$~27 (2022 Cause List)

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

Date of Decision: 22nd February, 2022

\+ CM(M) 174/2022 & CM APPL. 9125/2022 (*stay*)

VIRTUAL PERCEPTION OPC PVT LTD ..... Petitioner
Through: Mr. Viplav Sharma, Advocate.

versus

PANASONIC INDIA PVT LTD ..... Respondent
Through: Mr. Kunal Kher, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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The proceedings in the matter have been conducted through hybrid mode [physical and virtual hearing]

1. This petition under Article 227 of the Constitution has been filed against two orders, dated 21.09.2021 and 03.02.2022, passed by an Arbitral Tribunal ["the Tribunal"] in proceedings between the parties herein, arising out of an agreement dated 26.10.2017 ["the agreement"].

Facts

2. The parties entered into the agreement for provision of certain services by the respondent-Panasonic India Pvt. Ltd. ["Panasonic"] to the petitioner-Virtual Perception OPC Pvt. Ltd. ["VPL"]. Disputes arose between them, which were referred to arbitration by an order of

this Court dated 28.11.2019 in ARB.P. 428/2019 filed by Panasonic. Panasonic is the claimant before the Tribunal, and VPL is the respondent.

3. In the course of the arbitral proceedings, Panasonic filed an affidavit of evidence of one witness, namely Mr. Arvind Gopal. The affidavit of the witness was tendered in evidence on 05.04.2021, and he was partly cross examined on that date. It appears that there were some talks between the parties thereafter for a mutual settlement, and the proceedings were, in fact, next held after approximately five months. On 06.09.2021, Panasonic informed the Tribunal that Mr. Arvind Gopal had left its employment, and sought to file the evidence of another witness, namely Mr. Omkar Talwar. VPL objected to Panasonic's application for this purpose. By an order dated 21.09.2021, the Tribunal allowed the application and substituted Mr. Omkar Talwar as the witness in place of Mr. Arvind Gopal.

4. VPL thereafter filed an application, stated to be under Section 16(3) of the Arbitration and Conciliation Act, 1996 ["the Act"], in which it was contended that the Tribunal had exceeded its jurisdiction in passing the order dated 21.09.2021. VPL, therefore, sought recall of an order dated 27.09.2021, by which the proceedings had been fixed for Panasonic's evidence on 29.09.2021. The said application has been rejected by an order dated 03.02.2022. The Tribunal held that no ground for recall of the orders dated 21.09.2021 and 27.09.2021 had been made out.

5. The orders of the Tribunal dated 21.09.2021 and 03.02.2022 are under challenge in this petition.

Submissions

6. Mr. Viplav Sharma, learned counsel for VPL, submits that the view taken by the Tribunal is contrary to Section 27 of the Act, which permits an application to the Court for assistance in taking evidence, including summoning of a witness, if necessary. It is Mr. Sharma's submission that the witness who had been partially cross examined could not have been substituted by another witness on the ground that he had left the services of Panasonic, but the appropriate course would have been for the Tribunal or Panasonic to apply to the Court for assistance under Section 27 of the Act. Mr. Sharma submits that the orders of the Tribunal are inconsistent with this statutory scheme, inasmuch as the Tribunal has held that the substitution of the witness is justified by the circumstance that he has left the employment of Panasonic.

7. Mr. Kunal Kher, learned counsel for Panasonic, who appears on advance notice, objects to the maintainability of the present petition under Article 227 of the Constitution on the grounds raised. He cites the judgments of the Supreme Court in *Deep Industries vs. ONGC Limited and Another*[1] and *Bhaven Construction vs. Executive Engineer Sardar Sarovar Narmada Nigam Limited and Another*[2], and the order dated 18.09.2020 in *Punjab State Power Corporation Limited and Another vs. Emta Coal Limited and Another*[3] in support of this contention. He also draws my attention to the judgments of Coordinate Benches of this Court in *Surender Kumar Singhal and Others vs. Arun*

[1] (2020) 15 SCC 706
[2] (2022) 1 SCC 75
[3] Special Leave to Appeal (C) No. 8482/2020

Kumar Bhalotia and Others[4] and *Ambience Projects and Infrastructure Private Limited vs. Neeraj Bindal*[5]. Mr. Kher submits that the present petition does not reveal any of the narrow grounds upon which the order of an arbitral tribunal can be interfered with under Article 227 of the Constitution.

8. Responding to Mr. Kher's submissions on the question of maintainability, Mr. Sharma also draws my attention to the finding in the very same authorities to the effect that a petition under Article 227 of the Constitution can be entertained against the orders of arbitral tribunals. With regard to the limited scope of interference, Mr. Sharma submits that the supervisory jurisdiction of this Court can be invoked to ensure that courts and tribunals act within the scope of the authority vested in them.

9. Having regard to the language of Section 16(3) of the Act, Mr. Sharma submits that a decision in violation of the applicable legal provisions would, in effect, be beyond the scope of authority of the Tribunal and, therefore, susceptible to the supervisory jurisdiction of this Court. He draws my attention to the contents of the application filed by VPL under Section 16(3) of the Act to submit that VPL had clearly identified the applicable legal provisions. According to Mr. Sharma, the decision of the Tribunal contrary to those legal provisions demonstrates that the proceedings were being carried on in bad faith, which is one of the grounds available to justify interference with an order of an arbitrator under Article 227 of the Constitution.

[4] (2021) SCC Online Del 3708; judgment dated 25.03.2021 in CM(M) 1272/2019
[5] (2021) SCC Online Del 4023; judgment dated 13.08.2021 in CM(M) 525/2021

Mr. Sharma submits that the aforesaid judgments and order of the Supreme Court and this Court in this regard do not arise from proceedings under Section 16(3) of the Act, and the principles governing exercise of jurisdiction under Article 227 of the Constitution in the present case would, therefore, be different.

Analysis

10. The present case arises from an application made to the Tribunal under Section 16(3) of the Act. Section 16 of the Act reads as follows:

> *"**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."

11. Having heard learned counsel for both the parties, the first question which arises is regarding the scope of the supervisory jurisdiction of this Court against such orders of arbitral tribunals. The judgments cited by learned counsel for the parties deal with exactly this issue. They, no doubt, make it clear that even in case of an order passed by an arbitral tribunal under Section 16 of the Act, the constitutional jurisdiction of this Court under Article 227 of the Constitution is not barred. However, its scope is extremely limited.

12. The judgment in *Deep Industries*[6] dealt with proceedings under Article 227 of the Constitution against an order passed under Section 37 of the Act. The Supreme Court noticed the legislative objective of expeditious disposal of arbitration matters, as also the judgment of the Constitution Bench in *SBP and Company vs. Patel Engineering Limited and Another*[7]. While affirming that Article 227 of the Constitution remains available, the Supreme Court cautioned that the High Courts would be extremely circumspect in interfering with orders passed under Section 37 of the Act, taking into account the statutory

[6] Supra (note 1)
[7] (2005) 8 SCC 618

policy, and restricted the interference of the Court to orders which are "*patently lacking in inherent jurisdiction*"[8]. The Court also adverted to Section 16 of the Act, and noticed that no appeal is provided against the dismissal of an application under Section 16 of the Act, and the challenge must await the passing of the final award[9]. The Court did not find favour with the judgment of the High Court impugned therein, where the issue had been re-examined in a petition under Article 227 of the Constitution.

13. In *Punjab State Power Corporation Limited*[10], the Supreme Court was concerned with a case where an order in an application under Section 16 of the Act had been challenged under Article 227 of the Constitution. The Court held as follows: -

> *"We are of the view that a foray to the writ Court from a section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever – it must be the perversity of the order that must stare one in the face.*
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> *Unfortunately, parties are using this expression which is in our judgment in Deep Industries Ltd., to go to the 227 Court in matters which do not suffer from a patent lack of inherent jurisdiction. This is one of them. Instead of dismissing the writ petition on the ground stated, the High Court would have done well to have referred to our judgment in Deep Industries Ltd. and dismiss the 227 petition on the ground that there is no such perversity in the order which leads to a patent lack of inherent jurisdiction. The High Court ought to have discouraged*

[8] Supra (note 1) [paragraph 17]
[9] Supra (note 1) [paragraph 22]
[10] Supra (note 3)

similar litigation by imposing heavy costs. The High Court did not choose to do either of these two things. In any case, now that Shri Vishwanathan has argued this matter and it is clear that this is not a case which falls under the extremely exceptional category, we dismiss this special leave petition with costs of Rs.50,000/- to be paid to the Supreme Court Legal Services Committee within two weeks."

14. *Bhaven Construction*[11] also arose in a case under Section 16 of the Act, wherein the Court held as follows:-

"12. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under "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 non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

13. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

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18. ..... 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,

[11] Supra (note 2)

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 M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2020) 15 SCC 706, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed 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)*
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> *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."

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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 No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed 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.***

(emphasis supplied)*"*

15. In *Surender Kumar Singhal*[12], this Court has considered the aforesaid judgments and summarised the applicable principles as follows:-

[12] Supra (note 4)

"*25. 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;

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

16. A similar view has been taken by a Coordinate Bench in *Ambience Projects*[13].

[13] Supra (note 5)

17. The aforesaid principles must now be applied to the facts of the present case.

18. It is evident, particularly from Sections 16(5) and 16(6) of the Act, that the statute has contemplated the course of action in the event of rejection of a plea under Section 16(3), and that VPL's remedy is to be found in Section 34 of the Act, if the arbitral award ultimately goes against it. This scheme had been expressly noticed both in *Deep Industries*[14] and *Bhaven Construction*[15]. VPL is, therefore, not remediless, but has a specific relief under the Act itself.

19. VPL has also failed to make out a case of patent lack of inherent jurisdiction. The present petition concerns substitution of one witness by another. A patent lack of jurisdiction, as held in *Punjab State Power Corporation Limited*[16], would arise only if the perversity in the impugned order "*stares one in the face*". The present case does not display such a manifest lack of jurisdiction. The procedure of the Tribunal is a matter within its own competence. Subject to compliance with the principles of natural justice, as embodied in Section 18 of the Act, the Tribunal is bound neither by the normal rules of procedure, nor of evidence[17]. It has acted within its own jurisdiction, and the correctness of that decision is not open to scrutiny under Article 227 of the Constitution.

20. Mr. Sharma's argument that any decision, which is in violation of applicable legal provisions, betrays an excess of authority and bad

[14] Supra (note 1)
[15] Supra (note 2)
[16] Supra (note 3)
[17] Section 19(1), Arbitration and Conciliation Act, 1996

faith does not commend to me. Such an expansive reading would open the doors of the Court under Article 227 of the Constitution against virtually any procedural order of the Tribunal. The judgments outlined above clearly demonstrate that this is not the statutory scheme. In fact, Mr. Sharma's submission that Article 227 of the Constitution would lie in any case where an authority or court acts in violation of legal provisions, is based upon a misconception as to the scope of Article 227 itself. It is settled law that Article 227 cannot be used to correct every order of a court or tribunal, even if it is found to be erroneous, but only to ensure that the courts and tribunals function within the scope of the jurisdiction vested in them. This position has been clarified by the Supreme Court *inter alia* in *Estralla Rubber vs. Dass Estate (P) Ltd.*[18], which has been followed in the recent judgment in *Garment Craft vs. Prakash Chand Goel*[19]. As far as arbitral tribunals are concerned, even greater circumspection has been mandated by the judgments discussed above.

21. I am also not impressed by Mr. Sharma's submission that the judgments cited above are inapplicable in cases which arose before the Tribunal under Section 16(3) of the Act. Sections 16(5) and 16(6), make no such distinction. Neither do the judgments of the Supreme Court or this Court, which expressly consider Section 16 as a whole. In fact, each of the reasons mentioned above applies equally to applications under Section 16(3) as to Section 16(2), which covers the basic jurisdiction of the Tribunal itself.

[18] (2001) 8 SCC 97 [paragraph 6]
[19] (2022) SCC Online SC 29 [judgment dated 11.01.2022; arising out of S.L.P.(C) No. 13941 of 2021] [paragraph 18]

Conclusion

22. In view of the aforesaid legal position, I do not find any grounds to interfere with the orders of the Tribunal at this stage. VPL must also be liable to an order of costs, in terms of the order in *Punjab State Power Corporation Limited*[20]. The petition, alongwith the pending application, is therefore dismissed, with costs of ₹25,000/-, payable by VPL to Panasonic.

PRATEEK JALAN, J

FEBRUARY 22, 2022/*'Bp'/*

[20] Supra (note 3)