

\$~84-105

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

+ CM(M) 424/2021 & CM APPL. 20310-312/2021
+ CM(M) 437/2021 & CM APPL. 20771-773/2021
+ CM(M) 439/2021 & CM APPL. 20781-783/2021
+ CM(M) 440/2021 & CM APPL. 20786-789/2021
+ CM(M) 441/2021 & CM APPL. 20867-869/2021
+ CM(M) 469/2021 & CM APPL. 21684-685/2021
+ CM(M) 470/2021 & CM APPL. 21689-691/2021
+ CM(M) 471/2021 & CM APPL. 21694-696/2021
+ CM(M) 472/2021 & CM APPL. 21699-701/2021
+ CM(M) 473/2021 & CM APPL. 21714-716/2021
+ CM(M) 478/2021 & CM APPL. 22199-201/2021
+ CM(M) 479/2021 & CM APPL. 22204-206/2021
+ CM(M) 480/2021 & CM APPL. 22386-387/2021
+ CM(M) 481/2021 & CM APPL. 22391-393/2021
+ CM(M) 486/2021 & CM APPL. 22474-476/2021
+ CM(M) 487/2021 & CM APPL. 22573-575/2021
+ CM(M) 488/2021 & CM APPL. 22578-580/2021
+ CM(M) 491/2021 & CM APPL. 22748-750/2021
+ CM(M) 492/2021 & CM APPL. 22787-789/2021
+ CM(M) 496/2021 & CM APPL. 23042-044/2021
+ CM(M) 497/2021 & CM APPL. 23047-049/2021
+ CM(M) 498/2021 & CM APPL. 23052-054/2021

UNION OF INDIA

..... Petitioner

Through Mr. Rakesh Kumar, CGSC for
UOI

versus

INDIAN AGRO MARKETING CO OPERATIVE LTD

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

%

02.05.2022

1. These petitions assail identical orders dated 19th February, 2021, passed by the learned sole arbitrator, arbitrating on the dispute between the petitioner and the respondent, in respect of identical contracts bearing different numbers.
2. Despite notice, the respondent has not appeared today.
3. It is seen that there was no appearance on behalf of the respondent on the last date of hearing either.
4. I have heard Mr Rakesh Kumar, learned Counsel for the petitioner-Union of India and applied myself to the facts and the law that applies.
5. The learned sole arbitrator has, exercising her jurisdiction under Section 25(a)¹ of the Arbitration and Conciliation Act, 1996 (the 1996 Act), terminated the arbitral proceedings before her on the ground of default, on the part of the petitioner, in filing statements of claim, allegedly despite repeated opportunities having been granted for the said purpose. The petitioner also filed applications before the learned sole arbitrator for recall of the aforesaid orders, but it appears that the

¹ **25. Default of a party.** – Unless otherwise agreed by the parties, where, without showing sufficient cause, -

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

learned arbitrator has not condescended to pass any order on the said applications.

6. It is in these circumstances that the petitioner has moved these petitions before this Court, praying that the orders dated 19th February, 2021, passed by the learned sole arbitrator, be quashed and set aside or, in the alternative, that the learned arbitrator be directed to pass an order on the applications filed by the petitioner in these cases seeking recall of the said orders.

7. On the last date of hearing, I had queried of Mr. Rakesh Kumar as to how, in view of the judgment of the Supreme Court in *Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd*², the present petitions would not lie under Article 227 of the Constitution of India.

8. Mr. Rakesh Kumar submits that the present case is distinguishable from *Bhaven Construction*², as the impugned orders were passed under Section 25(a) of the 1996 Act, against which there is no alternate remedy available to the petitioner. He submits that *Bhaven Construction*² dealt with an order passed under Section 16(5) of the 1996 Act, against which the remedy under Section 34 is provided by Section 16(6) of the 1996 Act. Section 16 of the 1996 Act reads thus:

² (2022) 1 SCC 75

“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.”

9. On merits, Mr. Rakesh Kumar has placed reliance on the judgment of the Supreme Court in *Srei Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd*³, for the proposition that the learned Arbitral Tribunal is bound in law to consider the petitioner's application for recall of the impugned orders dated 19th February, 2021, passed under Section 25(a) of the 1996 Act.

10. On a careful perusal of the facts of the present case and the aforementioned judicial authorities, I am inclined to agree with Mr. Rakesh Kumar on both these counts.

11. In *Bhaven Construction*², an application was preferred by the Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. ("the XEN", hereinafter) – Respondent 1 before the Supreme Court – under Section 16 of the 1996 Act, questioning the jurisdiction of the arbitrator to arbitrate on the dispute of which he was in *seisin*. The application was rejected by the learned arbitrator *vide* order dated 20th October, 2001. This order was assailed, by the XEN, before the High Court of Gujarat, under Articles 226 and 227 of the Constitution of India. The learned Single Judge of the High Court rejected the petition, holding that, where a plea of jurisdiction, raised under Section 16, was rejected by the tribunal, the only remedy with the aggrieved party was to challenge the final award, which would come to be passed in the proceedings, under Section 34 of the 1996 Act, as provided under

³ (2018) 11 SCC 470

Section 16(6). The Division Bench, in appeal, however, reversed the decision of the learned Single Judge. Bhaven Construction appealed to the Supreme Court.

12. The Supreme Court set aside the judgement of the Division Bench, and affirmed the view of the learned Single Judge of the High Court. The 1996 Act having provided for an entire scheme by which the matter could be challenged, the Supreme Court held that the High Court could not have exercised jurisdiction under Articles 226 and 227 of the Constitution of India. [I may note, here, that in para 17 of the report, though the Supreme Court refers to the order passed by the learned Arbitral Tribunal as having been passed under Section 16(2) of the 1996 Act, the order was actually passed under Section 16(5).] An appeal under the order passed under Section 16(5) being available under Section 34 by virtue of Section 16(6), the Supreme Court held that the High Court could not have interfered with the order passed under Section 16(5), under Articles 226 and 227 of the Constitution of India.

13. As against this, in the present case, the impugned order has been passed under Section 25(a) of the 1996 Act. The 1996 Act does not provide for any remedy against such an order, either under Section 34 or Section 36 or any other provision thereof.

14. The situation here is, therefore, fundamentally different from that which obtained in *Bhaven Construction*². No alternate remedy

being available to the petitioner, to challenge the impugned order, which was passed under Section 25(a) of the 1996 Act, the present petitions under Article 227 of the Constitution of India are, *ex facie*, maintainable.

15. On merits, the issue appears to be covered in favour of the petitioner by the judgment of the Supreme Court in *Srei Infrastructure Finance*³. The situation which obtained in the said case is more or less identical to that which obtains in the present case. As the opening paragraph of the judgment itself discloses, the arbitral tribunal, in that case, too, terminated the arbitral proceedings under Section 25(a) of the 1996 Act on account of failure, on the part of the claimant in filing the statement of claim. An application was filed by the claimant for seeking recall of the order. The arbitral tribunal refused to recall the order, against which decision the aggrieved claimants moved the High Court under Article 227 of the Constitution of India. The High Court set aside the decision of the learned Arbitral Tribunal not to consider the recall application filed by the respondent before the Supreme Court.

16. In that case, Tuff Drilling Pvt. Ltd., (“Tuff”, hereinafter) was the claimant and Srei Infrastructure Finance Ltd. (“Srei”, hereinafter) was the respondent before the learned arbitrator.

17. The learned Arbitrator terminated the arbitral proceedings on the ground of failure, on the part of Tuff, in filing its statement of

claim.

18. Tuff, thereafter, moved an application seeking recall of the said decision. By order dated 12th December, 2011, the arbitrator refused to consider the recall application. Aggrieved, Tuff petitioned the High Court of Calcutta under Article 227 of the Constitution of India. The High Court, *vide* judgment dated 13th February, 2015, set aside the decision of the learned arbitrator not to consider the recall application of Tuff and directed the learned arbitrator to consider the said application.

19. Aggrieved thereby, Srei approached the Supreme Court.

20. The Supreme Court held that the opening words of Section 25 of the 1996 Act corseted the jurisdiction of the arbitral tribunal, under Section 25(a), to cases in which the claimant was not ready to show sufficient cause for failing to file statement of claim within the stipulated time. Where the claimant was able to show sufficient cause for not doing so, therefore, Supreme Court held that the arbitral tribunal could not terminate the proceedings under Section 25(a).

21. Thereafter, the Supreme Court addressed a situation which could arise where, on the ground of failure to file the statement of claim within time, the proceedings were terminated by the arbitral tribunal and, thereafter, the claimants moved an application seeking recall of the order, attempting to show sufficient cause for failing to file the statement of claim within time. The Supreme Court observed

that the arbitrator, in the proceedings before it, had refused to deal with the said application on the ground that there was no power, conferred by the 1996 Act, on the arbitrator, to recall the order earlier passed by it. This view, opined the Supreme Court, was erroneous, and held, in para 21 of the report in *Srei Infrastructure Finance*³, that the learned Arbitral Tribunal had, on sufficient cause being shown, the power to recall the order passed by it under Section 25(a) of the 1996 Act, terminating the arbitral proceedings.

22. In view of the law laid down in *Srei Infrastructure Finance Ltd.*³, I deem it appropriate to dispose of these petitions with a direction to the learned arbitrator to consider and take a decision on the petitioner's applications, seeking recall of the impugned orders dated 19th February, 2021.

23. The learned arbitrator would grant an opportunity of hearing to both sides before taking a decision in that regard.

24. All the aforesaid writ petitions stand partly allowed in the above terms, with no order as to costs.

25. Pending applications, if any, also stand disposed of.

C. HARI SHANKAR, J.

MAY 02, 2022

dsn