

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE DEVNARAYAN MISHRA

ON THE 16th OF JANUARY, 2024

WRIT PETITION No. 28151 of 2023

BETWEEN:-

**SUNCITY DHOOT COLONIZERS PVT. LTD. THROUGH ITS
AUTHORIZED SIGNATORY SHRI RAMANJANEYE VARA
PRASAD S/O SHRI PURNACHANDRA RAO, AGED 53
YEARS, A COMPANY INCORPORATED UNDER THE
PROVISIONS OF COMPANIES ACT 1956, OFFICE AT
VISTARA TOWNSHIP INDORE (MADHYA PRADESH)**

.....PETITIONER

(SHRI VIJAY KUMAR ASUDANI, COUNSEL FOR THE PETITIONER).

AND

**RAM CHANDRA PATIDAR S/O SHRI MANSHARAM
PATIDAR, AGED 45 YEARS, OCCUPATION: BUILDER R/O
A-49 VISTARA TOWNSHIP AGRA MUMBAI BY PASS
ROAD VILLAGE MAYAKHEDI INDORE (MADHYA
PRADESH)**

.....RESPONDENT

(SHRI ROHIT KUMAR MANGAL, COUNSEL FOR THE RESPONDENT).

.....
This petition coming on for admission this day, Justice Sushrut Arvind

Dharmadhikari passed the following:

ORDER

Heard on the question of admission and interim relief.

In this petition under Article 226 of the Constitution of India, the petitioner has challenged the validity, propriety and legality of the order dated 26.10.2023 passed in Arbitration Case No. 03/2022 by the Sole Arbitrator whereby the application filed by the petitioner under Section 16 of the

Arbitration and Conciliation Act, 1996 (referred to as the 'Act of 1996' hereinafter) has been dismissed.

2 . The brief facts of the case are that the petitioner Company and respondent No.1 had entered into a Memorandum of Understanding (MoU) on 01.12.2017 in respect of construction of model house on 11 plots in a residential colony developed by the petitioner. The MoU contains an arbitration clause for dispute resolution.

3 . Certain dispute arose between the parties in relation to the performance of the terms of the MoU and therefore, the respondent No.1 approached this Court by filing A.C.No. 71/2021 seeking appointment of Arbitrator under Section 11 of the Act of 1996. The said application was allowed vide order dated 11.11.2022 appointing Hon'ble Justice (Retd.) Shri S.K.Kulshrestha as the Sole Arbitrator.

4 . The petitioner filed an application before the Sole Arbitrator under Section 16 of the Act of 1996 on the ground that an arbitration clause contained in an unstamped document cannot be acted upon, with a prayer that respondent No.1 be directed to pay the stamp duty in respect of the MoU. Vide order dated 26.10.2023, the said application came to be dismissed by the Sole Arbitrator holding that the MoU was in the nature of an agreement to sale whereby the possession was not given and therefore, the stamp duty of Rs. 1,000/- was required to be paid. Since, Rs. 1,000/- has already been paid, therefore, there is no question of insufficiency of stamp duty.

5. Being aggrieved, the petitioner has approached this Court by filing the present writ petition assailing the impugned order on the ground that the same has been passed by the Sole Arbitrator in complete violation of constitutional mandate laid down by the five-judges constitutional bench of the

Apex Court in case of **N.N.Global Mercantile Pvt. Ltd. vs. Unique Flame Ltd. & Ors., (2023) 7 SCC 1.**

6. Learned counsel for the petitioner further contended that the MoU is not a simple agreement for sale of plot but it is an agreement for sale with a stipulation for construction covered by Article 6(d)(i) of the Indian Stamp Act. He further submitted that in similar facts and circumstances, one **Virendra Modi** had filed **W.P.No. 25217/2022** before this Court and this Court was pleased to grant stay in that case.

7. *Per contra*, learned counsel for the respondent has filed reply to the petition raising preliminary objection with regard to maintainability of the writ petition either under Article 226 or 227 of the Constitution. The present petition has been filed being aggrieved by the dismissal of their application under Section 16 of the Act of 1996. Learned counsel for the respondent submitted that there is no remedy under the Act of 1996 against dismissal of the application under Section 16. It is only after passing of the final award that the issue can be raised in appeal under Section 34 of the Act of 1996. In support of his contention, learned counsel for the respondent relied on the judgment of the Apex Court in case of **Deep Industries Ltd. vs. Oil and Natural Gas Corporation Ltd. & Anr., (2020) 15 SCC 706** wherein the aforesaid position has been settled as follows:

"..... The drift 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. What the High Court has done in the present case is to invert this statutory scheme by going into exactly the same matter as was gone into by the arbitrator in the Section 16 application, and then decided that the two year ban was no part of the notice for arbitration issued on 02.11.2017, a finding which is directly contrary to the finding of the learned Arbitrator dismissing the

Section 16 application. For this reason alone, the judgment under appeal needs to be set aside. Even otherwise, as has been correctly pointed out by Mr. Rohatgi, the judgment under appeal goes into the merits of the case and states that the action of putting the Contractor and his Directors "on holiday" is not a consequence of the termination of the agreement. This is wholly incorrect as it is only because of the termination that the show cause notice dated 18.10.2017 proposing to impose a two year ban was sent. Even otherwise, entering into the general thicket of disputes between the parties does not behove a court exercising jurisdiction under Article 227, where only jurisdictional errors can be corrected....."

8. Learned counsel for the respondent also relied on the judgment in case of **SBP & Co. vs. Patel Engineering Ltd. and Another, (2005) 8 SCC 618**, wherein the Apex Court in paragraph 45 and 46 has categorically dealt with the aspect as to whether a petition under Article 226 or 227 of the Constitution against rejection of application under Section 16 of the Act of 1996 would be maintainable or not. For the purpose of convenience, the relevant paragraphs are reproduced hereunder:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the

High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

9 . Learned counsel for the respondent further relied on the orders passed by the Coordinate Bench of this Court in case of **Indore Municipal Corporation vs. M/s Simplex Infrastructure Ltd. in W.P.No. 2581/2014** passed on 12.08.2016 and in case of **M.P.Rural Road Development Authority vs. R.C.Chugh in W.P.No. 11398/2010** passed on 15.11.2011, wherein relying upon the judgment in case of **SBP & Co. (supra)**, it has been held that once the matter reaches the Arbitration Tribunal or the Sole Arbitrator, the High Court would not interfere with the order passed by the Arbitrator or by the Arbitration Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 or in terms of Section 34 of the Act.

10. Having heard the learned advocates for the respective parties the question which needs to be answered is whether an order of arbitrator dismissing an application under Section 16 of the Act of 1996 raising objection as to its jurisdiction be challenged by way of writ petition under Article 226 or 227 of the Constitution of India or under what circumstances.

11. The fact reveals that the petitioner in the arbitral proceeding filed an application under Section 16 of the Act of 1996 before the learned arbitrator. In the application the petitioner raised the plea challenging the jurisdiction of learned Arbitrator on the ground that the agreement containing the arbitration clause, which as per law is compulsorily registrable, being not registered and stamped, the terms in such agreement including arbitration clause cannot be invoked or

acted upon. The learned Arbitrator though dismissed the application of the petitioner under Section 16 of the Act yet having reliance to Section 35 of the Indian Stamp Act kept the issue raised with regard to unstamped document open since such defect is curable upon payment of deficit stamp duty and such aspect can be decided upon evidence.

12. At the outset for convenience of discussion, Section 16 of the Act of 1996 is reproduced hereunder:

"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 respects to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an abitration 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."

13. Under Section 16 of the Act of 1996 the arbitral tribunal according to the doctrine of *kompetenz kompetenz* has the authority to decide whether it has the jurisdiction to adjudicate the dispute or not. Also, the arbitral tribunal

can decide on any objection with respect to the existence or validity of the arbitration agreement. The aforesaid provision further provides that a plea should be presented before the arbitral tribunal for an objection to the jurisdiction of the arbitral tribunal. This objection should be raised before the submission of the statement of defence. Also, a party does not get precluded from raising such an objection merely because he has participated in the appointment of an arbitrator. Further it provides that an objection that the arbitral tribunal or arbitrator is exceeding the scope of its authority shall be raised as soon as the matter, which is alleged to be beyond the scope of its authority, is brought up during the arbitration proceedings. The arbitral tribunal or the arbitrator may admit a plea of objection at a stage later than the stages mentioned above if it considers the delay justified.

14. An appeal lies against an order of the arbitral tribunal/arbitrator accepting the objection raised on its jurisdiction or the plea that it is exceeding its scope of authority to a court having competent jurisdiction under Section 34 or 37(2)(a) of the Act of 1996. मेव जयते

15. Section 16(5) of the Act of 1996 provides if the arbitral tribunal rejects the objection and decides that it is competent to adjudicate the present dispute then it shall continue with the arbitral proceedings and pass the arbitral award. The reading of Section 16(5) of the Act indicates that a decision rejecting the jurisdictional objections is a statutory precondition for continuance of arbitral proceedings. Now the question arises whether such rejection of jurisdictional objections can be intervened upon rejection or the aggrieved party has to wait till passing of the final award and then challenge the same under Section 34 of the Act.

16. In order to examine the question posed as aforesaid it would be

profitable to refer to the extent of intervention as spelt out in Section 5 of the Act of 1996 which provides as hereunder:

"5. Extent of judicial intervention.--Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

17. The aforesaid provision clearly express that there should be no judicial intervention in the matters governed by Part I of the Act of 1996 except where it is provided in the Act. Therefore, this Act follows the principle of minimum judicial intervention in arbitration proceedings. The non-obstante clause is provided to uphold the intention of legislature as provided in the preamble to adopt UNCITRAL (United Nations Convention on International Trade Regulation and Arbitration Laws) Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Act. For speedy resolution of the disputes, this Act allows for limited appealable orders. In the light of the above provisions, the extent of interference is to be examined with regard to order of dismissal under Section 16 of the Act. Section 16 of the Act of 1996 provides that if the arbitral tribunal finds that it does not have jurisdiction then an appeal can be filed under Section 34 or 37 of the Act. But if the arbitral tribunal/arbitrator considers that it is competent, which is the circumstances in the case at hand, then what would be the remedy available to the aggrieved party. In a similar situation a three-Judge bench of the Apex Court in the matter of **Deep Industries Limited versus Oil and Natural Gas Corporation Limited and Another reported in (2020) 15 SCC 706** held 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....."

18. Further in the matter of **Bhaven Construction through Authorised Signatory Premjibhai K. Shah versus Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Another reported in (2022) 1 SCC 75** referring to the aforesaid observation in **Deep Industries (supra)** held as follows:

"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.

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 I is therefore not left remediless and has statutorily been provided a chance of appeal.....

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 questions in the pending Section 34 proceedings"

19. Accordingly, in view of the above observation of the Apex Court in a case where the plea challenging jurisdictional competency of the arbitrator is dismissed the aggrieved party has to wait till the passing of the final award, and then he can file an application for setting aside such an arbitral award under

Section 34 of the Act. There is no segregated challenge permissible only on the question of the competency of the Arbitral Tribunal. Therefore, in the usual course the Arbitration Act provides for a mechanism of challenge under Section 34 of the Act and hence the aggrieved party cannot be said to be remediless in the circumstances of dismissal of application under Section 16 (2) of the Act of 1996. From the above judgements, it is clear that any challenge to the jurisdiction of the arbitrator necessarily has to be determined by the arbitrator in the first instance and then it can only be challenged under Section 34 after passing of the final arbitral award. Therefore, in view of the proposition as laid down by the Apex Court, since it is found in the case at hand that the final arbitral award is yet to be passed hence the aggrieved party-petitioner in the event of dismissal of application under Section 16 of the Act of 1996 has to wait till passing of the final award by the arbitrator and thereafter challenge the award under Section 34 of the Act. Further, the Apex Court in case of **Mcdermott International INC vs. Burn Standard Co. Ltd. and others, (2006) 11 SCC 181** has held that decision taken by arbitrator with regard to jurisdictional question would be subject matter of challenge under Section 34 of the Act of 1996. Thus, the petitioner is not left remediless and has statutorily been provided a chance of appeal.

20. Now it is to consider whether Article 226 or 227 of the Constitution of India can be invoked in the circumstances at hand where jurisdictional objections raised has been rejected by the learned arbitrator.

21. In the matter of **Deep Industries Ltd. (supra)** the Apex Court has held as follows :

"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."

22. Thus, a petition under Article 226 or 227 of the Constitution of India can be filed challenging the order of the arbitral tribunal dismissing application under Section 16 of the Act, only if the possible conclusion is that there is a patent lack in inherent jurisdiction. Nothing has been indicated showing patent inherent lack of jurisdiction. The jurisdiction of the arbitrator has been challenged precisely on the ground that the agreement containing arbitration clause is unstamped. The appointment of arbitrator has been made by an order dated 11.11.2022 in A.C.No. 71/2021. It is pertinent to note that there is nothing on record to suggest of patent inherent lack of jurisdiction of the learned arbitrator.

23. Further in the matter of **Bhaven Construction (supra)** the Apex Court referring to the aforesaid observation in **Deep Industries (supra)** held as follows:

"20. In the instant case, Respondent No. 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 the Respondent No.1 in a separate Section 34 application, which is pending."

24. Therefore, the remedy under Article 226 or 227 of the Constitution

of India can be invoked on the ground of exceptional circumstances or 'bad faith' on the part of the other party. There are no materials on record of any exceptional circumstances or 'bad faith' of the opposite party has been shown in the present petition.

25. The principle which culls out from the aforesaid decisions of the Hon'ble Court is that petition under Article 226 or 227 of the Constitution of India can be invoked on the ground of patent lack in inherent jurisdiction or exceptional circumstances or 'bad faith' of the opposite party. It is already found that none of the aforesaid grounds exist so far as the present case is concerned. Since the petitioner is not left remediless and has a chance of appeal under Section 34 of the Act, we find substance in the submissions of the learned counsel for the respondent. Hence the petition under Article 226 or 227 of the Constitution of India is not maintainable.

26. Bearing in mind the principles laid down by the Apex Court *Deep Industries Ltd. (supra)* and *Bhaven Construction (supra)* specifying the extent of application of provisions under Article 226 or 227 of the Constitution of India to proceedings under Arbitration Act, are not maintainable.

27. In view of the aforesaid reasons, we allow the preliminary objection raised by the respondent in the light of the judgment in case of **SBP & Co. (supra)** and hold that the writ petition under Article 226 or 227 of the Constitution of India is not maintainable against every order passed by arbitral tribunal or sole arbitrator until and unless exceptional circumstances or 'bad faith' of the opposite party has been shown in the petition.

28. However, the petitioner would be at liberty to wait until the award is pronounced and thereafter, avail the remedy of appeal as available to them under Section 34 or 37 of the Act of 1996 raising all these questions, as the

case may be.

29. Accordingly, this writ petition stands dismissed as not maintainable.

(S. A. DHARMADHIKARI)
JUDGE

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(DEVNARAYAN MISHRA)
JUDGE

