

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

% Judgment reserved on: 24.10.2013/25.10.2013
Date of Decision: 08.11.2013

+ W.P.(C) 6328/2013 & CM No.13822/2013

M/S STEEL AUTHORITY OF INDIA LTD. Petitioner
Through: Mr. A.K. Ganguli, Sr. Adv. with
Mr. Sunil K. Jain & Mr. Madhur Jain,
Advs.

versus

INDIAN COUNCIL OF ARBITRATION & ORS Respondents
Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Gaurav Mitra, Mr. Dhruv Kapur,
Mr. Vijender Kumar & Mr. Alif
Fazzelboy, Advs. for R-2.

+ W.P.(C) 4886/2013

UNITED SPIRITS LTD Petitioner
Through: Mr. M. Dutta, Ms. Neelam Saini &
Mr. P. Vinod, Advs.

versus

M/S STITCH CRAFT (INDIA) Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

Sub-Section (2) of Section 16 of the Arbitration and Conciliation Act provides that a plea that the Arbitral Tribunal does not have

jurisdiction shall be raised not later than the submission of the statement of defence. Sub-section (3) of the aforesaid Section provides that 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. Sub-section (5) of the aforesaid section, which is relevant for the purpose of these petitions, reads as under:-

“(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.”

Section 37 of the Act, to the extent it is relevant, provides for an appeal from an order of the Arbitral Tribunal accepting the plea referred to in sub-section (2) of sub-section (3) of Section 16. No appeal, however, is provided, in case such a plea is rejected. Section 5 of the Act provides that notwithstanding anything contained in another law for the time being in force, in matter governed by Part-I of the Act, no judicial authority shall interfere, except where so provided in the said Part.

2. The following two issues of law arise for consideration in these two petitions:-

(i) Whether the Arbitral Tribunal is mandatorily required to take a decision on the plea referred to in sub-section (3) of the Act before it proceeds further in the matter or it can decide such a plea at a later stage while making the arbitral award;

(ii) If the Arbitral Tribunal decides to go ahead with the arbitral proceedings, without taking a decision on such a plea or if it rejects the said plea whether such an order of the Tribunal can be interfered with in exercise of writ jurisdiction under Article 226/227 of the Constitution.

3. In W.P.(C) No. 6328 of 2013, the petitioner before this Court, in response to the statement of claim and also by filing a separate application under Section 16 of the Act, challenged the very initiation of arbitration proceedings on the ground that there was no arbitration agreement between it and respondent No. 2-Seaspray Shipping Co. Ltd. It was also pleaded in the said application that disputes, if any, could not be classified as maritime dispute attracting applicability of clause 60 of the agreement between the parties and the agreement dated 04.12.2007 does not fulfill the ingredients of an arbitration agreement, as prescribed in Section 7 of the Act. The aforesaid application, however, was not decided by the Arbitral Tribunal which was of the view that on the first date of hearing, the claims should be decided and adjudicated. This was followed by three more applications before the Arbitral Tribunal seeking a decision of the issue of jurisdiction, competence and validity of the Arbitral Tribunal. The Arbitral Tribunal, however, decided to proceed with the matter, without giving decision on the applications filed by the petitioners. Being aggrieved from the order of the Tribunal dated 05.07.2013, deciding to proceed with the matter, the petitioner is before this Court seeking quashing of the aforesaid order, besides a direction terminating the mandate of the Arbitral Tribunal.

4. In W.P.(C) No.4886/2013, the petitioner before this Court, on receipt of notice from the Arbitrator, raised a preliminary objection with respect to maintainability of the arbitration proceedings, inter alia, on the ground that there was no arbitration agreement between the parties. The Arbitrator vide impugned order dated 15.06.2013 rejected the preliminary objection of the petitioner. Being aggrieved, the petitioner is before this Court seeking quashing of the aforesaid order dated 15.06.2013.

5. The learned counsel for the petitioner in W.P.(C) No. 6328/2013, in support of its case, has relied upon *Southern Gas Ltd. vs. Visveswaraya Iron and Steel Ltd.* (1998) 9 SCC 555, *Kavaerner Cementation vs. Bajranglal Aggarwal*, (2012) 5 SCC 214, *Lalit Kala Academy v. Svapan Const* (2005) 2 Arb LR 447 (Del), *Punjab Agro Industries Corpn. Ltd. vs. Kewal Singh Dhillon*, (2008) 10 SCC 128, *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267, *U.P. SRTC vs. Commissioner of Police (Traffic)* (2009) 3 SCC 634, *Archcon and Others vs. Sewda Construction Company and Others* 2005(2) ARBLR 156, *Anuptech Equipments Private Limited vs. Ganpati Co-operative Housing Society Limited and Others*, AIR 1999 BOM 219, *Arati Dhar vs. S.K. Dutta*, 2002(3) Arb. LR (Calcutta) and *Unik Accurates vs. Sumedha Fiscal*, 2000 Supp. Arb LR 220, whereas the petitioner in W.P.(C) No. 4886/2013 has relied upon *Union of India vs. Tantia Construction Private Limited* (2011) 5 SCC 697. The respondent No. 2 in W.P.(C) No. 6328/2013 relied upon *S.B.P. Co. Vs. Patel Engineering and Anr.* (2005) Supp 4 S.C.R. 688, *Maharshi Dayanand University and Anr. Vs. Anand Coop. L/C Society Ltd. and*

Anr. (2007) 5 SCC 295, *Roshan Lal Gupta vs. Shri Parasram Holding Pvt. Ltd. and Anr.* 2009 (157) DLT 712, *Cadre Estate Pvt Ltd. vs. Salochana Goyal and Ors.* 2010 (119) DRJ 457 and *Shakti Bhog Foods Limited v. Kola Shipping Limited and Anr.* 2012(193) DLT 421.

Issue No. 1

6. In contending that the Arbitral Tribunal is required to decide the issue of jurisdiction as a preliminary issue before taking any further pleas in the arbitration proceedings, the learned senior counsel for the petitioner in W.P.(C) No. 6328/2013 laid emphasis on the words “where the Arbitral Tribunal, takes a decision rejecting the plea, continue with the arbitral proceedings and make an award” used in sub-section (5) of Section 16 and submitted that ignoring the aforesaid mandate of law is likely to visit the parties with consequences of having to suffer in terms of the wastage of time and incurring huge costs, if at the end of arbitral proceedings, the Tribunal was to hold that it had no jurisdiction in the matter. He further submitted that right to appeal conferred by Section 37(2) of the Act in the event of the Tribunal acceding the plea of want of jurisdiction or exceeding the scope of its authority, as the case may be, is a clear indicator that the jurisdictional issue is required to be decided as a preliminary issue and such a decision cannot be postponed to a later stage. The learned counsel for the respondent No. 2, on the other hand, submitted that it is not obligatory of the Arbitrator under the scheme of the Act, to decide such a plea as a preliminary issue and he can adjudicate upon the said plea at a later stage though before making the award on merits.

7. In *Maharshi Dayanand* (supra), the appellant before the Apex Court contended that there was no arbitration agreement as understood in the Act, justifying the appointment of an Arbitrator. The Apex Court, however, felt that in the facts and circumstances of the case, the question must be left to be decided by the Arbitrator in the first instance. The operative part of the order is relevant for the purpose of these petitions and reads as under:

“11. But we make it clear that the arbitrator, in the first instance, has to decide whether the existence of an arbitration agreement in terms of Section 7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of Clause 25A of the tender conditions in case it is found to be an agreement within the meaning of Section 7 of the Act. Only on deciding these two aspects can the arbitrator go into the merits of the claim made by the respondent. But we clarify that it does not mean, that he should treat these two aspects as preliminary issues and decide them first; but only that he must decide them without fail while proceeding to finally pronounce his award.”

(emphasis supplied)

It would thus be seen that the mandate given by the Apex Court to the Tribunal was not to decide the aforesaid issue as a preliminary issue though he was required to decide the same before pronouncing the award on merits.

In **Roshal Lal Gupta** (supra), one of the pleas taken by the petitioner was that the Arbitrator had failed to decide first the challenge

to the arbitration proceedings. Rejecting the contention, this Court held as under:-

“39. Under Section 16 of the Act upon a challenge being made to the jurisdiction of the arbitrator, the arbitral tribunal though is required to adjudicate the same but there is nothing to show that the arbitrator is to first adjudicate the same and can thereafter only proceed to adjudicate on the merits of the claim. The arbitral tribunal in its jurisdiction is entitled to decide the said challenge either as a preliminary issue or together with the entire matter. It is significant that even in the event of the arbitrator deciding against the challenge, no remedy therefor is provided and the challenge to such finding can be made only after the arbitral award in accordance with Section 34 of the Act. Thus, it cannot be said that any illegality has been committed by the arbitrator in not deciding the challenge as a preliminary issue as sought for by the petitioner/appellant.”

In *Shakti Bhog Foods Limited(supra)*, it was contended before this Court that the Arbitrator ought to have decided the objections as to his jurisdiction as a preliminary issue before deciding the merit. Replying upon the *Maharshi Dayanand University and Anr.(supra)*, the contention was rejected by this Court.

8. In **Southern Gas Ltd.** (supra), the Hon'ble Supreme Court, while remitting the matter back to the Tribunal, directed the Arbitrator to first go into the question whether the dispute falls within the ambit of arbitration agreement and if not then to proceed further to determine all the questions as raised by the parties. The aforesaid decision was, however, rendered under the provisions of Arbitration Act, 1940 and not under the provisions of Arbitration and Conciliation Act, 1996 and,

therefore, the Apex Court had no opportunity to interpret the provisions of Section 16(5) of the Act.

In **Kavaerner Cementation** (supra), another judgment relied upon by the learned senior counsel for the petitioner, a civil suit was filed for a declaration that there exists no arbitration clause and as such the arbitration proceedings were without jurisdiction. It appears that the Civil Court passed an interim order of injunction which was later vacated by it. The learned Single Judge of Bombay High Court, in view of the provisions of Section 5 read with Section 16 of the Act, refused to interfere with the order of the Civil Court vacating the interim order. The Hon'ble Supreme Court found no infirmity in the order passed by the High Court and directed that the petitioner could raise the question of jurisdiction before the Arbitrator and on such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings. The Apex Court, thus, did not examine the issue as to whether the Arbitrator was mandated by law to decide such an issue as a preliminary issue or not.

In **Lalit Kala Academy** (supra), the petitioner before this Court objected to the jurisdiction of the Arbitrator. The said objection, however, was overlooked by the Arbitrator, who, proceeded with the arbitration proceedings and made and published an award. Referring to the power conferred by Section 16 of the Act on the Arbitral Tribunal to rule on its jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement, this Court held

that the Arbitrator had failed to exercise the said jurisdiction and consequently, set aside the award and remitted the matter back to the Arbitrator. While remitting the matter back to the Arbitrator, it was directed that the Arbitral Tribunal shall, in the first instance, treat the letter of the petitioner as an objection under Section 16 of the Act in regard to his own jurisdiction as also the existence or validity of arbitration agreement and depending on the same, further proceeding, if any, shall be taken up in accordance with the law. It would thus be seen that in the aforesaid case, the Arbitrator had made an arbitral award, without adjudicating upon the issue of jurisdiction raised before him and the Court did not go into the question as to whether it is mandatory for the Arbitrator to decide such an issue as a preliminary issue or not.

9. Considering the mandate given by the Apex Court in **Maharshi Dayanand** (supra) and the decision of this Court in **Roshan Lal** (supra), and **Shakti Bhog Foods** (supra), I hold that though the Arbitral Tribunal, may in its discretion, treat the plea referred to in sub-section (2) or (3) of Section 16 as a preliminary issue, it is not obligatory for the said Tribunal to do, in every case.

Issue No. 2

10. The following view taken by the Hon'ble Supreme Court in **SBP Company** (supra), in my view, clinches this issue:-

“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.

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47 (vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court

only in terms of Section 37 of the Act or in terms of Section 34 of the Act.”

Following the aforesaid decision of the Apex Court, a learned Single Judge of this Court in *Cadre Estate Pvt Ltd.* (supra), inter alia, held as under:

“30. It may be observed that as regards the Petitioner's challenge to the jurisdiction of the learned Arbitrator it is not as if it has no remedy. If its application under Section 16 of the AC Act is allowed by the learned Arbitrator it will have no grievance left. If not, the Petitioner has to abide by the legislative scheme outlined in Section 16(5) read with Section 16(6) AC Act and await the passing of the Award. If the Award goes against the Petitioner, it can challenge the Award on the grounds available to it under Section 34 of the AC Act. The mere fact that this may cause it the inconvenience of having to await the conclusion of the arbitral proceedings is no ground to entertain a writ petition at an intermediate stage in a manner contrary to the legislative scheme under Section 16 AC Act. The AC Act being a complete code in itself and with Section 5 of the AC Act limiting interference by judicial authorities, any attempt to expand the scope for interference by the High Court in exercise of its powers under Article 226 of the Constitution would defeat the object and purposes of the AC Act.

32. Consequently, this Court holds that the present writ petition under Article 226 of the Constitution read with Article 227 thereof, to challenge either the jurisdiction of the learned Arbitrator generally or the order dated 18th December 2009 passed by the learned Arbitrator in particular, is not maintainable.”

11. It was contended by the learned senior counsel for the petitioner that being a Tribunal exercising quasi judicial function, the Arbitral Tribunal is subject to the writ jurisdiction of the Court and a party aggrieved from the failure of the Arbitral Tribunal to rule to its own jurisdiction, despite objection from a party cannot be left remediless. He also submitted that appeal to Supreme Court by way of a special leave under Article 136 of the Constitution cannot be said to be an appropriate remedy. He also submitted that the only issue before the Hon'ble Supreme Court in **SBP Company** (supra) was as to what is the function of the Chief Justice or his designate under Section 11 of the Court and the Apex Court, while adjudicating on the said issue, held that even the Chief Justice or his designate will have the right to decide the preliminary aspects such as the existence of a valid arbitration agreement between the parties. In support of his contention that **SBP & Company** is not an authority on the question of law arising in this petition, the learned counsel for the petitioner relied upon the view taken in U.P. SRTC (supra) holding that a decision is an authority for which it decides or not what can be logically deduced therefrom. He also submitted that in Punjab Agro Industries (supra), which is a later decision, Supreme Court has clarified that its decision in **SBP & Company** (supra) does not affect the maintainability of the writ petition. He also referred to National Insurance Company Limited (supra), where the Apex Court categorized the issue arising in an application under Section 11 of the Act into three categories; one of them being the issues which the Chief Justice or his designate will have to decide. One of the issues falling in the first category is as to whether there is an arbitration

agreement or whether a party who has applied under Section 11 of the Act is a party to such an agreement or not.

12. A careful perusal of the decision of the Apex Court in **SBP & Company** (supra) would show that in the aforesaid case, the Apex Court, while examining the nature of the functions of the Chief Justice or his designate under Section 11 of the Act, had gone into the whole gamut of the Act and had examined its scheme at length. Section 16 of the Act, interpretation of which is involved in the present writ petitions, also was analyzed by the Apex Court in para 12 and 20 of the judgment (SCC Citation). The view taken by the Apex Court in paras 45, 46 and 47 (vi) of the judgment, therefore, cannot be said to be only an obiter and is a clear statement of law on the applicability of Article 226 and 227 of the Constitution to an order passed by the Arbitral Tribunal.

In Municipal Committee, Amritsar versus Hazara Singh (1975 1 SCC 794), the Apex Court approved the following statement of law:

“Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that even statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force.”

Obiter dicta of the highest Court, where it lays down a rule of law, is certainly entitled to the greatest respect. In fact, several times, the obiter dicta of the Supreme Court has been taken as a precedent though every passing expression, of course, cannot be treated as an authority.

In Sarwan Singh Lamba and others versus Union of India and others [(1995) 4 SCC 546], the Apex Court observed that normally even the obiter dicta is expected to be abided and followed.

13. In **Tantia Construction Private Limited** (supra), the Apex Court, inter alia, held that availability of an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and even without exhausting such alternative remedy, a writ petition would be maintainable. This judgment, in my view, does not apply to the issue involved in the present writ petitions.

14. In any case, the decision of this Court in *Cadre Estate Pvt Ltd.* (supra), which is a judgment directly on this very issue, also binds this Court even if there be no pronouncement of the Apex Court directly on this very issue. Neither in *Punjab Agro Industries* (supra) nor *National Insurance Co. Ltd.* (supra), the Apex Court has taken a view on the maintainability of a writ petition against a non-appealable order such as an order of the Arbitral Tribunal deciding to go ahead with the arbitration proceedings, without first adjudicating upon the plea of want of jurisdiction raised under sub-section (2) of Section 16 of the Act or rejecting such a plea. As regards the decisions of Bombay High Court in *Anuptech Equipments Private Limited* (supra) and the decision of the

Calcutta High Court in Arati Dhar (supra) and Unik Accurates (supra), no reliance on the aforesaid decision can be placed by this Court considering the view taken by the Apex Court in **SBP & Company** (supra) as well as the view taken by this Court in **Cadre Estate Pvt Ltd.** (supra). This Court, therefore, must necessarily hold that a writ petition does not lie against a non-appealable order passed by the Arbitrator during the course of arbitral proceedings.

15. In any case, even if it is held that a writ petition against a non-appealable order of the Arbitrator is maintainable, considering the legislative intent, as expressed in Section 5 of the Act, which provides that no judicial authority shall intervene in matters governed by Part-I except to the extent provided in the said Part and acknowledging that interference with the arbitral proceedings, in exercise of writ jurisdiction of the Court, is bound to delay the conclusion of such proceedings, thereby defeating one of the main objectives behind preferring arbitration over litigation, the Court would be well advised in not interfering with such an order in exercise of its writ jurisdiction.

16. For the reasons stated hereinabove, I find no merit in the writ petitions and the same are hereby dismissed. There shall be no orders as to costs.

NOVEMBER 08, 2013
BG

V.K. JAIN, J.