Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3957 OF 2021

Tagus Engineering Private Limited & Ors …Petitioners
Versus
Reserve Bank of India & Anr …Respondents

WITH

WRIT PETITION NO. 7348 OF 2021

(Not on Board)

IDFC First Bank Limited …Petitioner
Versus
Bell Invest India Limited & Anr …Respondents

Mr Paritosh Jaiswal, *with Prashant Phople and Ariha Karhed, i/b PMH Law, for the Petitioner in WP/3957/2021.*
Mr Sharan Jagtiani, Senior Advocate, *with Aditya Mehta, Siddharth Joshi, Sushmita Gandhi, Anamika Singh, Bhargav Kosuru and Aayu Saxena, i/b Indus Law, for Respondent No.2 in WP/3957/2021.*
Mr Mustafa Doctor, Senior Advocate, *with Smriti Jha, i/b Juris Corp, for the Petitioner in WP/7348/2021.*
Mr Rohan Agarwal, *i/b G Aniruth Purusothaman, for Respondent No.1 in WP/7348/2021.*

CORAM **G.S. Patel &**
Madhav J. Jamdar, JJ.
DATED: **21st February 2022**

PC:-

1. Writ Petition No. 7348 of 2021 is not on board. By consent, it is mentioned and taken on board.

2. In both matters, we granted an ad-interim order on 16th December 2021.

3. For some reason on that day, our attention was not drawn to the fact that in both matters Writs of Mandamus are sought against the Respondents which are private financial entities. Unarguably, neither of these private entities are the 'State' within the meaning of Article 12 and are not susceptible to the writ jurisdiction of this Court.

4. We believe it is wholly impermissible for this Court to exercise its jurisdiction under Article 226 of the Constitution of India even on questions of jurisdictional competence except perhaps where the arbitral tribunal is itself a statutory tribunal i.e. one created by a statute. The decision of the Supreme Court in *Deep Industries Ltd v Oil And Natural Gas Corporation Ltd & Another*[1] is unambiguous. In paragraph 19, the Supreme Court referred to *SBP & Co v Patel Engineering Ltd*[2] and reaffirmed paragraph 14 of that decision. Paragraph 19 of *Deep Industries* reads thus:

> "**19.** In *SBP & Co.,* this Court while considering interference with an order passed by an Arbitral Tribunal

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1 (2020) 15 SCC 706.

2 (2005) 8 SCC 618.

under Articles 226/227 of the Constitution laid down as follows: (SCC p.663, paras 45-46)

> 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. If 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 as 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 dismissing 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."

5. This view was even more emphatically reasserted by the Supreme Court in *Bhaven Construction Through Authorised Signatory Premjibhai K Shah v Executive Engineer Sardar Sarovar Narmada Nigam Ltd & Anr.*[3] Some of the observations in this context are important and we quote paragraphs 18 to 23, 26 and 27 of *Bhaven Construction*.

> "**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* [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court referred to several judgments and held: (SCC p. 343, para 11)
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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

3 (2021) SCC OnLine SC 8.

> Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation — L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577]. *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 *Deep Industries Ltd* v *ONGC* [*Deep Industries Ltd.* v. *ONGC*, (2020) 15 SCC 706], wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analysed as under:

"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].

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 hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.**"

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.

21. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modelled on the "principle of unbreakability". This Court in *P Radha Bai v P Ashok Kumar*, (2019) 13 SCC 445 : (2018) 5 SCC (Civ) 773] , observed:

> "***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:
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> > "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."
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> **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.**
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> 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 supplied)

21. 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 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.

23. Respondent 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, Respondent 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 Respondent 1 has already preferred a challenge under Section 34 to the same. Respondent 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.

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 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In *Deep Industries* case [*Deep Industries Ltd. v. ONGC*, (2020) 15 SCC 706] , this Court observed as follows : (SCC p. 718, para 22)

> "22. One other feature of this case is of some importance. As stated hereinabove, on 9-5-2018, 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."
>
> (emphasis supplied)
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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 Article 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."
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> (*Emphasis added*)

6. According Mr Doctor for the Petitioner in the IDFC First Bank Limited petition, there are exceptional circumstances. Specifically, the arbitration is contrary to the law laid down by the Supreme Court in *Vidya Drolia & Ors v Durga Trading Corporation*,[4] as it forbids a recourse to arbitration where one of the parties has remedies under the SARFAESI Act, RDDBI Act and DRT law. But this is not, in our view, "an exceptional circumstance." What the argument overlooks is that the intent and purpose of arbitration law, and our Arbitration & Conciliation Act, 1996 is to limit the scope for judicial interference, and to provide a quick mechanism for dispute resolution, extending through enforcement. The Arbitration Act specifically recognizes the possibility of jurisdictional challenges and

4 (2021) 2 SCC 1.

bars, and has an in-built mechanism to address those, inter alia under Section 16 of that Act. There is no doubt that in both cases the Petitioners have filed applications questioning jurisdiction under Section 16 of the Arbitration Act. They may not like the outcome of those applications. But their remedies against those Section 16 orders lie elsewhere and not in mounting Writ Petitions claiming 'exceptional circumstances'.

7. In any case, as *Bhaven Constructions* points out, it was always open to the Petitioner to even invoke this point in its application under Section 16 of the Arbitration Act. If it has not done so it cannot invoke our jurisdiction under Article 226. If it has already done so, and not been successful in that endeavour, its remedy lies elsewhere.

8. Mr Jaiswal enthusiastically asks us to consider the decision of a Division Bench of this Court, of which one of us (Madhav J Jamdar, J) was a member in *JSW Steel Ltd v Kamlakar v Salvi & Ors.*[5] He claims that the Division Bench specifically assumed writ jurisdiction over an arbitration. The submission is misconceived, and based on an incorrect reading of the decision. The question there arose of an assumption of arbitral jurisdiction by a *statutory tribunal* under Section 18(3) of the Micro, Small and Medium Enterprises Development Act ("**MSME Act**"). Paragraph 35 of *JSW Steel* reflects that *SBP & Co* was cited before it. We reproduce

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5 Writ Petition No. 12897 of 2016, Civil Application No. 268 of 2018 and Civil Application No. 935 of 2018 in Writ Petition No. 12897 of 2016 decided on 4th October 2021.

paragraphs 26, 27, 35 to 37 and 43 to 45, for completeness, of *JSW Steel*.

> "26. Mr. R. A. Thorat, learned senior counsel for respondent No.1 has referred to various provisions of the MSMED Act and submits that since the provisions of the 1996 Act are made applicable under section 18(3) of the MSMED Act in terms of which arbitration proceedings were conducted by the Council which were contested by the petitioner, the only recourse which was open to the petitioner to challenge the award of the Council dated 08.05.2015 was under Section 34 of the 1996 Act for setting aside the award and not by way of a writ petition. In such circumstances, he submits that the writ petition is not maintainable.
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> 26.1. Referring to the judgment of the Supreme Court in *Patel Engineering* (supra), he submits that Supreme Court has made it very clear that once an award is passed, the only recourse available is to challenge the same in terms of Section 34 and/or Section 37 of the 1996 Act. He further submits that following the decision in *Patel Engineering* (supra), Supreme Court in *Modern Industries Vs. Steel Authority of India Ltd.*, (2010) 5 SCC 244, has held that challenging an award passed by the Industrial Facilitation Council under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (briefly "the 1993 Act" hereinafter) before the High Court under Article 226 would not be justified. Highlighting this aspect, Mr. R. A. Thorat submits that in the body of the writ petition there is no reason or explanation as to why the statutory remedy under Section 34 of the 1996 Act has not been availed of. Again, referring to the language of sub section (1) of Section 34 of the 1996 Act, he submits that language of the said provision makes it abundantly clear that an arbitral award can only be challenged by an application

for setting aside such award in accordance with sub sections (2) and (3) of Section 34.

26.2. Mr. R. A. Thorat also submits that challenge to vires of section 16 of the MSMED Act which came to be incorporated in the writ petition by way of an amendment is only an after thought to somehow bring the case within the ambit of Article 226 of the Constitution of India, as petitioner is fully aware that only a challenge to the award may not be entertained by a writ court. **Strategy of the petitioner to incorporate challenge to vires of Section 16 is a clever attempt to overcome the bar of Section 34 of the 1996 Act. However, now that petitioner has given up the challenge to vires of Section 16, the writ petition as it stands is nothing but a challenge to the award made by the Council for which the appropriate statutory remedy is under Section 34 of the 1996 Act.**

… …

26.5. In so far contention of the petitioner that the claim of respondent No.1 is barred by limitation is concerned, Mr. R. A. Thorat submits that it was open to the petitioner to challenge the award of the Council under Section 34 of the 1996 Act but that would not imply that the Council lacked jurisdiction to entertain the dispute.

26.6. **Mr. R. A. Thorat further submits that petitioner cannot simply contend that the award passed by the Council is a nullity. Law is well settled that an order becomes a nullity only in the event the Court or the authority passing such order inherently lacks jurisdiction. A conjoint reading of sections 18 and 24 of the MSMED Act would make it abundantly clearly that the Council alone had jurisdiction to entertain the reference of respondent No.1. If there is any inadequacy in the award that would be a ground for challenge before**

the statutory forum under Section 34 of the 1996 Act but that would not make the award a nullity.

26.8. He therefore submits that the writ petition so filed is misconceived and should be dismissed.

… …

35. There is no dispute to the proposition laid down in *Patel Engineering* (supra). Primarily, the question before the seven judge bench of the Supreme Court was about the nature of function of the Chief Justice or his designate under Section 11 of the 1996 Act. Earlier a three judge bench of the Supreme Court had taken the view that it was purely an administrative function, being neither judicial nor quasi-judicial; Chief Justice or his nominee performing functions under Section 311(6) of the 1996 Act could not decide any contentious issue between the parties. The said view was approved subsequently by a constitution bench. Correctness of such view was under consideration in *Patel Engineering* (supra). In that case the seven judge bench held that the power exercised by the Chief Justice of a High Court or the Chief Justice of India under Section 11(6) of the 1996 Act is not an administrative power; it is a judicial power. **Before summing up the conclusions, Supreme Court noted that some High Courts had proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration would be capable of being challenged under Articles 226 or 227 of the Constitution of India. Adverting to Section 37 of the 1996 Act, which makes certain orders of the Arbitral Tribunal appealable and to Section 34 whereby the aggrieved party has an avenue for ventilating his grievance against an award, Supreme Court disapproved of such stand and held that such an intervention by the High Courts is not permissible. Explaining further, Supreme Court held that the object of minimizing judicial intervention while dispute is**

being arbitrated upon will be defeated, if the High Courts could be approached under the Article 227 or under Article 226 of the Constitution against every order made by the Tribunal.

36. **This position has been reiterated by the Supreme Court in *Modern Industries* (supra). That was a case under the 1993 Act. In the facts of that case, Supreme Court observed that though the 1993 Act provides a statutory remedy of appeal against an award passed by the Industry Facilitation Council but the buyer did not avail the statutory remedy of appeal against the award and instead challenged the award passed by the Council before the High Court under Article 226 of the Constitution of India bypassing the statutory remedy which was viewed as not justified.**

37. **From a careful analysis of the above two judgments of the Supreme Court in *Patel Engineering* (supra) and in *Modern Industries* (supra), we find that view of the Supreme Court is that any and every order (emphasis is ours) made by an Arbitral Tribunal would not be open to challenge or being corrected by the High Court under Articles 226 or 227 of the Constitution of India. Ordinarily, an order or award passed by the Industry Facilitation Council under the 1993 Act or by the Micro and Small Enterprises Facilitation Council (Council) is to be challenged under Section 34 of the 1996 Act or appealed against under Section 37 of the said Act.**

… …

45. The above are jurisdictional facts which were absent before respondent No.2 could assume jurisdiction. **In the absence of such jurisdictional facts, respondent No.2 could not have proceeded under section 18(3) of the MSMED Act and could not have passed the impugned**

> **order (award) dated 08.05.2015.** As held by the Supreme Court in *Arun Kumar* (supra), in the absence of the jurisdictional facts, respondent No.2 had rendered itself coram non judice. Any order or award passed by an authority which is rendered coram non judice is a nullity and can certainly be interfered with by the High Court under Article 226 of the Constitution of India. Therefore, reverting back to our discussions made in paragraph 37 of this judgment, from an analysis of the judgments of the Supreme Court in *Patel Engineering* (supra) and *Modern Industries* (supra) the position becomes very clear. While the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not entertain any and every order passed by an Arbitral Tribunal, certainly the High Court would entertain an order or award passed by a statutory Arbitral Tribunal which is a nullity or when the Tribunal had rendered itself coram non judice."
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> (*Emphasis added*)

9. Far from assisting Mr Jaiswal, this decision is against the overbroad proposition he canvasses. The decision of the Division Bench of this Court could not be in conflict with the decisions of the Supreme Court in *Deep Industries* or *Bhaven Construction*.

10. The Petitions are rejected. There will be no order as to costs.

11. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**