have a remedy against the order passed by the arbitrator within the Act itself, the rule of alternative remedy comes into operation and the petitioners' application under Article 227 of the Constitution of India is not maintainable and in such event this court can direct the party to avail the remedies available within the framework of the Act before invoking constitutional remedy. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***A. Venkatasubbiah Naidu versus S.Chellappan and Others*** reported in ***(2000) 7 SCC 695***. In light of his aforesaid submissions, he prayed that the revisional application of the petitioners is liable to be dismissed on the ground of it being not maintainable.

5. In reply to the contentions raised on behalf of the opposite party, Mr Rahul Karmakar, learned advocate for the petitioners submitted that the petitioners filed application under Section 16 of the Act on the precise issue that the agreement containing the arbitration clause is an unstamped and unregistered one due to which reason the same cannot be acted upon and the arbitral reference cannot be proceeded with by virtue of an unstamped document and in such premises the arbitrator does not have the jurisdiction

to receive, entertain or determine the dispute and claims referred by the claimant. However, such plea of the petitioners raised in the application under Section 16 of the Act was not accepted by the learned arbitrator. Section 37 of the Act clearly envisages that where the plea of the parties is accepted by the arbitrator in such a case appeal lies whereas in the event the plea raised by a party is not accepted by the arbitrator there is no such remedy whatsoever available under the Act to file appeal. Thus, on rejection of the plea of the petitioners in respect of their application under Section 16 of the Act by the arbitrator, the petitioners are left with no other alternative but to file revisional application under Article 227 of the Constitution of India. He further indicates that the legislature has consciously used the words *'accept'* in Section 37 and not the words *'entertain'* as is appearing in Section 9(3) of Act. Referring to decision of Hon'ble Supreme Court passed in ***Hindusthan Commercial Bank versus Punnu Sahu*** reported in ***AIR 1970 SC 1384*** he submitted that the words '*entertain'* is to mean adjudicate upon or proceed to consider on merits. Further referring to *Black's Law Dictionary* he submitted that the word *'accept'* means to receive with approval or satisfaction or to admit and agree to. Therefore, the plea of the petitioners though entertained by the arbitrator yet it was never accepted since the same was dismissed by the order impugned and thus the present application is maintainable in law. He further submitted that the power under Article 227 of the Constitution of India is an extraordinary power conferred upon the High Court of superintendence over all courts and tribunals throughout the territories to which it exercises jurisdiction and

further existence of an alternative remedy does not preclude the Court from exercising its powers under such Article and in support of his contention he relied on the decision of this court passed in ***Abanindra Kumar Maity versus A.K Biswas*** reported in ***AIR 1954 Cal 355.*** Further the power under Article 227 of the Constitution of India is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction or resulting in manifest injustice by the courts or tribunals subordinate. To buttress his contention, he relied on the decision of Hon'ble Supreme court passed in ***Achutananda Baidya versus Prafullya Kumar Gayen & Ors*** reported in ***AIR 1997 SC 2077.*** He also relied on an unreported decision of this Court passed in ***Security Hitech Graphics Private Limited versus LMI India Private Limited*** in C.O 1931 of 2022.

He further submitted that the main issue raised in the application under Section 16 of the Act challenging jurisdiction of the arbitrator is that the agreement containing the arbitration clause is unstamped and unregistered and by virtue of the embargo under Section 35 of the Indian Stamp Act, 1899 it is settled position that an unstamped document cannot be acted upon far less placing the same on evidence. The arbitration clause being an inbuilt clause of the said unstamped agreement accordingly cannot also be acted upon and thus the arbitral reference also cannot be proceeded with on the basis of an unstamped document. As per settled proposition of law, an unstamped agreement is at first to be impounded in accordance with law

and only upon payment of requisite stamp duty the clauses contained in the agreement becomes enforceable. Therefore, the arbitration clause within the stipulations of the said unstamped agreement cannot be acted upon until and unless the aforesaid requirement of the law is fulfilled.

In light of his aforesaid submissions, he prayed for allowing the revisional application by setting aside the impugned order passed by the learned arbitrator.

6. Having heard the learned advocates for the respective parties the question which needs to be answered is whether an order of arbitrator dismissing an application under Section 16 of the Arbitration and Conciliation Act, 1996 raising objection as to its jurisdiction be challenged by way of revision under Article 227 of the Constitution of India or under what circumstances.

7. The fact reveals that the petitioners in the arbitral proceeding filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the learned arbitrator. In the application the petitioners raised the plea challenging the jurisdiction of learned arbitrator on the ground that the agreement containing the arbitration clause, which as per law is compulsorily registrable, being not registered and stamped, the terms in such agreement including arbitration clause cannot be invoked or acted upon. The learned arbitrator though dismissed the application of the petitioner under Section 16 of the Act yet having reliance to Section 35 of the Indian Stamp Act kept the issue raised with regard to unstamped document open since such defect is curable upon payment of deficit stamp duty and such aspect can be decided upon evidence.

8. At the outset for convenience of discussion Section 16 of Arbitration and Conciliation Act, 1996 is reproduced hereunder:

> ***"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."*

Under Section 16 of the Arbitration and Conciliation Act, 1996 the arbitral tribunal according to the doctrine of *kompetenz kompetenz* has the authority

to decide whether it has the jurisdiction to adjudicate the dispute or not. Also, the arbitral tribunal can decide on any objection with respect to the existence or validity of the arbitration agreement. The aforesaid provision further provides that a plea should be presented before the arbitral tribunal for an objection to the jurisdiction of the arbitral tribunal. This objection should be raised before the submission of the statement of defence. Also, a party does not get precluded from raising such an objection merely because he has participated in the appointment of an arbitrator. Further it provides that an objection that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter, which is alleged to be beyond the scope of its authority, is brought up during the arbitration proceedings. The arbitral tribunal may admit a plea of objection at a stage later than the stages mentioned above if it considers the delay justified.

An appeal lies against an order of the arbitral tribunal accepting the objection raised on its jurisdiction or the plea that it is exceeding its scope of authority to a court having competent jurisdiction under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996.

Section 16(5) of the Arbitration and Conciliation Act, 1996 provides if the arbitral tribunal rejects the objection and decides that it is competent to adjudicate the present dispute then it shall continue with the arbitral proceedings and pass the arbitral award. The reading of Section 16(5) of the Act indicates that a decision rejecting the jurisdictional objections is a statutory precondition for continuance of arbitral proceedings. Now the question arises whether such rejection of jurisdictional objections can be

intervened upon rejection or the aggrieved party has to wait till passing of the final award and then challenge the same under Section 34 of the Act.

9. In order to examine the question posed as aforesaid it would be profitable to refer to the extent of intervention as spelled out in Section 5 of the Arbitration and Conciliation Act, 1996 which provides as hereunder:

> "***5. Extent of judicial intervention.*** *—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

The aforesaid provision clearly express that there should be no judicial intervention in the matters governed by Part I of the Arbitration and Conciliation Act, 1996 except where it is provided in the Act. Therefore, this Act follows the principle of minimum judicial intervention in arbitration proceedings. The non-obstante clause is provided to uphold the intention of legislature as provided in the preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Act. For speedy resolution of the disputes, this Act allows for limited appealable orders. In the light of the above provisions, the extent of interference is to be examined with regard to order of dismissal under Section 16 of the Act. Section 16 of the Arbitration and Conciliation Act, 1996 provides that if the arbitral tribunal finds that it does not have jurisdiction then an appeal can be filed under Section 37 of the Act. But if the arbitral tribunal considers that it is competent, which is the circumstances in the case at hand, then what would be the remedy available to the aggrieved party. In a similar situation a three-Judge bench of the

Hon'ble Supreme Court in the matter of ***Deep Industries Limited versus Oil and Natural Gas Corporation Limited and Another*** reported in ***(2020) 15 SCC 706*** held as follows.

> *"22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34……."*

Further in the matter of ***Bhaven Construction through Authorised Signatory Premjibhai K. Shah versus Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Another*** reported in ***(2022) 1 SCC 75*** referring to the aforesaid observation in *Deep Industries (supra)* held as follows:

> *"26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the court examines the same under Section 34. Respondent I is therefore not left remediless and has statutorily been provided a chance of appeal……."*

Accordingly, in view of the above observation of the Hon'ble Court in a case where the plea challenging jurisdictional competency of the arbitrator is dismissed the aggrieved party has to wait till the passing of the final award, and then he can file an application for setting aside such an arbitral award under Section 34 of the Act. There is no segregated challenge permissible only on the question of the competency of the Arbitral Tribunal. Therefore,

in the usual course the Arbitration Act provides for a mechanism of challenge under Section 34 of the Act and hence the aggrieved party cannot be said to be remediless in the circumstances of dismissal of application under Section 16 (2) of the Act. From the above judgements, it is clear that any challenge to the jurisdiction of the arbitrator necessarily has to be determined by the arbitrator in the first instance and then it can only be challenged under Section 34 after passing of the final arbitral award. Therefore, in view of the proposition as laid down by the Hon'ble Supreme Court, since it is found in the case at hand that the final arbitral award is yet to be passed hence the aggrieved party-petitioner in the event of dismissal of application under Section 16 of the Act has to wait till passing of the final award by the arbitrator and thereafter challenge the award under Section 34 of the Act. Further the decision of Hon'ble Supreme Court in *Mcdermott International INC (supra)* cited on behalf of opposite party also held that decision taken by arbitrator with regard to jurisdictional question would be subject matter of challenge under Section 34 of the Act. Thus, the petitioner is not left remediless and has statutorily been provided a chance of appeal.

10. Now it is to consider whether Article 227 of the Constitution of India can be invoked in the circumstances at hand where jurisdictional objections raised has been rejected by the learned arbitrator.

10.1. In the matter of *Deep Industries Ltd. (supra)* the Hon'ble Supreme Court held as follows:

> *"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."*

Thus, a petition under Article 227 of the Constitution of India can be filed challenging the order of the arbitral tribunal dismissing application under Section 16 of the Act, only if the possible conclusion is that there is a patent lack in inherent jurisdiction. Nothing has been indicated showing patent inherent lack of jurisdiction. The jurisdiction of the arbitrator has been challenged precisely on the ground that the agreement containing arbitration clause is unstamped. The appointment of arbitrator has been made by an order dated 7th October 2021 passed in APO/320/2021 on agreement of the learned counsel of the parties. It is pertinent to note that there is nothing on record to suggest of patent inherent lack of jurisdiction of the learned arbitrator.

10.2. Further in the matter of *Bhaven Construction (supra)* the Hon'ble Supreme Court referring to the aforesaid observation in *Deep Industries (supra)* held as follows:

> *"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."*

Therefore, the remedy under Article 227 of the Constitution of India can be invoked on the ground of exceptional circumstances or 'bad faith' on the part of the other party. There are no materials on record of any exceptional circumstances or 'bad faith' of the opposite party has been shown.

10.3. The principle which culls out from the aforesaid decisions of the Hon'ble Court is that application under Article 227 of the Constitution of India can be invoked on the ground of patent lack in inherent jurisdiction or exceptional circumstances or 'bad faith' of the opposite party. It is already found that none of the aforesaid grounds exist so far as the present case is concerned. Since the petitioner is not left remediless and has a chance of appeal under Section 34 of the Act, I find substance in the submissions of Mr Gaffar, learned advocate for the opposite party in this context relying on *A. Venkatasubbiah Naidu (supra)* that though no hurdle can be put against exercise of Constitutional powers of the High Court it is well recognised principle which gained judicial recognition that the parties should avail the alternative remedies before resorting to constitutional remedies. Hence the

application under Article 227 of the Constitution of India is not maintainable.

11. Bearing in mind the principles laid down by Hon'ble Supreme Court in *Deep Industries Ltd. (supra)* and *Bhaven Construction (supra)* specifying the extent of application of provisions under Article 227 of the Constitution of India to proceedings under Arbitration Act, the reports in *Abanindra Kumar Maity (supra)* and *Achutananda Baidya (supra)* cited on behalf of the petitioner since does not pertain to Arbitration and Conciliation Act, 1996 hence is not applicable to the case at hand.

12. In the decision of this Court in *Security Hitech Graphics Private Limited (supra)* challenge was thrown to the order of the arbitrator making the 5th, 6th and 7th Schedule of Arbitration and Conciliation Act inapplicable to referred arbitral proceeding thereby causing infraction to the provisions of Section 12(1) and (2) of the Arbitration and Conciliation Act, 1996 which is quite different from case at hand, hence is not applicable.

13. In light of above discussion, the revisional application being C.O 2545 of 2022 stands dismissed as not maintainable.

14. All connected applications, if any, stands disposed of.

15. Interim orders, if any, stands vacated.

16. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary legal formalities.

(Bivas Pattanayak, J.)