

**WHETHER PETITION UNDER ARTICLE 226/227 OF
CONSTITUTION OF INDIA MAINTAINABLE AGAINST
ORDERS PASSED BY THE TRIBUNAL DURING
PENDENCY OF ARBITRATION PROCEEDING.**

The apex court once again deprecated the practice of challenging non-appealable orders passed by the arbitral tribunal under the Arbitration and Conciliation Act, 1996 ("Act") by way of filing petitions under Article 226/227 of Constitution of India. The apex court reaffirmed the law laid down in its judgment in the case of *Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd. & Anr.*¹, wherein it was held that interference through petition under Article 227 would strictly be restricted to orders that are passed with patent lack of inherent jurisdiction. In the case of *Punjab State Power Corporation Limited v. EMTA Coal Limited & Anr.*² a 3-judges' bench dismissed the special leave petition on the ground that the case before it did not fall in the exceptional category i.e. perversity in the order leading to a patent lack of inherent jurisdiction.

Brief Facts of the Case

- In the present case, the Punjab State Power Corporation Limited ('Petitioner') invited tenders to carry out coal mining operations to be conducted through a Joint Venture Company to be created for the said purpose. Petitioner entered into three following agreements with the highest bidder, EMTA Coal Ltd. ('Respondent No. 2'), each of which contained an arbitration clause: -

¹ (2019) SCC Online SC 1602

² SLP No. 8482 /2020 decided on 18.09.2020 against the order dated 10.12.2019 (in C.W.P. 12700/2019) passed by the Ld. Single Judge of Punjab and Haryana High Court at Chandigarh



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- a. First Agreement - Petitioner and EMTA agreed to form a joint venture for carrying out mining operations to extract coal from Pachwara (Central) Coal Block.
 - b. Second Agreement - Joint Venture Agreement dt. 21.03.2001 through which Petitioner and EMTA created PANEM for extracting coal to be supplied to the Petitioner.
 - c. Third Agreement - Coal Purchase Agreement dt. 30.08.2006 between the petitioner and PANEM to set out terms and manner of supply of coal to the petitioner.
- EMTA raised a dispute regarding non-payment of its dues by the petitioner and a three members' arbitral tribunal came to be constituted under the Joint Venture Agreement dated 21.03.2001. Both the claimant and respondent filed their claims and counter-claims respectively.
 - Petitioner filed an application under Section 16 of the Act to contend that Tribunal had no jurisdiction to adjudicate EMTA's claim, which was dismissed by the Tribunal vide order dt. 08.01.2017.
 - Matter before the arbitral tribunal continued up to the completion of final arguments by EMTA. When the matter was fixed for arguments of the Petitioner, Petitioner filed a petition under Art. 227 before the Punjab & Haryana High Court, challenging the order dt. 08.01.2017.

Proceedings before the P&H High Court

Shorn of unnecessary details, it would be sufficient to mention that the Ld. Single Judge of Punjab and Haryana High Court dismissed the petition under Section 227 of the constitution of India on the ground that the legislative intent, as reflected under the provisions of the Act, does not permit interference with the order of the Tribunal rejecting Application under Section 16 of the Act. For arriving at the said conclusion, the High Court placed reliance on the constitution bench judgment of the apex court in the case of ***M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.***³, wherein the Hon'ble Supreme Court expressly disapproved of any interference by the High Court through petitions filed under Art. 226/227 of the Constitution of India and held that where any of the party is aggrieved by any order of the Arbitral Tribunal, which are not appealable under Section 37 of the Act, such party has to

³ (2005) 8 SCC 618.

wait until the stage of passing of the award by the Tribunal to raise a challenge under Section 34 of the Act.

Another ground pressed into service by the High Court for dismissing the petition was that the petitioner waited almost for $2\frac{1}{2}$ years during which he did not challenge the impugned order dt. 08.01.2017 and voluntarily participated in the proceedings before the Tribunal.

Proceedings before the Apex Court

Later, the petitioner sought special leave to appeal before the Hon'ble Supreme Court stating that from the overall look at the Joint Venture Agreement and the arbitration clause, the third party was not referred at all, thus the order passed by the Tribunal patently lacked inherent jurisdiction for which the Petitioner heavily relied on the judgment of apex court in the case of ***Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd. & Ors.*** (supra)

The apex court disposed of the matter at the stage of SLP itself. After extracting para 16⁴ of the judgment in the case of Deep Industries (supra), the apex court held that a petition under 227 of the Constitution of India can be filed for challenging the order passed by the tribunal dismissing Section 16 application only if the order passed is so perverse that only possible conclusion is that there is a patent lack in inherent jurisdiction. It has further been held that a patent lack of inherent jurisdiction requires no arguments whatsoever- it must be perversity of the order that must stare one in the face. The apex court further opined that instead of dismissing the petition for the reasons stated by the High Court, High Court ought to have referred to the decision in the case of Deep Industries (supra) and dismissed the Petition on the ground that there was no perversity in the order leading to patent lack of inherent jurisdiction.

Conclusion

⁴ Para 16 of Deep Industries Ltd. (supra):

"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 the judgment 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."

Though the apex court's verdict appears to be loud and clear, namely, Petition under Article 227 of the constitution (and not under Article 226 of the Constitution) would be maintainable only in cases of patent lack of inherent jurisdiction, there is every possibility of the litigants filing petition under Article 227 taking shelter under the ground of '*patent lack of inherent jurisdiction*'. There can be more than one category of cases where one can raise the ground of patent lack of inherent jurisdiction like composition of the tribunal and/or qualification of the arbitrator(s) not being in terms of the agreement, non-signatory to arbitration clause being made party or denied opportunity to participate in the arbitration proceedings, dispute being non-arbitrable as per Indian law, tribunal dismissing an application under Section 16 and continuing with arbitration proceedings in respect of claims falling in the category of an excepted matter etc. It appears that the recent judgment, as also the judgment in the case of Deep Industries (supra), adds a different dimension to the law laid down by the constitution bench of the apex court (in para 45 & 46 of the judgement) in case of S.B.P (supra) which ruled out any possibility of filing petition under Article 226 & 227 of the Constitution for challenging any order passed by the Tribunal during arbitral proceedings. In the said case it was held that unless a right of appeal under Section 37 of the Act is available, a party aggrieved by any order passed by the Arbitral Tribunal must wait until the award is passed. However, now the apex court has held that remedy under Article 227 cannot be shut in cases involving patent lack of inherent jurisdiction. To what an extent, this determination would sub-serve the object of speedier resolution of dispute, is to be seen in times to come.

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