Power under Articles 226/227of the Constitution must be exercised in an arbitration case with exceptional rarity (Supreme Court of India)

Update by Editor

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Bhaven Construction v. Executive Engineer, Sardar Sarovar Nigam Limited and another

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 14665 of 2015 | **Citation**: 2021 SCC OnLine SC 8 | **Bench**: NV Ramana, Surya Kant & Hrishikesh Roy JJ | **Date**: 06 January 2021

This is NFRAL's case Update on *Bhaven Construction* v. *Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & another*, the third 3-judge bench decision in reasonably quick succession on the power of the High Court under Articles 226 & 227 of the Constitution to interfere in an arbitration matter. A 3-judge bench presided by RF Nariman J discussed the issue in *Deep Industries* (decided on December 2019) and prescribed a test. In *Emta Coal*, another 3-judge court presided by Nariman J clarified the test observing that the judgment in *Deep* was being misused. *Bhaven* refers to *Deep* but does not discuss it; it does not refer to *Emta*. It prescribes what apparently is a different test.

A. An executive summary

Both Articles 226 and 227 of the Constitution give the High Courts the power of judicial review. Exercising this power, the High Court can review under both provisions an order of a tribunal situated within its territory because:

(a) Tribunals fall within the sweeping language of Article 226.

(b) Article 227 expressly mentions tribunals and gives the High Courts the power of superintendence over them.

An arbitral tribunal also is "amenable" to the jurisdiction of the High Courts under Articles 226 and 227:

(a) An arbitral tribunal has been considered to be a tribunal within the meaning of Article 227 in quite a few cases [e.g., *SREI Infrastructure Finance Limited* v. *Tuff Drilling Private Limited*, (2018) 11 SCC 470].

(b) Arbitration cases on Article 227 also refer in the same vein to Article 226, and it is not disputed anywhere that Article 226 also applies.

Both provisions are part of the Constitution's basic structure and cannot be excluded or ousted by any legislation. Therefore, they remain unaffected even by Section 5 ACA, which prescribes that no judicial authority shall intervene except under the ACA itself.

The question of the High Court's jurisdiction under Articles 226/227 in arbitration matters may arise in at least two situations. One, directly against the arbitral tribunal's order. Two, where the issue had gone initially to a subordinate court and its order is challenged.

In both situations, the courts have said though there is jurisdiction, as a matter of judicial discipline, it should be exercised in very limited cases. What are these types of cases? In answer:

(a) In *Deep Industries* (cited below), heading a 3-judge bench, RF Nariman J said that courts must interfere against those orders which are patently lacking in inherent jurisdiction.

(b) In *Emta Coal* (cited below) presiding over another 3-judge bench, RF Nariman J clarified that an order patently lacks in inherent jurisdiction where the perversity of the order stares in the face. It requires no arguments (to establish the perversity).

(c) Now, in *Bhaven*, another 3-judge bench presided by NV Ramana J has pointed to another test and referred to 'exceptional rarity' cases, where one party is left remediless, or a clear bad faith is shown by one of the parties. They referred to *Deep* by just reproducing paragraph 16. *Emta* was not referred.

B. The context

B1. Articles 226 and 227 of the Constitution generally

The following orders can be made under Article 226:

(a) directions, orders or writs (for convenience, "Writ");

(b) for "the enforcement of any of the rights conferred by Part III", that is, the fundamental rights;

(c) or "for any other purpose," that is, the enforcement of any other legal right.

A Writ under Article 226 lies against the following (illustratively):

(a) against any person or authority or any government;[1]

(b) therefore, against the State governments, the Union government, legislatures, authorities or agencies of the State within Article 12[2] of the Constitution, and *tribunals*;

(c) a body discharging statutory or public function;

(d) but generally, not against a wholly private body or person (since, after all, a Writ is a public law remedy).

As to Article 227:

(a) Control on judicial orders by subordinate courts is exercised either through appeal or revision (conferred by any statute) or the power of superintendence conferred by the Constitution under Article 227. Under Article 227, every High Court has the power of superintendence, both judicial and administrative, over all courts and *tribunals* in its territory (except armed forces).

[1] Either the person, authority, or government must be within the court's territorial jurisdiction, or if not, the cause of action should have arisen within the court's territorial jurisdiction.

[2] "In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".

(b) The power means that a High Court can interfere when a subordinate court or a tribunal, for instance, refuses to exercise jurisdiction, exceeds its jurisdiction, makes a perverse finding.

(c) The correct provision to interfere with a civil court order is Article 227 because a Writ of Certiorari under Article 226 is not issued to a civil court. Instead, it is the power of superintendence Article 227 that applies [per *Radhey Shyam and another* v. *Chhabi Nath and others,* (2015) 5 SCC 423].[3]

B2. Articles 226 and 227 are part of the basic structure of the Constitution. Therefore, Section 5 ACA cannot oust or exclude them

The principle of "basic structure" comes from the 13-judge bench decision in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, which is quite easily the most crucial case so far in India's constitutional history. Generally speaking, the question concerned the scope of the Parliament's power under (the then) Article 368 to amend the Constitution.

It was argued that the power conferred by Article 368 on the Parliament did not extend to destroying any of the basic fundamental features of the Constitution. By a majority of 7:6--HR Khanna J being the swaying opinion--the court accepted the doctrine. Khanna J applied it to the case to say that judicial review was a basic feature of the Constitution.

In *L Chandra Kumar* v. *Union of India* (1997) 3 SCC 261, a 7-judge bench expressly decided that Articles 226 and 227 were part of the basic structure.

It is settled now that since Articles 226 and 227 are part of the basic structure, they cannot be ousted or excluded by any statute (or otherwise).

B3. In *Deep Industries*, Article 227 was deployed against a civil court's order in an arbitration matter. The court laid the "patently lacking in inherent jurisdiction" test

Deep Industries Limited v. *ONGC Limited and another*, 2019 SCC OnLine SC 1602 is a decision of a 3-judge bench by RF Nariman, Aniruddha Bose and V Ramasubramanian JJ.

The arbitral tribunal had made an interim order under Section 17 ACA. An appeal was filed before the City Civil Court under Section 37 ACA but was rejected. Then, a petition under Article 227 of the Constitution was filed challenging the City Court's order.

The court ruled at paragraph 16[4] that the High Courts can exercise jurisdiction under Articles 226/227 against judgments allowing or dismissing first appeals under Section 37 ACA, but with extreme

[3] In *Surya Devi Rai* v. *Ram Chander Rai* (2003) 6 SCC 675, a 2-judge bench of RC Lahoti and Ashok Bhan JJ said that Article 226 preserved the High Court the power to issue a writ of certiorari amongst others. They discussed the meaning and the history of the writ of certiorari. They also said that the difference between the two jurisdictions-- the power to issue a writ of certiorari under Article 226 and the exercise of supervisory jurisdiction under Article 227—stands almost obliterated in practice. And this probably was why it has become customary with the lawyers labelling their petitions as one under Articles 226 and 227. *Surya Devi* was overruled in *Radhey Shyam* on the point whether the High Court could issue a writ under Article 226 to a subordinate court. The 3-judge bench said that, relying on a 9-judge bench decision in *Naresh Shridhar Mirajkar* v. *State of Maharashtra* (1966) 3 SCR 744, a writ under Article 226 lies against orders of tribunals and authorities other than civil courts.

[4] Paragraph 16, *Deep*: "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

circumspection, considering the statutory policy of the ACA so that interference is restricted to orders which are patently lacking in inherent jurisdiction.

Read NFRAL's Update on *Deep Industries* here.

B4. In *Emta Coal*[5]—the order of the arbitral tribunal was directly challenged, and *Deep's* test of "patently lacking …" was clarified

In an arbitration, the Punjab State Power Corporation ("PSPL") had applied under Section 16 ACA challenging the jurisdiction of the tribunal, but the application was dismissed, and the arbitration proceeded. The remedy for an aggrieved party in such a case is to take up the issue at the setting aside stage under Section 34 ACA [see Section 16 (4) and 16 (5) ACA].

However, about two and half years after the tribunal rejected the plea, PSPL challenged that order before the High Court in a petition filed under Articles 226 and 227 of the Constitution.

Deepak Sibal J decided the High Court case on 10 December 2019, approximately ten days after the judgment in *Deep Industries*. He dismissed the petition on two grounds:

(a) First, he said that a writ petition was not maintainable against the order of an arbitral tribunal. For this conclusion, he relied on *M/s SBP & Co.* v. *M/s Patel Engineering Limited*, (2005) 8 SCC 618[6] and a few other cases. He did not refer to *Deep Industries*, and it is not clear if the decision was brought to his attention. Possibly not.

(b) Second, however, Sibal J added another reason. He said that the petition "is liable to be dismissed on another ground as well", that is, on delay because the petitioner continued to participate in the arbitration and came to the court two and a half years later.

PSPL now appealed to the Supreme Court.

A 3-judge bench of RF Nariman, Navin Sinha, and Indira Banerjee JJ heard the matter and dismissed it with costs of rupees fifty thousand.

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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*". (emphasis added)

[5] *Punjab State Power Corporation Limited* v. *Emta Coal Limited and another*, Special Leave to Appeal (C) No. 8482 of 2020, order dated 18 September 2020.

[6] At paragraph 46 of *SBP*—a case mainly on the nature of power under Section 11 ACA--the 7-judge bench had said as follows: "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 or under Article 226 of the Constitution 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". *Deep Industries* had relied on this passage from *SBP*, and so did the High Court in *Emta*. The court in *SBP* summed up its conclusions at paragraph 47, one of which was as follows: "Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the 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". The High Court in *Emta* relied on this passage also.

The Supreme Court's order starts by noting (erroneously) that the High Court's judgment "is grounded on the fact" that the tribunal's order was challenged only after two and a half years after the arguments had been concluded.

PSPL had argued (the order notes) that its case fell under the test set out in paragraph 16 of *Deep Industries* ("patently lacking in inherent jurisdiction").

Nariman J rejected the argument and clarified the meaning of "patent lack of inherent jurisdiction." He said, underlining the expression patent for emphasis, that "a foray to the writ court from a section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction." Then, "a patent lack of inherent jurisdiction requires no argument whatsoever—it must be the perversity of the order that must stare one in the face."

He also lamented that "unfortunately, parties are using this expression which is in our judgment in *Deep* … to go to the 227 Court in matters which do not suffer from a patent lack of inherent jurisdiction."

According to him, the *Emta* matter was one of them where "instead of dismissing the writ petition on the ground stated, the High Court would have done well to have referred to our judgment in *Deep Industries* and dismiss the 227 petition …".

Bhaven Construction is now the third 3—judge bench decision of the Supreme Court in the series.

C. The *Bhaven construction* case

C1. The arbitrator dismissed an application filed under Section 16 ACA. This order was challenged in a writ petition

Bhaven had a contract in 1991 with Sardar Sarovar Nigam Limited (SSN), a state government company. The arbitration clause provided for arbitration under the Indian Arbitration Act, 1940 "and any statutory modification thereof."

In 1992, the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act ("the Tribunal Act") was enacted.

A dispute arose in 1998. SSN refused to participate in the appointment of an arbitrator because Bhaven wanted an arbitration under the ACA, but SSN said Bhaven should have gone to the Tribunal under the Tribunal Act. Bhaven nonetheless appointed a sole arbitrator.

SSN challenged the arbitrator's jurisdiction[7] by applying Section 16 ACA. The arbitrator rejected the application and asserted jurisdiction.[8] SSN filed a writ petition "under Articles 226 and 227 of the Constitution of India."[9]

[7] SSN first filed an anti-arbitration suit but was unsuccessful (see judgment of the Single Judge of the High Court here or AIR 2006 Guj 74).

[8] It appears from the judgment of the 2-judge bench of the High Court that the arbitrator concluded the contract did not fall within the definition of a "works contract" under the Tribunal Act, and thus was not the subject-matter of that enactment. See footnote 5 below.

[9] It is a practice in many courts to file a petition jointly under Articles 226 and 227 of the Constitution. See footnote 3 above.

C2. A single judge dismissed the writ petition, but a 2-judge bench allowed the appeal and quashed the arbitration proceedings giving liberty to approach the tribunal under the Tribunal Act

MR Shah J, sitting singly, dismissed the writ petition relying on *SBP*. He said that once the arbitrator ruled on his jurisdiction, the finding could only be challenged at the set-aside stage.[10]
SSN appealed.

A 2-judge bench of RN Tripathi and NV Anjaria JJ concluded that[11]:

(a) The dispute arose out of a works contract (rejecting the argument that the tribunal had found that it was not a works contract and that finding could be assailed only at the set-aside stage).

(b) There was no doubt that the Tribunal Act "holds the field" and not the ACA.

(c) SSN raised the issue of forum matter at the earliest available opportunity. Bhaven "cannot appoint a sole Arbitrator and thereafter cannot contend that now that the Arbitrators is already appointed and he … has already exercised power, [SSN] has to wait till the arbitration award is passed …."

Now, Bhaven challenged this judgment in a special leave petition.

C3. The matter before the Supreme Court

The matter went to the Supreme Court on Bhaven's appeal. In January 2013, a 2-judge bench of SS Nijjar and Anil R Dave JJ stayed the operation of the High Court's 2-judge bench judgment, as a result of which the arbitration continued before the sole arbitrator. By the time the matter was heard by the Supreme Court, an award had been passed in Bhaven's favour, and SSN's set-aside application was pending [see para 20, *Bhaven*].

That aside, the matter was examined by the 3-judge bench of NV Ramana, Surya Kant and Hrishikesh Roy JJ. Speaking through Ramana J, the court framed the question: "the question which needs to be answered is whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?" [see para 10].

In answer, for the reasons set out below, they concluded that the "High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution."

(a) The ACA is a "code in itself"

The sub-heading was the court's first reasoning. It said:

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[10] An order passed under Section 16 ACA allowing the plea that the tribunal does not have jurisdiction is appealable under Section 37 (2) (a) ACA. An order that the tribunal has jurisdiction is not appealable. The remedy for the aggrieved party is to challenge the finding at the set-aside stage. See, e.g., Section 34 (2) (iv) ACA. Shah J reproduced paragraphs 44 to 46 of the 7-judge bench *SBP* for the point that "once the matter reached the arbitral Tribunal … the High Court would not interfere with orders passed by the Arbitrator or the Arbitral Tribunal during course of arbitration proceedings and parties could approach the court only in terms of Section 37 [ACA] or … Section 34 [ACA]". *Ibid*. See also para 5, *Bhaven*.

[11] See <http://gujarathc-casestatus.nic.in/gujarathc/> <search><LPA No. 182 of 2006>. Judgment of 17 September 2012. See also para 6, *Bhaven*.

(i) The phrase—"code in itself"—is not perfunctory but has definite legal consequences, one of which is spelt out in Section 5 ACA ("the non-obstante clause").[12] It is provided to "uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act".

(ii) The ACA framework portrays an intention to address most of the issues within the ambit of the Act itself without scope for any extra-statutory mechanism to provide just and fair solutions.

(b) Anyone can enter into an arbitration agreement and specify a procedure. Bhaven acted within the agreed procedure

Any party can enter into an arbitration agreement as defined under Section 7 ACA and "agree for their own procedure." Recourse for court assistance under Section 8 or 11 ACA can be taken if a party fails to refer a matter to arbitration or does not appoint an arbitrator. Bhaven acted following the procedure laid down under the agreement and appointed a sole arbitrator without SSN "mounting a judicial challenge at that stage". SSN then appeared before the sole arbitrator and challenged his jurisdiction under Section 16(2) ACA.[13]

Then, it challenged the arbitrator's order in a petition under Article 226/227 of the Indian Constitution. In the usual course, the mechanism of the challenge is set out under Section 34 ACA. The opening phrase of the section uses the expression "only"[14]. The use of the term 'only' as occurring under the provision serves two purposes: making the enactment a complete code and laying down the procedure.

(c) Intervention by writ court only in "exceptional rarity" where a party is left remediless or clear "bad faith" is shown by one of the parties

The court's next reason concerned the constitutional right (of approaching a writ court) under Articles 226 and 227 versus a statutory provision. Ramana J referred to paragraph 11 of *Nivedita Sharma* v. *Cellular Operators Association of India*, (2011) 14 SCC 337, which referred to *L Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261. *Nivedita* had said that:

(i) Articles 226 and 227 are part of the "basic feature of the Constitution and cannot be curtailed by parliamentary legislation."

(ii) But, "it is one thing to say that … the High Court can entertain a writ petition …and it is an altogether different thing to say that each and every petition … must be entertained". Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained.

Ramana J said that, therefore, it is "prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment." He then set out a test:

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[12] "Section 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".

[13] It is not entirely clear what Ramana J meant to convey in this passage. For one, it is factually incorrect. As noted in both the High Court judgments, before filing a writ petition, SSN had filed an anti-arbitration suit. Then, the whole case is about the fact that SSN had "mounted a judicial challenge" by filing a writ petition, and it was said that the correct remedy was to make that challenge in the set-aside stage.

[14] Recourse to a Court against an arbitral award may be made only --- by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

> "This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient".

Then, he referred *Deep Industries* and reproduced paragraphs 15 and 16 to say that "interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analysed." These are the same passages we discussed in Section A of this Update, where Nariman J prescribed the test "patently lacking in inherent jurisdiction."

Ramana J then found that SSN had not been able to show exceptional circumstance or "bad faith." He also said that though its power is "broad and pervasive", it should not have used its inherent power to interject the arbitral process at this stage.[15]

(d) The "principle of unbreakabilty"

Next, Ramana J referred to what he called the "principle of unbreakabilty." He said that "viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modeled on the 'principle of unbreakabilty.'

To support this proposition, he referred to paragraph 36. 3 of *P Radha Bai* v. *P Ashok Kumar*, (2019) 13 SCC 445 [Himself and S Abdul Nazeer JJ].

In *P Radha Bai*, he had referred to one Dr Peter Binder and reproduced a passage from one of his books[16]. The context was the time limit to set aside an award (i.e., thirty days under Article 34(3) of the Model Law] and Article 33. If a party has requested correction or interpretation of the award under Article 33, the time limit of three months begin after the tribunal has disposed of the request.

The author says in the passage that "according to this "unbreakabilty" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-month time-limit has expired cannot be raised."[17]

Ramana J's conclusion on the discussion on "unbreakabilty" was that "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."[18]

(e) Reasoning reiterated: Bhaven acted under agreed procedure without any mala fides; SSN submitted to the jurisdiction of the tribunal

Raman J then turned back to two reasons he had already set out. One, Bhaven acted in accordance with the agreed procedure. Two, SSN did not take any legal "legal recourse against the appointment of the

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[15] Again, it is not clear what was the court referring in saying "at this stage". In very next line, the court referred to the fact that it had been brought to its notice that "subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by [SSN] in a separate Section 34 application, which is pending".

[16] Dr Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd Edn. We have not reviewed the passage or the context of the passage from this source.

[17] Para 36.3 of *P Radha Bai* notes the quoted portion as part of Dr Binder's passage. Its reproduction in the *Bhaven* judgment suggests erroneously that these were words of the court in *P Radha Bai*.

[18] No meaning of 'principle' can possibly apply to the "principle of unbreakabilty". Further, its relevance to the issue is not quite apparent.

sole arbitrator, and rather submitted themselves before the tribunal." So, it had to "endure the natural consequences of submitting themselves to the jurisdiction" (that is, taking the point at the set-aside stage).

(f) Whether the agreement was a Works Contract is a matter of interpretation of the contract and thus for the arbitrator

The High Court had also found that the dispute arose out of a works contract within the Tribunal Act definition. Ramana J said that "this is a question that requires contractual interpretation, and is a matter of evidence, especially when both parties have taken contradictory stands regarding this issue."

Further, it is "settled law that the interpretation of contracts in such cases shall generally not be done in the writ jurisdiction."

Furthermore, "the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain the plea … to challenge the ruling of the arbitrator under Section 16 of the Arbitration Act."

It was an issue to be taken at the set-aside stage, and SSN was not "left remediless." [citing *Deep* where Nariman J said that "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."]

(g) Disposition

The appeal was allowed clarifying that SSN was at liberty to "raise any legally permissible objections regarding the jurisdictional question" in the pending set-aside proceedings.