2024:DHC:8131-DB

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Order reserved on: October 14, 2024**
Order pronounced on: October 22, 2024

\+ W.P.(C) 11484/2023

MS CP RAMA RAO SOLE PROPRIETOR .....Petitioner
Through: Mr. Angad Mehta, Mr. Rupin Bahl & Mr. Ansh, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
.....Respondent

Through: Mr. Manank Grover & Ms. Pratibha Vyas, Advs.
Dr. Amit George, Amicus Curiae with Mr. Rishabh Dheer, Mr. Arkaneil Bhaumik & Mr. Dushyant Kishan Kaul, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

YASHWANT VARMA, J.

1. The writ petitioner impugns the order of the District Judge dated 22 August 2023 which has principally held that the Section 34 petition as preferred by the writ petitioner under the **Arbitration and Conciliation Act, 1996**[1] would not be maintainable before the concerned commercial court. That opinion rests on the District Judge construing Section 42 of the Act as mandating the Section 34 petition being liable to be instituted before the High Court by virtue of the fact that on an earlier occasion a Section 11(6) petition had come to be

[1] Act

preferred before this Court. The District Judge has thus taken the view that since the Section 11 petition would amount to a prior application made to a court, it would be that court alone which could have been petitioned for setting aside the Award.

2. When this writ petition was initially considered, a doubt appears to have been expressed by the Court as to whether a petition under Article 227 of the Constitution would be maintainable. The initial reservation appears to have been based on the Court doubting the maintainability of the writ petition bearing in mind the remedy which Section 37 constructs. It becomes pertinent to note that Section 37 of the Act prescribes the orders against which an appeal would lie and reads as follows:

> **"37. Appealable orders**.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
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> (*a*) refusing to refer the parties to arbitration under Section 8;
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> (*b*) granting or refusing to grant any measure under Section 9;
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> (*c*) setting aside or refusing to set aside an arbitral award under Section 34.]
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> (2) An appeal shall also lie to a court from an order of the arbitral tribunal—
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> (*a*) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
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> (*b*) granting or refusing to grant an interim measure under Section 17.
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> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court"

3. It appears to have been urged before the Court that the order of the District Judge impugned before us would be liable to be treated as one refusing to set aside an arbitral award and thus falling within the ambit of Section 37(1)(c). It is in that backdrop perhaps that the Court had doubted the right of the writ petitioner to invoke our supervisory jurisdiction conferred by Article 227 of the Constitution.

4. Dr. George, the learned amicus who has rendered invaluable assistance, while dealing with the question of whether the order passed by the District Judge would fall within the ambit of Section 37 has drawn our attention to the following significant findings as rendered by the Supreme Court in **BGS SGS Soma JV v. NHPC Limited**[2]

> **"13.** Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (*a*), (*b*) and (*c*) *and from no others*. The pigeonhole that the High Court in the impugned judgment [*NHPC Ltd.* v. *Jaiparkash Associates Ltd.*, 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] has chosen to say that the appeals in the present cases were maintainable is sub-clause (*c*). According to the High Court, even where a Section 34 application is ordered to be returned to the appropriate court, such order would amount to an order "refusing to set aside an arbitral award under Section 34".
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> **14.** Interestingly, under the proviso to Section 13(1-A) of the Commercial Courts Act, 2015, Order 43 CPC is also mentioned. Order 43 Rule (1)(*a*) reads as follows:
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> > "**1. *Appeals from orders***.— An appeal shall lie from the following orders under the provisions of Section 104, namely—

[2] (2020) 4 SCC 234

> (*a*) an order under Rule 10 of Order 7 returning a plaint to be presented to the proper court except where the procedure specified in Rule 10-A of Order 7 has been followed;"
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> This provision is conspicuous by its absence in Section 37 of the Arbitration Act, 1996, which alone can be looked at for the purpose of filing appeals against orders setting aside, or refusing to set aside awards under Section 34. Also, what is missed by the impugned judgment [*NHPC Ltd.* v. *Jaiparkash Associates Ltd.*, 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] is the words "under Section 34". Thus, the refusal to set aside an arbitral award must be under Section 34 i.e. after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the Court has turned down such grounds. Admittedly, on the facts of these cases, there was no adjudication under Section 34 of the Arbitration Act, 1996 — all that was done was that the Special Commercial Court at Gurugram allowed an application filed under Section 151 read with Order 7 Rule 10 CPC, determining that the Special Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 application, and therefore, such application would have to be returned to the competent court situate at New Delhi."

5. As the Supreme Court explained in *BGS SGS Soma*, it is only those orders which would be referable to Section 34 and amounting to a refusal to set aside an award on grounds mentioned therein, which could be placed in clause (c) of Section 37(1). As in the present case, *BGS SGS Soma* was dealing with a question raised with reference to the return of a Section 34 petition by the Special Commercial Court at Gurugram which had held that it would lack jurisdiction. Such an order, the Supreme Court explained, would clearly not fall within the ambit of clause (c) of Section 37(1).

6. Reverting to the facts of the present case, we find that the District Judge has taken the position that by virtue of the Section 11 petition having been preferred before this Court and the said circumstance being relevant for the purposes of Section 42, the petition for setting aside

could have only been instituted before the High Court. That order clearly cannot be described to be a refusal to set aside an award on grounds which are specified and spoken of in Section 34(2) of the Act.

7. It is in the aforesaid backdrop that Dr. George, the learned amicus submitted that in the absence of the petitioner having a remedy under Section 37 read along with Section 13 of the **Commercial Courts Act, 2015**[3], it would be justified in seeking to invoke this Court's power of superintendence conferred by Article 227 of the Constitution.

8. As the learned amicus rightly points out, not only is the Article 227 power an extension of our jurisdiction to exercise judicial review and the same being a basic feature of the Constitution, it falls upon this Court in exercise of its constitutional authority of superintendence and supervision to adjudge the validity of orders passed by the District Courts. Dr. George in this regard also invited our attention to the decision in **Black Diamond Trackparts Pvt. Ltd. & Ors. v. Black Diamond Motors Pvt. Ltd**.[4] and where while dealing with the power of the High Court to correct orders made by a commercial court, we had enunciated the following principles which would guide:

> **"9.** The question of maintainability of a petition under Article 227 of the Constitution of India, with respect to proceedings in a commercial suit before the District Judge (Commercial) arose, because Section 8 of the Commercial Courts Act as under:
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> > *"**8. Bar against revision application or petition against an interlocutory order**.—Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any*

[3] 2015 Act
[4] 2021 SCC OnLine Del 3946

interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court."

10. Expressly bars the remedy of "civil revision application or petition". It was deemed apposite to hear the counsels on, whether by use of the word "petition" in addition to the words "civil revision application", though with a "or" between them, the purport of Section 8 supra was to also bar the remedy of Article 227 petition with respect to proceedings in a commercial suit at the level of the District Judge. The remedy under Article 227 of the Constitution of India, it was felt, was similar/identical/at par with the remedy of a civil revision application under Section 115 of the CPC and it was thus deemed appropriate to frame the question no. (i) aforesaid and hear the counsels thereon. Similarly, it was deemed apposite to hear the counsels on the reasoning which prevail with the Single Judge, that since appeals against orders in a commercial suit at the level of the District Judge are to be heard by the Commercial Appellate Division, petitions under Article 227, if maintainable, emanating from proceedings in such suits should also be heard by the Commercial Appellate Division. Accordingly, question no. (ii) aforesaid was framed.

11. The senior counsel for the respondent in CM (M) No. 132/2021, in our view, has rightly contended and none of the other counsels have controverted, that the remedy under Article 227 being a constitutional remedy could not be affected by a statute framed by a legislature which was itself a creature of constitution. A creature of the Constitution of India cannot act in negation of the provisions of the Constitution of India. We are reminded of *Surya Dev Rai* v. *Ram Chander Rai* (2003) 6 SCC 675, concerned with the impact of the amendment in Section 115 of the CPC brought about by the amendment of the CPC with effect from 1st July, 2002. In the wake of the said amendment, a question arose, whether on such amendment restricting/limiting the orders of the subordinate courts with respect to which a revision application under Section 115 of the CPC could be preferred to the High Court, an aggrieved person was completely deprived of the remedy of judicial review under Article 227 also. It was held, that curtailment of revisional jurisdiction of the High Court did not take away and could not have taken away the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court, nor was the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. It was further held that the said power continued to exists, untrammelled by the amendment in Section 115 CPC and remained available to be exercised, subject to the rules of

> self-discipline and practice, which were well settled. Similarly, in *State of Gujarat* v. *Vakhatsinghji Vajesinghji, Vaghela* AIR 1968 SC 1481, *Jetha Bai and Sons, Jew Town, Cochin* v. *Sunderbas Rathenai* (1988) 1 SCC 722, *State of H.P.* v. *Dhanwant Singh* (2004) 13 SCC 331 and *Union of India* v. *Major General Shri Kant Sharma* (2015) 6 SCC 773 it was held that the legislature cannot take away the power of superintendence of the High Court under Article 227 of the Constitution over all Courts and Tribunals which are within the territories in relation to which the High Court exercises its jurisdiction. Rather, in *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261, judicial review including under Article 227, was held to be a basic feature of the Constitution, even beyond the realm of amendability and Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent excluded the jurisdiction of the High Court and Supreme Court under Articles 226/227 and 32 of the Constitution with respect to matters falling within the jurisdiction of the Courts and Administrative Tribunals referred to therein, were held to be unconstitutional.
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> **12.** Thus, the question no. (i) aforesaid is answered by holding that the petition under Article 227 of the Constitution of India to the High Court with respect to orders of the Commercial Courts at the level of the District Judge is maintainable and the jurisdiction and powers of the High Court has not been and could not have been affected in any manner whatsoever by Section 8 of the Commercial Courts Act. The use of the word "petition" in Section 8 is not and could not have been with reference to a petition under Article 227 of the Constitution and is with reference to a revision application/revision petition only."

9. The aspects noticed by us in *Black Diamond* also find resonance in a judgment rendered by the High Court of Bombay in **Pravinchandra v. Hemant Kumar**[5] and where it was held:

> "15. Though Section 8 of the Commercial Courts Act, 2015,creates a bar against revision or petition against an interlocutory order, that however by itself would not interdict the intervention by the High Court, when it finds that the facts merit judicial intervention and in the instant matter specifically so, in light of the order in Commercial Appeal No.2/2019 by the learned Division Bench, granting liberty to the petitioners/plaintiffs to move an application for amendment considering the subsequent events. Section 8 of the Commercial Courts Act, has been considered by the learned Division Bench of

[5] 2023: BHC-NAG: 16159

> the Delhi High Court in ***Black Diamond Trackparts Pvt. Ltd***. (supra), wherein it has been held that word 'petition' in Section 8 of the Commercial Courts Act, is not and could not have been with reference to a petition under Article 227 of the Constitution and is with reference to a revision application/revision petition only and therefore would not bar the exercise of the jurisdiction of this Court under Article 227 of the Constitution of India. I, am in complete agreement with what has been said in ***Black Diamond Trackparts Pvt. Ltd.*** (supra), for holding otherwise, would amount to a statutory provision creating an embargo upon the constitutional provisions, which position cannot be countenanced in law."

10. We also bear in mind the well settled contours of the power which the Constitution confers upon a High Court by virtue of Article 227. While it is true that the said power of superintendence does not amount to an unrestricted prerogative or one intended to be wielded to correct every erroneous decision rendered by a subordinate court or tribunal, the salutary power so enshrined in that Article has been consciously placed as being liable to be exercised where a failure to correct may result in grave injustice. Although the scope of the power vested in a High Court by virtue of Article 227 is well settled, we deem it apposite to notice the decision in **Estralla Rubber v. Dass Estate [Pvt.] Ltd.**[6] and where the Supreme Court had explained the power of superintendence in the following words:-

> **"6.** The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to

[6] (2001) 8 SCC 97

cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

7. This Court in *Ahmedabad Mfg. & Calico Ptg. Co. Ltd.* v. *Ram Tahel Ramnand* [(1972) 1 SCC 898 : AIR 1972 SC 1598] in AIR para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case *Waryam Singh* v. *Amarnath* [AIR 1954 SC 215 : 1954 SCR 565] . This Court in *Bathutmal Raichand Oswal* v. *Laxmibai R. Tarte* [(1975) 1 SCC 858 : AIR 1975 SC 1297] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order."

We also take note of the decision in **Ramesh Chandra Sankla and Ors. v. Vikram Cement and Ors.**[7] and where the Supreme Court had enunciated the legal position as follows:-

"90. Now, it is well settled that jurisdiction of the High Courts under Articles 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of *Jodhey* v. *State* [AIR 1952 All 788] observed: (AIR p. 792, para 10)

"*10*. … There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian

[7] (2008) 14 SCC 58

of all justice within the territorial limits of its jurisdiction and *to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein*."

(emphasis supplied)

91. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a *court of law* but also as a *court of equity*. It is, therefore, *power* and also the *duty* of the Court to ensure that power of superintendence must "advance the ends of justice and uproot injustice".

92. In *Roshan Deen* v. *Preeti Lal* [(2002) 1 SCC 100 : 2002 SCC (L&S) 97] , dealing with an order passed by the High Court setting aside an order of the Commissioner for Workmen's Compensation, this Court stated: (SCC p. 106, para 12)

"*12*. … Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide *State of U.P.*v. *District Judge, Unnao* [(1984) 2 SCC 673 : AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. *If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law*."

(emphasis supplied)

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98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the court must take into account the balancing of interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in *Shiv Shankar Dal Mills* v. *State of Haryana* [(1980) 2 SCC 437 : (1980) 1 SCR 1170] courts of equity should go much further both to

> give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience."

11. These aspects pertinent to the extent of the power conferred by Article 227 came to be reiterated by the Supreme Court in **Central Council for Research in Ayurvedic Sciences and Anr. v. Bikartan Das and Others**[8] in the following words:

> **"**60. So far as the errors of law are concerned, a writ of certiorari could be issued if an error of law is apparent on the face of the record. To attract the writ of certiorari, a mere error of law is not sufficient. It must be one which is manifest or patent on the face of the record. Mere formal or technical errors, even of law, are not sufficient, so as to attract a writ of certiorari. As reminded by this Court time and again, this concept is indefinite and cannot be defined precisely or exhaustively and so it has to be determined judiciously on the facts of each case. The concept, according to this Court in K.M. Shanmugam v. The S.R.V.S. (P) Ltd., AIR 1963 SC 1626, 'is comprised of many imponderables… it is not capable of precise definition, as no objective criterion could be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element.' A general test to apply, however, is that no error could be said to be apparent on the face of the record if it is not 'self-evident' or 'manifest'. If it requires an examination or argument to establish it, if it has to be established by a long drawn out process of reasoning, or lengthy or complicated arguments, on points where there may considerably be two opinions, then such an error would cease to be an error of law. (See : Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137.)
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> 61. However, in our opinion, such a test should not be applied in a straitjacket formula and may fail because what might be considered by one Judge as an error self-evident, might not be considered so by another Judge.
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> 62. At this stage, it may not be out of place to remind ourselves of the observations of this Court in Syed Yakoob (supra) on this point, which are as follows:

[8] 2023 SCC OnLine SC 996

> "Where it is manifest or clear that the conclusion of law recorded by an inferior court or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or something in ignorance of it, or may be even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. Certiorari would also not lie to correct mere errors of fact even though such errors may be apparent on the face of the record. The writ jurisdiction is supervisory and the court exercising it is not to act as an appellate court. It is well settled that the writ court would not re-appreciate the evidence and substitute its own conclusion of fact for that recorded by the adjudicating body, be it a court or a tribunal. A finding of fact, howsoever erroneous, recorded by a court or a tribunal cannot be challenged in proceedings for certiorari on the ground that the relevant and material evidence adduced before the court or the tribunal was insufficient or inadequate to sustain the impugned finding.
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> It is also well settled that adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal and these points cannot be agitated before the writ court."

63. In the aforesaid context, it will be profitable for us to refer to the decision of this Court in the case of Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union, (2000) 4 SCC 245 : AIR 2000 SC 1508. This Court observed as under:

> "… The findings of fact recorded by a fact-finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon such materials which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly undertaken. …"

64. However, we may clarify that findings of fact based on 'no evidence' or purely on surmises and conjectures or which are perverse points could be challenged by way of a certiorari as such findings could be regarded as an error of law.

> **65.** Thus, from the various decisions referred to above, we have no hesitation in reaching to the conclusion that a writ of certiorari is a high prerogative writ and should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course. To put it pithily, certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when in the exercise of undoubted jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. By its exercise, only a patent error can be corrected but not also a wrong decision. It should be well remembered at the cost of repetition that certiorari is not appellate but only supervisory.
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> **66.** A writ of certiorari, being a high prerogative writ, is issued by a superior court in respect of the exercise of judicial or quasi-judicial functions by another authority when the contention is that the exercising authority had no jurisdiction or exceeded the jurisdiction. It cannot be denied that the tribunals or the authorities concerned in this batch of appeals had the jurisdiction to deal with the matter. However, the argument would be that the tribunals had acted arbitrarily and illegally and that they had failed to give proper findings on the facts and circumstances of the case. We may only say that while adjudicating a writ-application for a writ of certiorari, the court is not sitting as a court of appeal against the order of the tribunals to test the legality thereof with a view to reach a different conclusion. If there is any evidence, the court will not examine whether the right conclusion is drawn from it or not. It is a well-established principle of law that a writ of certiorari will not lie where the order or decision of a tribunal or authority is wrong in matter of facts or on merits. (See : *King* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (PC))"

12. That only leaves us to examine whether the District Judge correctly construed Section 42 of the Act when it took the view that since an earlier petition under Section 11 had come to be preferred before this Court, all subsequent application including under Section 34 would lie only before this High Court.

13. The issue of whether a Section 11 petition would fall within the ambit of Section 42 is no longer res integra. We in this regard bear in

mind the following enunciation of the legal position found in **State of West Bengal. v. Associated Contractors**[9]:

> **"16.** Similar is the position with regard to applications made under Section 11 of the Arbitration Act. In *Rodemadan India Ltd.* v. *International Trade Expo Centre Ltd.* [(2006) 11 SCC 651] , a Designated Judge of this Hon'ble Court following the seven-Judge Bench in *SBP and Co.* v. *Patel Engg. Ltd.* [(2005) 8 SCC 618] , held that instead of the court, the power to appoint arbitrators contained in Section 11 is conferred on the Chief Justice or his delegate. In fact, the seven-Judge Bench held : (*SBP and Co. case* [(2005) 8 SCC 618] , SCC pp. 644-45 & 648, paras 13 & 18)
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> > "*13*. It is common ground that the Act has adopted the Uncitral Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to 'the court or other authority specified in Article 6 to take the necessary measure'. The words in Section 11 of the Act are 'the Chief Justice or the person or institution designated by him'. The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. 'Court' is defined in the Act to be the Principal Civil Court of Original Jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The Principal Civil Court of Original Jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously, Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral Tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the

[9] (2015) 1 SCC 32

High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on the Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the State or in the country concerned. This is to ensure the utmost authority to the process of constituting the Arbitral Tribunal.

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18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power."

It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(*e*).

The said view was reiterated somewhat differently in *Pandey & Co. Builders (P) Ltd.* v. *State of Bihar* [(2007) 1 SCC 467] , SCC at pp. 470 & 473, Paras 9 & 23-26.

17. That the Chief Justice does not represent the High Court or Supreme Court as the case may be is also clear from Section 11(10):

> "**11. (10)** The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him."

The scheme referred to in this sub-section is a scheme by which the Chief Justice may provide for the procedure to be followed in cases dealt with by him under Section 11. This again shows that it is not the High Court or the Supreme Court Rules that are to be followed but a separate set of rules made by the Chief Justice for the purposes of Section 11. Sub-section (12) of Section 11 reads as follows:

> "**11. (12)(*a*)** Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to 'Chief Justice' in those sub-sections shall be construed as a reference to the 'Chief Justice of India'.
>
> **(*b*)** Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to 'Chief Justice' in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in clause (*e*) of sub-section (1) of Section 2 is situate and, where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court."

It is obvious that Section 11(12)(*b*) was necessitated in order that it be clear that the Chief Justice of "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(*e*) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1)(*e*). This sub-section also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record.

xxxx xxxx xxxx

25. Our conclusions therefore on Section 2(1)(*e*) and Section 42 of the Arbitration Act, 1996 are as follows:

(*a*) Section 2(1)(*e*) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(*b*) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(*c*) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(*d*) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(*e*) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(*e*), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(*f*) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(*g*) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

14. It is thus manifest that the District Judge has clearly taken an erroneous view in holding that a petition under Section 11 is one made to a court and which would consequently attract Section 42 of the Act. As has been unequivocally held by the Supreme Court, a petition under

Section 11 for the constitution of an arbitral tribunal cannot be recognised as an application made to a court. The provisions of Section 42 would consequently be inapplicable. Viewed in that light, it is manifest that the District Judge clearly erred in returning the petition for presentation before the High Court and that too on a wholly unsustainable construction of Section 42. That error, if not corrected, would clearly result in manifest injustice and clearly merits the legal position which would flow from Section 42 being clearly enunciated.

15. In view of the aforesaid, we allow the instant writ petition and set aside the order of the District Judge dated 22 August 2023.The Section 34 petition shall consequently stand revived on the board of the concerned Commercial Court to be heard afresh and bearing in mind the observations made hereinabove.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

OCTOBER 22, 2024/DR