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

\+ CM(M) 707/2022 & CM APPL. 32174/2022, CM APPL. 32175/2022

EASY TRIP PLANNERS LTD ..... Petitioner
Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Kushagra Bansal, Adv.

versus

ONE97 COMMUNICATIONS LTD ..... Respondent
Through: Mr. Aman Nandrajog, Mr. Dhruv Wadhwa, Advs.

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

O R D E R (ORAL)

% 25.07.2022

1. A learned three-member Arbitral Tribunal has, in arbitral proceedings between the parties of which it is *in seisin*, passed an interlocutory order on 18th June 2022, rejecting an application filed by the petitioner under Order VII Rule 14 of the Code of Civil Procedure, 1908, to bring on record additional documents.

2. This petition, under Article 227 of the Constitution of India, assails the said order.

3. To my mind, the present petition is not maintainable, in view of the following enunciation of the law, to be found in paras 45 and 46 of

the report in ***SBP & Co. v. Patel Engineering Ltd.***[1]:

> "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*."
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> (Emphasis supplied)

There is no equivocation, whatsoever, in the exposition of the legal position by the Supreme Court, in the afore-extracted passages. The

[1] **(2005) 8 SCC 618**

Court can be approached against an interim order in arbitral proceedings *only if the order is appealable under Section 37*[2] *of the Arbitration and Conciliation Act, 1996* ("the 1996 Act"). *In all other cases, the litigant, who deems himself aggrieved, has to await the conclusion of the arbitral proceedings and rendition of award therein.*

4. Appeals to the Court lie, against arbitral orders, only under sub-section (2) of Section 37, if they are rendered under Section 16(2) or (3), or Section 17 of the 1996 Act. The impugned order has been passed under Order VII Rule 14 of the CPC, and is not relatable to any of these provisions. Nor, for that matter, does Mr. Rajshekhar Rao, learned Senior Counsel for the petitioner, so seek to contend.

5. Mr. Rajshekhar Rao, instead, sought to advance a submission that the rationale of para 45 of the decision in ***SBP***[1], as apparent from the passage, was that the interim order, being sought to be challenged under Article 226 or 227 of the Constitution of India, would otherwise be amenable to challenge under Section 34 of the Act. He bases this submission on the observation, to be found in the said passage, that "under Section 34, the aggrieved party has an avenue for ventilating

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[2] **37. Appealable orders. –**
(1) Notwithstanding anything contained in any other law for the time being in force, 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) An 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.
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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". In other words, he submits that the bar to maintainability of the remedy under Articles 226 and 227 of the Constitution of India, as set out in para 45 of ***SBP***[1], would be limited to cases where the order would be amenable to challenge under Section 34.

6. Section 34 of the 1996 Act permits a challenge "against an arbitral award … only by an application for setting aside such award". "Arbitral award" is defined, in clause (c) of Section 2(1), as "including an interim award". Section 31(6) empowers the arbitral tribunal to, "at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award". ***IFFCO v. Bhadra Products***[3] clarifies that an interim award would be one that finally adjudicates an issue on which the parties have joined the issue and which, therefore, could have been decided in the final award, but made at an interim stage.

7. It is nobody's case that the impugned order dated 18th June 2022 constitutes an "interim award" within the meaning of Section 2(1)(c) read with Section 31(6) of the 1996 Act. Admittedly, therefore, it is not amenable to challenge under Section 34.

8. The sequitur, to the legal impregnability of the impugned order to challenge under Section 34, Mr. Rajshekhar Rao would seek to submit, is that the impermeability to challenge under Article 226 and

[3] **(2018) 2 SCC 534**

227 of the Constitution of India, postulated in para 45 of ***SBP***[1], would not apply to it.

9. I confess my inability to accept the submission.

10. To my mind, the *raison d'etre* behind paras 45 and 46 of ***SBP***[1] is not Section 34 but Section 5[4] of the 1996 Act, which specifically disapproves interference, judicially, with the arbitral process.

11. Para 45 of ***SBP***[1], when read, leaves no manner of doubt that the philosophy behind the decision is that, in order to minimise interference with the arbitral process, the party would have to be relegated to his remedy against the final or interim arbitral award, under Section 34 of the 1996 Act.

12. The words "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", occurring in para 45 of ***SBP***[1], on which Mr Rao laid especial emphasis, do not, in my opinion, seek to delimit the applicability of the passage to cases where the order under challenge is amenable to challenge under Section 34 of the 1996 Act, as Mr Rao would seek to contend. They merely underscore the position that all grievances that the arbitral litigant may nurse against any interim order or orders that the arbitral tribunal may come to pass during the course of the arbitral proceedings would always be open to

[4] **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.

being canvassed as grounds of challenge to the final award that may come to be passed in the arbitral proceedings. To maintain the current and flow of the arbitral proceedings, therefore, the Supreme Court has proscribed, by judicial fiat, challenges to such interlocutory orders midstream. That, in my view, is what these words intend to convey.

13. Mr. Rajshekhar Rao also drew my attention to paras 18, 20 and 22 of the decision in ***Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.***[5]**,** which read thus:

> "18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In ***Nivedita Sharma v. COAI***[6], this Court referred to several judgments and held:
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> > "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

[5] **(2022) 1 SCC 75**
[6] **(2011) 14 SCC 337**
[7] **(1997) 3 SCC 261**

entertained ignoring the statutory dispensation."

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.

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20. In the instant case, *Respondent 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 Respondent 1 in a separate Section 34 application, which is pending.

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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 Respondent 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."

(Emphasis supplied)

14. The afore-extracted passages from ***Bhaven Construction***[5] do not, in any manner, in my view, militate against what is stated in paras 45 and 46 of ***SBP***[1].

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.

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.

17. The obvious reason why ***Bhaven Construction***[5] would not help the petitioner is because, even as per ***SBP***[1], 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 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***[1] 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***[1].

20. In view thereof, reserving liberty with the petitioner to seek remedies as may be available to him in law at the appropriate stage, this petition is dismissed as not maintainable.

C. HARI SHANKAR, J.

JULY 25, 2022
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