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

Date of Decision: 09TH MAY, 2022

\+ CM(M) 425/2021 & CM APPL. Nos. 20315-20317/2021,
CM(M) 430/2021 & CM APPL. Nos. 20601-20603/2021,
CM(M) 431/2021 & CM APPL. Nos. 20606-20608/2021,
CM(M) 432/2021 & CM APPL. Nos. 20614-20616/2021,
CM(M) 433/2021 & CM APPL. Nos. 20619-20621/2021,
CM(M) 438/2021 & CM APPL. Nos. 20776-20778/2021,
CM(M) 442/2021 & CM APPL. Nos. 20876-20878/2021,
CM(M) 443/2021 & CM APPL. Nos. 20881-20883/2021,
CM(M) 444/2021 & CM APPL. Nos. 20886-20888/2021,
CM(M) 449/2021 & CM APPL. Nos. 21150-21152/2021,
CM(M) 450/2021 & CM APPL. Nos. 21185-21187/2021,
CM(M) 453/2021 & CM APPL. Nos. 21370-21372/2021,
CM(M) 456/2021 & CM APPL. Nos. 21497-21499/2021,
CM(M) 457/2021 & CM APPL. Nos. 21502-21504/2021,
CM(M) 458/2021 & CM APPL. Nos. 21507-21509/2021,
CM(M) 459/2021 & CM APPL. Nos. 21515-21517/2021,
CM(M) 460/2021 & CM APPL. Nos. 21523-21525/2021,
CM(M) 461/2021 & CM APPL. Nos. 21533-21535/2021,
CM(M) 462/2021 & CM APPL. Nos. 21538-21540/2021,
CM(M) 463/2021 & CM APPL. Nos. 21548-21550/2021,
CM(M) 464/2021 & CM APPL. Nos. 21553-21555/2021,
CM(M) 465/2021 & CM APPL. Nos. 21560-21562/2021,
CM(M) 466/2021 & CM APPL. Nos. 21568-21570/2021,
CM(M) 467/2021 & CM APPL. Nos. 21575-21577/2021

UNION OF INDIA ..... Petitioner

versus

DELHI STATE CONSUMER
CO OPERATIVE FEDERATION LTD. ..... Respondent

Present:- Mr. Rakesh Kumar, CGSC for the Petitioner.

Ms. Anju Bhattacharya, Advocate for the Delhi State Consumer Co Operative Federation Ltd.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. These 24 petitions under Article 227 of the Constitution of India have been filed by the Union of India [hereinafter, "the Union"] in respect of identical orders dated 19.02.2021 passed by a sole Arbitrator in 24 different arbitration proceedings. The Union has, in the alternative, sought a direction upon the Arbitrator to consider the applications filed by it for recall of the impugned orders.

2. All the proceedings were filed by the Union against the respondent-Delhi State Consumers Co-operative Federation Limited [hereinafter, "DSCCFL"]. By the impugned orders, the Arbitrator has terminated the proceedings under Section 25(a) of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"].

A. Facts

3. The 24 arbitral proceedings arise in substantially similar circumstances. In response to four different tender enquiries floated by the Union, DSCCFL offered to supply various qualities of pulses [*dal*] for the use of defence personnel. According to the Union, DSCCFL failed to furnish the requisite security deposit, as a result of which

each of the contracts were cancelled at the risk and cost of the respondent. The Union sought to claim consequential damages. A chart showing the details of each contract and the damages claimed by the Union has been placed on record, but it is not necessary to reproduce the same here, as the facts relating to the underlying dispute between the parties are not relevant to the adjudication of the issue raised in these petitions.

4. What is relevant for the present purposes is that each of the contracts contains an identical arbitration clause, which is in the following terms:-

> *"**15 I. <u>ARBITRATION CLAUSE</u>:***
> *(a) In the event of any question, dispute or difference arising under or out of or in connection with the conditions mentioned in this schedule or in annexure thereto or in General Conditions of contract governing contracts placed by the Central Purchase Organisation of the Government of India. (Now under Department. Of Supply.) Form No. DGS&D-68 (Revised) or touching or concerning the construction, meaning or operation or effect thereof/or of any matter contained therein or as to the rights, duties or liabilities of the parties in connection with this contract (Except as to any matters the decision of which is specially provided for in the conditions mentioned in the schedule or in annexure thereto or in General Conditions of Contract as aforesaid), the same shall be referred the Sole Arbitration of any person appointed by the Additional Secretary to Government of India, Ministry or Department of Government of India administratively dealing with the contact at the time of such appointment, or if there is no Additional Secretary or he is one leave or is absent from duty or is not available for any reason whatsoever the Joint Secretary dealing with the contract of such Ministry*

or Department at the time of such appointment. It will be no objection to any such appointment that the person appointed is a Government Servant.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reasons or his award being set aside by the court for any reason, it shall be lawful for the said Additional Secretary or the Joint Secretary, as the case may be, to appoint an arbitrator in the place of the outgoing arbitrator in the manner aforesaid and the person so appointed will proceed with the references from the stage at which it was left by his predecessor. It is also a term of this contract that no person, other than a person appointed by the Additional Secretary or the Joint Secretary of the Ministry or Department as aforesaid shall act as Arbitrator and if for any reason that is not possible the matter shall not be referred to arbitration at all.

(c) Subject as aforesaid the Arbitration and conciliation Act, 1996 and the Rules thereunder and any statutory modification thereof for the time being in force shall apply to the arbitration proceedings under this clause.

(d) Upon every and any reference as aforesaid the assessment of costs of the incidental to the reference and award respectively shall be in discretion of the sole arbitrator.

(e) The venue of the arbitration proceedings will be the premises of the Government of India, Ministry of Defence, New Delhi or such other place as the sole arbitrator may decide.

II. <u>TIME LIMIT FOR REFERENCE TO ARBITRATION:</u>

(a) If no request in writing for arbitration is made by the contractor within a period of one year from the date of completion of the contract, all claims of the contractor under the contract shall be deemed to be waived and absolutely barred and the purchaser, i.e. President of

India, shall be discharged and released of all his liabilities under the contract.

(b) The date to completion of the contract shall mean and include:
(i) The date when the goods are delivered according to the terms of delivery.
(ii) In case of Warranty clause contract, the date when warranty expires,
(iii) In case where the contract is cancelled wholly or partly the date when the letter of cancellation is served upon the supplier."

5. On 05.09.2016, the Union received legal notices from DSCCFL for reference of the matters to arbitration. By a letter dated 21.11.2016, all 24 disputes were referred to the arbitration of Mr. Ramesh Chander, Deputy Legal Advisor and Arbitrator (Directorate General of Supplies and Disposals). The Arbitrator entered into the reference and issued his first order more than six months thereafter, on 06.07.2017[1]. By the said order, the Union was directed to file its Statement of Claims by 10.08.2017, and DSCCFL was directed to file its counter Statement of Claims by 31.08.2017. The cases were fixed for hearing on 12.09.2017.

6. By the next order dated 18.09.2017, the Arbitrator noted that neither party had filed the Statement of Claims. The Arbitrator was informed by the representative of the Union that they had sent a letter to the Department of Legal Affairs, Ministry of Law and Justice for appointment of a government counsel, and they would file the

[1] Although the name of the Sole Arbitrator is mentioned as "R.C. Kathia" in this order, the order refers to the reference letter dated 21.11.2016. It therefore appears that Mr. Ramesh Chander referred to in the reference order and Mr. R.C. Kathia are one and the same person.

Statement of Claims "*as and when the Govt. Counsel is appointed*". The Arbitrator gave further time for filing Statement of Claims and counter claims until 18.10.2017 and 01.11.2017 respectively. The hearings were adjourned to 02.11.2017.

7. On 25.10.2017, however, the Arbitrator issued an order rescheduling the hearing to 11.01.2018 "*due to winding up of DGS&D office and transfer of existing arbitral records*". On 06.11.2018, the Department of Legal Affairs, Ministry of Law and Justice, issued an office order by virtue of which the proceedings in question were to be heard by Ms. Renu Pandey, Assistant Legal Adviser. Ms. Pandey was, however, appointed as an Arbitrator by a separate communication issued eight months thereafter, on 08.07.2019. She issued her first notice in these proceedings more than one year thereafter, on 16.10.2020. By the said notice, she directed the Union to file the Statement of Claims "*on the next date of hearing*", which was fixed on 02.11.2020.

8. The Statement of Claims was not filed, and a further order came to be passed on 02.11.2020, again directing the Union to "*file the Statement of Claim, if any on the next date of hearing*", which was fixed for 16.12.2020.

9. On 16.12.2020, the Union once again submitted that they have written a letter to the Ministry of Law and Justice for appointment of government counsel and that reply was still awaited. The Union was directed to pursue the matter with the Law Ministry for early

appointment of counsel and to file the Statement of Claims on the next date of hearing. The order sheet dated 16.12.2020 reads as follows:-

> *"Ld. Advocate for Respondent has filed her Vakalatnama, which is taken on record. The representative for Claimant has submitted that they have written a letter to Ministry of Law & Justice for appointment of Govt. Counsel and reply is still awaited. The Claimant is again directed to pursue the matter with Judicial Section / MoL for early appointment of counsel and file the Statement of Claim on the next date of hearing otherwise matter will be terminated.*
> *2. The case is fixed for hearing on 06.01.2021 at 3.05 pm.*
> *3. The venue of the arbitration shall be at Room No. 215, 2nd Floor, Jeevan Tara Building, Sansad Marg, New Delhi -110001.*
> *4. It may be noted that if either of the parties fail to attend the hearing on the date and time fixed, the case will be heard and determined '**ex-parte**'.*
> *5. Copy of this Order Sheet be sent to the parties concerned."*

10. A similar order was passed on 06.01.2021, fixing the next date of hearing as 22.01.2021.

11. On 11.01.2021, the Union appointed a counsel in these proceedings. However, it is not disputed that the hearing scheduled on 22.01.2021 was not held.

12. Before any further progress could be made in the matter, the Arbitrator terminated the proceedings by the impugned order dated 19.02.2021. The impugned order reads as follows:-

"The Order u/s 25(a) of the Arbitration & Conciliation Act, 1996 is made and published on the 19th February, 2021.

2. Whereas on account of disputes, I, Renu Pandey, Asstt. Legal Advisor to the Govt. of India, Ministry of Law & Justice, D/o Legal Affairs was appointed as Sole Arbitrator by the Secretary, Ministry of Law & Justice, D/o Legal Affairs vide Office Order No. 47/2018 dated 29th June 2018, under the terms and conditions agreed to by the parties with reference to the contract mentioned above and the differences between them relating to the said contract were referred to arbitration.

3. In pursuance of the supra order dated 29th June, 2018, notices were issued on 16.10.2020 to the parties, including the claimant, directing them to file their statement of claim alongwith all the supporting documents by 02.11.2020, with an advance copy to the respondents. No response has been received so far from the claimants even my predecessor also directed claimants on 06.07.2017 and 18.09.2017 but no claim statement has been filed by the claimants till date.

4. On each and every hearing, representative from APO office attended the hearings without counsel on the pretext that process of appointment of Govt. Counsel is under process.

5. In view of above observation and also considering the spirit of maxim "vigilantibus non dormientibus jura subbeniunt", i.e. law does not help those who sleep over their rights as well as exercising the power conferred in the Section 25 of Arbitration and Conciliation Act, 1996 as amended up-to-date.

6. I did not see any reason to give any further Notice to the claimant. They have failed to show sufficient cause to communicate their statement of claim, in accordance with Section 23(1) of the Act.

7. In view of the above, I 'terminate' the 'proceedings', under Section 25(a) of the Act.

8. THE ORDER HAS BEEN MADE UNDER THE ARBITRATION AND CONCILIATION ACT, 1996.
9. IN WITNESS WHEREOF I HAVE SIGNED this ORDER ON THIS THE 19th FEBRUARY, 2021."

13. Upon receipt of these orders, the Union applied to the Arbitrator for recall thereof and, according to the Union, the applications were taken up for hearing on 08.03.2021. However, the Union claims that the learned Arbitrator returned the applications on 09.03.2021 without passing any orders thereupon[2].

B. Submissions

14. Assailing the impugned orders, Mr. Rakesh Kumar, learned Central Government Standing Counsel, submitted that the learned Arbitrator has, in declining to consider the applications made by the Union for recall of the impugned orders, failed to exercise jurisdiction vested in her. He relied upon the judgment of the Supreme Court in *Srei Infrastructure Finance Limited vs. Tuff Drilling Private Limited*[3] to contend that an order for termination of proceedings under Section 25 of the Act ought to be preceded by a notice to the concerned party, and that such an order is susceptible to an application for review/recall.

15. Mr. Kumar further submitted that, in the facts and circumstances of the cases, the termination of the proceedings visits an unduly harsh consequence upon the Union. He relied upon various communications addressed by the concerned department to the

[2] Paragraph 4 (xxvi) in all petitions
[3] (2018) 11 SCC 470

Ministry of Law and Justice for appointment of the Arbitrator. He further drew my attention to the terms of the very last order passed by the Arbitrator, being the order dated 06.01.2021. The said order required the Union to file the Statement of Claims "*on the next date of hearing*" which was fixed for 22.01.2021. However, Mr. Kumar submitted that no hearing was, in fact, conducted on 22.01.2021, and no further communication was received until the impugned orders dated 19.02.2021. Government counsel having been appointed by way of the communication of the Ministry of Law and Justice dated 11.01.2021, Mr. Kumar submitted that it cannot be presumed that the Union would not have been able to submit its Statement of Claims on the next date fixed for the purpose i.e. 22.01.2021.

16. Ms. Anju Bhattacharya, learned counsel for the DSCCFL, objected at the outset as to the maintainability of these petitions under Article 227 of the Constitution in respect of the impugned orders passed by the learned Arbitrator under the Act. She cited the judgments of the Supreme Court in *Bhaven Construction vs. Executive Engineer*, *Sardar Sarovar Narmada Nigam Limited and Another*[4] and *Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Another*[5], as well as the judgments of this Court in *Surender Kumar Singhal & Ors. vs. Arun Kumar Bhalotia & Ors.*[6] and *Awasthi*

[4] (2022) 1 SCC 75
[5] (2020) 15 SCC 706
[6] Decision dated 25.03.2021 passed in CM(M) 1272/2019

Construction Co. vs. Govt. of NCT of Delhi & Anr.[7] in support of this contention.

17. On merits, Ms. Bhattacharya submitted that a reference to the chronology of events narrated above, displays the utterly lethargic attitude which beset the Union in prosecuting its claims. She submitted that, on each occasion, adjournments were taken because the Union was unable even to appoint counsel in good time. Ms. Bhattacharya urged the Court not to permit the Union to take advantage of its own gross delays in the facts and circumstances of these cases.

18. Mr. Kumar, in rejoinder, disputed Ms. Bhattacharya's submissions regarding maintainability of these petitions. He submitted, relying upon the very judgments cited by Ms. Bhattacharya, that the supervisory jurisdiction of this Court is available even in respect of arbitral proceedings, albeit in a narrow category of cases. Mr. Kumar submitted that the Arbitrator having failed to exercise a power vested in her, these cases fall squarely within the scope of Article 227.

19. Regarding the Union's delay, Mr. Kumar contended that no proceedings were held between 2018 and 2020 as the Directorate General of Supplies and Disposals was wound up. He also pointed out that in the applications filed before the Arbitrator for recall of the impugned orders, the Union specifically averred that the Statement of

[7] 2012 SCC OnLine Del 5443 [LPA No. 701/2012, decided on 16.10.2012]

Claims had been kept ready for filing on the date of hearing i.e. 22.01.2021.

C. Analysis

I. The judgment in Srei Infrastructure

20. I turn first to the judgment in *Srei Infrastructure*[8], as the present cases arise in very similar circumstances. In *Srei Infrastructure*, arbitration proceedings between the parties were terminated by the Arbitral Tribunal under Section 25 of the Act as the claimant failed to file the Statement of Claims. The claimant's application for recall of this order was dismissed by the Arbitral Tribunal, following which the High Court was moved under Article 227 of the Constitution. The High Court set aside the order of the Tribunal, and the Supreme Court affirmed this view.

21. The Supreme Court formulated the issues arising in appeal as follows:-

> *"12.1. (i) Whether the Arbitral Tribunal which has terminated the proceeding under Section 25(a) due to non-filing of claim by the claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?*
>
> *12.2. (ii) Whether the order passed by the Arbitral Tribunal under Section 25(a) terminating the proceeding is amenable to jurisdiction of the High Court under Article 227 of the Constitution of India?*

[8] Supra (note 3)

12.3. (iii) Whether the order passed under Section 25(a) terminating the proceeding is an award under the 1996 Act so as to be amenable to the remedy under Section 34 of the Act?"

22. As far as issue No. (i) is concerned, the Supreme Court noticed the mandate of Section 18 of the Act[9] and interpreted Section 25 as follows:-

"20. In the present case, proceedings were terminated vide order dated 12-12-2011 under Section 25(a). After termination of proceedings, ***application to recall the said order was filed by the claimant on 20-1-2012, which was rejected by the Arbitral Tribunal on the ground that it has no jurisdiction to recommence the arbitration proceedings.*** *Section 25 contemplates a situation that when the claimant fails to communicate his statement of claim within the time as envisaged by Section 23, the Arbitral Tribunal has to terminate the proceedings. This section thus contemplates a situation where arbitration proceeding has not been started. The most important words contained in Section 25 are "where without showing sufficient cause—the claimant fails to communicate his statement of claim". Under Section 23(1), the claimant is to state the facts supporting his claim within the period of time agreed upon by the parties or determined by the Arbitral Tribunal. The question of termination of proceedings thus arises only after the time agreed upon between the parties or determined by the Arbitral Tribunal comes to an end. When the time as contemplated under Section 23(1) expires and no sufficient cause is shown by the claimant the Arbitral Tribunal shall terminate the proceedings.* ***The question of showing sufficient cause will arise only when the claimant is asked to show cause as to why he***

[9] Section 18 - The parties shall be treated with equality and each party shall be given a full opportunity to present its case.

failed to submit his claim within the time as envisaged under Section 23(1) or the claimant, on his own, before the order is passed under Section 25(a) to terminate the proceedings comes before the Arbitral Tribunal showing sufficient cause for not being able to submit his claim within the time. *In both the circumstances i.e. when a show-cause notice is issued to the claimant as observed above or the claimant of his own shows cause for non-filing the claim within the time the Arbitral Tribunal shall take a call on terminating the proceedings. It is easy to comprehend that* ***in the event, the claimant shows a sufficient cause, the Arbitral Tribunal can accept the statement of claim even after expiry of the time as envisaged under Section 23(1)*** *or grant further time to the claimant to file a claim. Thus, on sufficient cause being shown by a claimant even though time has expired under Section 23(1), it is not obligatory for the Arbitral Tribunal to terminate the proceedings. The conjunction of the wordings "where without showing sufficient cause" and "the claimant fails to communicate his statement of claim", would indicate that* ***it is a duty of the Arbitral Tribunal to inform the claimant that he has failed to communicate his claim on the date fixed for that and requires him to show cause why the arbitral proceedings should not be terminated?*** *Opportunity to show sufficient cause for his failure to communicate his claim statement can only be given after he has actually failed to do so. Whether in a case where the claimant failed to file a statement of claim and has failed also to show cause before an order of termination of proceedings is passed, the claimant is entitled to show cause subsequent to the termination, is the question which has fallen for consideration.*

21. When the Arbitral Tribunal without sufficient cause being shown by the claimant to file the claim statement can terminate the proceedings, ***subsequent to termination of proceedings, if the sufficient cause is shown, we see no impediment in the power of the***

> ***<u>Arbitral Tribunal to accept the show cause and permit the claimant to file the claim.</u>*** *The scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by Section 23(1) has expired. Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the Arbitral Tribunal by accepting the show-cause and there is no lack of the jurisdiction in the Arbitral Tribunal to recall the earlier order on sufficient cause being shown."*[10]

23. The Court noticed a conflict of views between various High Courts on the points and endorsed the view taken by the Patna High Court, the Madras High Court and this Court, to the effect that arbitral proceedings can be recommenced after they are terminated under Section 25(a) of the Act, provided sufficient cause is shown to recall the termination order. The Tribunal's order holding that it cannot recommence arbitration proceedings was, therefore, held to be erroneous and the judgment of the High Court exercising jurisdiction under Article 227 of the Constitution was affirmed.

24. As far as issue Nos. (ii) and (iii) are concerned, the Supreme Court did not consider it necessary to enter into those issues, in view of its finding that the Arbitral Tribunal had jurisdiction to consider the application for recall of the order terminating proceedings under Section 25(a) of the Act.

[10] Emphasis supplied.

25. Although the Supreme Court, in *Srei Infrastructure*[11], declined to enter into the jurisdictional question posed in paragraph 12.2 (ii) extracted above, its affirmation of the exercise of Article 227 jurisdiction by the High Court provides a context to consider the issue of maintainability of these petitions in greater detail.

II. Maintainability of the petitions

26. The question of exercise of the supervisory jurisdiction of the High Court in respect of arbitration proceedings has been squarely considered in the recent judgments of the Supreme Court in *Deep Industries*[12] and *Bhaven Construction*[13], and in the judgment of this Court in *Surender Kumar Singhal*[14].

27. In *Deep Industries*, the Supreme Court upheld the maintainability of petitions under Article 227 of the Constitution against arbitral orders, but cautioned that they should be sparingly entertained. The Court also reiterated that Article 227 is intended to correct jurisdictional errors.

28. In *Bhaven Construction*, the judgment in *Deep Industries* was considered. The Court noted that the Act is a code in itself. However, the exercise of jurisdiction under Article 227 of the Constitution was not altogether ruled out, as would be evident from the following observations:-

[11] Supra (note 3)
[12] Supra (note 5)
[13] Supra (note 4)
[14] Supra (note 6)

"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 : (SCC p. 714, paras 16-17)

> *"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*."*

xxxx xxxx xxxx

21. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modelled on the "principle of unbreakability".

xxxx xxxx xxxx

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.****"*[15]

[15] Emphasis supplied.

29. The aforesaid principles have been considered by this Court in *Surender Kumar Singhal*[16] and summarised by way of the following principles:-

> *"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;*

[16] Supra (note 6)

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided."

30. The aforesaid judgments lead me to the conclusion that the present petitions cannot be rejected on grounds of maintainability, for the following reasons:-

a) First, the availability of the Constitutional remedy has been expressly preserved by the Supreme Court, while also guarding against excessive intervention of the writ court in matters of arbitration. The observations in these judgments are in the context of cases where the courts were called upon to re-examine issues determined under the Act. The present cases are different, inasmuch as the Union's grievance is not just against a substantive decision made by the Arbitrator, but also against her failure to decide the review applications. The grievance therefore is that the Arbitrator has neglected to exercise jurisdiction vested in her. To ensure that a tribunal does perform the duty entrusted to it is a core aspect of the supervisory function of this Court, just as much as to ensure that it does not exceed its jurisdiction. Reference in this connection may be made to judgments of the Supreme Court in *Hari Vishnu Kamath vs. Syed Ahmad Ishaque and Others*[17], *Estralla Rubber vs. Dass Estate (P) Ltd.*[18] and *Ouseph Mathai and Others vs. M.*

[17] (1955) 1 SCR 1104 : AIR 1955 SC 233 [paragraph 21]
[18] (2001) 8 SCC 97 [paragraph 6]

Abdul Khadir[19]. I therefore hold that, to this extent, at least, the grievance raised in the present cases fall within the narrow band of cases in which this Court would invoke Article 227 in respect of arbitral proceedings.

b) A second crucial distinguishing factor in the present cases is that the Court is being called upon not to interdict the arbitral process, but to aid and support it. The concern of the Supreme Court, as expressed in *Deep Industries*[20] and *Bhaven Construction*[21], to limit judicial interference in arbitral process is to aid the efficiency and ensure fairness of the proceedings under the Act. The exercise of writ jurisdiction to interdict the arbitral process has, therefore, been discouraged. The exercise of jurisdiction in the present cases would, in contrast, give the defaulting claimant an opportunity to explain its conduct to the Arbitrator so that, if the Arbitrator is satisfied with the explanation offered, the process can be recommenced and taken to its logical conclusion. In that sense, these cases present an "exceptional circumstance"[22], where exercise of jurisdiction would not constitute an interference with the arbitral process, but a step in aid thereof.

c) As noted above, the aforesaid conclusion is fortified by the judgment of the Supreme Court in *Srei Infrastructure*[23], which

[19] (2002) 1 SCC 319 [paragraph 4]
[20] Supra (note 5)
[21] Supra (note 4)
[22] See *Bhaven Construction* (Supra note 4) [paragraph 23]
[23] Supra (note 3)

also dealt with a very similar situation under Section 25 of the Act. The Supreme Court approved the High Court's exercise of jurisdiction under Article 227 of the Constitution, and setting aside of the order of the Tribunal.

31. For the aforesaid reasons, I hold that these petitions under Article 227 of the Constitution are not liable to be rejected on approval of maintainability.

III. Consideration in the facts of the present cases

32. This being the legal position, it is evident that in the facts of the present cases also, the Arbitrator has failed to exercise the jurisdiction vested in her, inasmuch as she has passed no order on the applications filed by the Union for recall of the orders dated 19.02.2021. The factual position pleaded in these petitions, to the effect that the applications were taken up for hearing before the Arbitrator on 08.03.2021 and returned without any order been passed thereupon, has not been controverted by the respondent.

33. There is an additional factual circumstance which also persuades me that the impugned orders of the Arbitrator in the present cases, suffer from perversity of approach. As noted above, prior to the impugned orders, the last order of the Arbitrator was passed on 06.01.2021. By that order, the case was fixed for hearing on 22.01.2021 and the Union was given time to file the Statement of Claims "*on the next date of hearing*". It is the admitted position that no hearing was, in fact, held on 22.01.2021, and none was fixed

thereafter. The Arbitrator, in the impugned orders, has lost sight of this position and has referred only to the earlier order passed by her on 16.10.2020. The abrupt issuance of the impugned orders without holding any hearing as contemplated by the order dated 06.01.2021 and without issuing show cause notice to the Union, as required by *Srei Infrastructure*[24], is also unsustainable.

34. In these circumstances, I am of the view that it would be appropriate to allow the Union's alternative prayer for a direction upon the Arbitrator to consider the applications presented by it for recall of the impugned orders dated 19.02.2021. It may be noted that, whether or not the Union is able to show sufficient cause for its delay in submitting the Settlement of Claims, is a matter for the Arbitrator to consider.

IV. Judgment in Awasthi Construction cited on behalf of DSCCFL

35. Ms. Bhattacharya relied on the judgment of this Court in *Awasthi Construction*[25]. However, the said judgment is not, in my view, conclusive of the matter. In the aforesaid judgment, the Division Bench was concerned with a case where the arbitral proceedings were terminated under Section 25(a) of the Act, against which the writ petition had been dismissed by the learned Single Judge of this Court. The writ petition was dismissed on the ground of *laches*, although the learned Single Judge had also expressed a doubt regarding the maintainability of the writ petition, and regarding the correctness of

[24] Supra (note 3)
[25] Supra (note 7)

the view taken by the Patna High Court in *Senbo Engineering Limited vs. State of Bihar*[26].

36. The Division Bench affirmed the view taken by the learned Single Judge on the question of *laches*. However, it also held that the proceedings before the Arbitrator can be revived if the claimant shows cause under Section 25 of the Act, even after the proceedings have been terminated. To this extent, the decision actually supports the position of the Union in the present cases. However, Ms. Bhattacharya relies upon the judgment, to the extent that the Division Bench did not accept the view taken by the Allahabad, Bombay and Patna High Courts that such an order could be challenged in writ proceedings.

37. As noted above, in *Awasthi Construction*[27] also, this Court noticed the availability of the remedy for recall of an order terminating the proceedings under Section 25(a) of the Act before the Arbitrator himself. On this issue, the view taken by this Court in *Awasthi Construction* and *ATV Projects India Ltd. vs. Indian Oil Corporation Ltd. & Anr.*[28], as well as by the Patna High Court in *Senbo Engineering*[29] have been expressly endorsed by the Supreme Court in *Srei Infrastructure*[30]. A reading of *Srei Infrastructure* as a whole, therefore, leads to an inescapable conclusion that an order terminating proceedings under Section 25(a) of the Act can be recalled by the Arbitral Tribunal on the application of the claimant, and that the

[26] AIR 2004 Patna 33
[27] Supra (note 7)
[28] (2013) 200 DLT 553 (DB)
[29] Supra (note 26)
[30] Supra (note 3)

interference of the writ court is justified where the Tribunal has failed to interfere. The judgment in *Awasthi Construction* must be read in this context.

D. Conclusion

38. In view of the aforesaid, the writ petitions are partly allowed. The Arbitrator is directed to consider the applications presented by the Union for recall of the orders dated 19.02.2021 terminating the arbitral proceedings under Section 25(a) of the Act. As the proceedings have been unduly prolonged, the Arbitrator is directed to dispose of the applications after hearing the parties, within three months from today. It is made clear that this Court has not made any comment on the merits of the said applications.

39. Pending applications also stand disposed of.

40. There will be no order as to costs.

41. A copy of this judgment be kept in the file of each of the petitions.

PRATEEK JALAN, J.

MAY 09, 2022
'pv/vp'/