Writ Petitions Not Ordinarily Maintainable against Non-Interim Arbitral Orders

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Recently, a single judge of the Delhi High Court issued an order in *Easy Trip Planners Ltd. v. One97 Communications Ltd.* (25 July 2022), where it precluded a party from challenging an 'order' of an arbitral tribunal. The party had sought recourse to the constitutional remedy of approaching High Courts ("**HC**") under their writ jurisdiction provided under Article 226 and Article 227 of the Indian Constitution. The HC's refusal to maintain this challenge concerns situations where an arbitral order is not appealable pursuant to section 37 of the Arbitration and Conciliation Act, 1996 (the**"Act**") as it is not an 'interim order' as per relevant provisions of the Act. Thereafter, the HC also clarified that the bar on the maintainability of writ petitions under the foregoing constitutional provisions equally applies to cases where recourse to section 34 of the Act is denied to a party, thereby precluding challenges to such an order by the arbitral tribunal. In this post, we shall dissect and analyse this HC order.

Brief Background

Easy Trip Planners Ltd. ("**ETPL**") and One97 Communications Ltd. had entered into an arbitration agreement on an unspecified date. Thereafter, a dispute arose between the parties where a three-member arbitral tribunal was constituted. ETPL had filed an application seeking to produce additional documents before the arbitral tribunal by placing reliance on Order VII Rule 14 of the Code of Civil Procedure, 1908 ("**CPC**").

On 18 June 2022, the arbitral tribunal passed an order rejecting the foregoing request made by ETPL. Importantly, an arbitral tribunal, unlike a court of law, is not bound to follow the CPC. Furthermore, as subsequently noted by the HC in *Easy Trip*, the foregoing order was admittedly *not* an order passed under section 16 of the Act as it was rendered with a reference to Order VII Rule 14 of the CPC. Aggrieved, ETPL filed a writ petition under Article 227 of the Constitution against this order. Two interlinked questions thus arose through the petition:

(1) Is ETPL's writ petition maintainable before the HC?

(2) Assuming recourse to challenge under section 37 was not available to ETPL, does the bar to writ jurisdiction under Article 226 and Article 227 of the Constitution apply *only* to cases where an arbitral order is challengeable under Section 34 of the Act?

Court's Analysis

Precedent in *Patel*: Minimizing Judicial Intervention

The Court took the view that the present writ petition was not maintainable. It asserted this view by placing reliance on a seven-judge bench of the Supreme Court ("**SC**") in *SBP & Co. v. Patel Engineering Ltd.* (2005), which was decided prior to the regime emanating from the 2015 amendments and subsequent legislative amendments to the Act. In *Patel*, the SC, among other things, recorded its concern about the practice of various HCs opting to allow writ petitions to be heard by taking the view that *any* and all interim orders passed by an arbitral tribunal would be assailable under writ jurisdiction provided in Article 226 or Article 227 of the Constitution. Displeased with this practice of HCs, the SC had noted that it was unwarranted and impermissible, considering that it would make room for obstruction tactics to impede arbitrations.

In that light, the SC in *Patel* held that recourse to section 34 of the Act was available to any aggrieved parties to challenge not only the final arbitral award by an arbitral tribunal, but simultaneously to challenge any interim awards rendered prior to making of the final award. Notably, readers may recall that according to section 2(1)(c) of the Act, an arbitral award includes an 'interim award', which means that an interim award rendered in accordance with the provisions of the Act should be assailable under section 34. Hence, the SC held that: "*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*" (emphasis ours).

It further observed that this was in fact the intent of the legislature, observing that: "*The* ***object*** *of ¨while the matter is* ***in the process of being arbitrated upon****, will certainly be* ***defeated*** *if the HC 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****"* (emphasis ours). Notably, the SC opted to take an arbitration-friendly approach by reading down Article 226 and Article 227 of the Constitution to preclude a HC from exercising its writ jurisdiction in cases where a party to an arbitration agreement cannot challenge any interim award, appeal to which is not expressly provided under section 37 of the Act.

Following the abovementioned holdings in *Patel*, the HC in the *Easy Trip* order held that only arbitral orders passed under section 16 of the Act are assailable before the court under section 37. As the challenged interim order was not rendered by the arbitral tribunal under section 16, a challenge by ETPL to the foregoing order could not proceed by recourse to section 37.

Arbitral orders which do not constitute 'interim orders' per the Act are challengeable under section 34

Next, ETPL sought to contend that the holdings in *Patel* meant that the bar on maintainability of such writ petitions before High Courts only applied in situations where recourse to section 34 of the Act was available to an aggrieved party to challenge an interim arbitral order. In the present case, as the order by the arbitral tribunal was

admittedly not an 'interim order' within the meaning of the Act, ETPL appeared to contend that recourse to Section 34 was not available to it to challenge this order. The HC yet again rejected this contention, recording that the holdings in *Patel* would not apply to the present case and that ETPL's writ petition was not maintainable.

The HC referred to section 5 of the Act which categorically disapproves judicial interference with an arbitral process, except as envisioned in the provisions in the Act, a view which it believes guided the rationale in *Patel*. Subsequently, the HC took the view that *Patel* did not intend to delimit the bar on writ jurisdiction only to situations where recourse to section 34 was available to a party. Thereafter, it recorded that the holdings in *Patel* judgment, "*[…] merely underscore the position that* ***all grievances that the arbitral litigant may nurse*** *against* ***any*** *interim order* ***or orders*** *that the* ***arbitral tribunal*** *may come to pass during the course of the arbitral proceedings would* ***always be open to being canvassed as grounds of challenge to the final award that may come to be passed in the arbitral proceedings***. *To maintain the current and flow of the arbitral proceedings, therefore, the SC has proscribed, by judicial fiat, challenges to such interlocutory orders midstream*" (emphasis ours).

Consequently, placing emphasis on the words "or orders" in the above-mentioned extract from the HC order, a new position of law emerges that even orders such as the one passed in the *Easy Trip* case by an arbitral tribunal, which do not constitute 'interim orders' within the meaning of the Act, are amenable to challenge under section 34 of the Act (although only *after* the final award is rendered by the arbitral tribunal).

Reconciling the *Bhaven* and *Patel* precedents

In its final bet of winning, ETPL contended that as per the SC precedent in *Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.* (2021) (analysed on this Blog here), it is a settled principle that any legislative enactment of the Parliament cannot restrict a constitutional right (such as the writ remedies under Article 226 and Article 227). Consequently, it appears that ETPL sought to argue that section 5 or other provisions of the Act could not preclude a HC's writ jurisdiction, therefore making the present order by the arbitral tribunal appealable under Article 226 and/or Article 227.

Importantly, the SC in *Bhaven* had also clarified that the above-mentioned principle does not mean that a HC is required to entertain *each and every* writ petition while ignoring that an aggrieved litigant has an effective alternate remedy available to them. Contrarily, a writ petition should not be entertained by HCs where a statutory forum has been created by the parliament for redressal of specific grievances. As noted by the HC in *Easy Trip*, the SC in *Bhaven* had recognised two scenarios where an HC could entertain a writ petition *even* where alternate remedies were available to the litigant:

[i] *First*, where an order by an impugned authority suffers from "bad faith"; or

[ii] *Second*, where a party would *not* be rendered remediless, if the challenge to the order vis-à-vis writ petition is not permitted, a HC could allow a writ petition to be heard in "*rare and exceptional cases and within the narrow confines of the jurisdiction*" provided

under Article 226 and Article 227.

Reconciling these judgments, the HC held that *Bhaven* instead of conflicting with the view in *Patel*, was re-affirming the limited judicial intervention laid down in the latter precedent in its own way. As ETPL could challenge the present arbitral order under section 34 (on the basis of the HC holding in the previous segment) at a later stage of proceeding (upon rendering of final arbitral award), there did not arise a situation where it would be rendered remediless or could justify any rare and exceptional reason why the present writ petition should have been maintainable.

As a result, the HC ultimately dismissed ETPL's writ petition, although permitting ETPL to pursue remedies available to it at the subsequent appropriate stages, presumably inferring to ETPL's need to now wait until rendering of final arbitral award to challenge the arbitral award, in line with the *Patel* precedent.

Authors' Comments

The HC's clarification that not only interim awards or final arbitral awards, but also any awards can be challenged by litigants under section 34 of the Act is altogether necessary. It also finds support in section 2(c) which defines an 'arbitral award' to *include* an interim award, meaning that an inclusive and expansive interpretation can be applied to the foregoing phrase which can encompass 'any' order by an arbitral tribunal, thus rendering all such awards challengeable under section 34, even if they cannot be challenged under section 37. While the *Easy Trip* order did not attract much mainstream commentary, it is undoubtedly significant not only in its legal implications with respect to limiting constitutional remedies – but also in reaffirming the trend of the Indian judiciary in respecting party autonomy even at the cost of its own powers to intervene – something which deserves appreciation in itself. That is evident in the HC's attempts to reconcile and fill any possible gaps between different SC judgments so as to ensure they do not become weapons in the hands of parties searching for obstruction tactics to hinder arbitrations. To that end, one hopes that other HCs follow suit as regards the holdings delivered in the Delhi HC order.

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