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Indian High Courts' Supervisory Jurisdiction over Arbitral Tribunals' Orders: A Damocles' Sword

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India is witnessing a protracted corporate battle — fought before multiple courts and an India-seated SIAC arbitral tribunal — for control over one of its largest retail chains. This heavily publicised dispute between Amazon and the Future group took an unexpected turn in January this year when a Division Bench of the Delhi High Court ordered an interim stay of the SIAC arbitration proceedings between them. Amazon had appealed the Division Bench's order (order here) before the Supreme Court of India. As reported in the news, the Supreme Court of India has yesterday permitted the resumption of the SIAC arbitration proceedings by consent of the parties. However, the Division Bench's order draws attention to an issue that deserves a relook by Indian courts – the exercise of the High Courts' supervisory jurisdiction under Article 227 of the Constitution of India, 1950 ("**Constitution**") over orders of arbitral tribunals.

Amazon – Future orders

In December 2021, the Future group approached a single judge of the Delhi High Court ("**Single Judge**") under Article 227 challenging a procedural order by the SIAC arbitral tribunal. By this procedural order, the arbitral tribunal had declined the Future group's request for an early hearing of an application for termination of the SIAC arbitration. Instead, the arbitral tribunal had decided to continue with the pre-scheduled hearings pertaining to expert testimony, and the hearing of the termination application was scheduled after that.

The Single Judge (judgment here) declined to grant relief to the Future group on the basis that: (a) a petition under Article 227 was not maintainable against case management orders of arbitral tribunals; and (b) exercise of jurisdiction under Article 227 was not merited in the case, since courts should interfere with arbitral tribunals' orders only in "*exceptional circumstances*", "*where the order is so perverse that it is patently lacking in inherent jurisdiction*" and "*the perversity […] stare[s] in the face*".

The Future group appealed the Single Judge's decision before the Division Bench. The Division Bench, without addressing the issue of the petition's maintainability under Article 227, granted an interim stay of the SIAC arbitration until the next date of hearing, essentially derailing the arbitration. The SIAC arbitration continued to be stayed for over two months, until the Supreme Court yesterday permitted the resumption of the SIAC arbitration, that too since both parties

consented.

This case is an apt example of why the supervisory jurisdiction of the High Courts (constitutional courts) should not be extended to interim orders of arbitral tribunals as a matter of legal principle. Any exercise of the supervisory jurisdiction under Article 227 should be limited to only arbitration-related court proceedings.

Article 227 and its extension to arbitration

Article 227 provides for the High Courts' power of "superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction". This supervisory jurisdiction is to be sparingly exercised in cases where: (a) the court/tribunal has assumed jurisdiction that it does not have; (b) the court/tribunal has failed to exercise jurisdiction which it does have; and (c) the court/tribunal has overstepped the limits of its jurisdiction. The supervisory jurisdiction cannot be used to overturn findings of fact or law, or to sit as a court of appeal.

In view of the purpose of such jurisdiction, the scope of Article 227 in relation to "tribunals" should be limited to tribunals constituted by statute (under Articles 323-A and 323-B of the Constitution or otherwise) or to tribunals exercising statutory powers or sovereign functions. However, through recent judicial precedent (discussed below), there has been an attempt to bring even arbitral tribunals under the ambit of Article 227.

The Supreme Court's ambivalence

The Supreme Court's seven-judge judgment in ***SBP and Co. v. Patel Engineering and Anr***. is the first point of reference on the issue of Article 227 jurisdiction in the context of arbitration. The Supreme Court took note of the practice by High Courts of extending such jurisdiction to orders passed by arbitral tribunals – particularly where the Arbitration and Conciliation Act, 1996 ("**Act**") did not provide for a statutory appeal against such order. The Supreme Court held in no uncertain terms that such an exercise of jurisdiction by High Courts is not permissible since the arbitral tribunal is ultimately a creature of contract. The Supreme Court also noted that if such exercise of jurisdiction were permitted, the same would defeat the Act's object of minimal judicial intervention.

The matter appeared to have been laid to rest but was revived over a decade later by the Supreme Court. In ***SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited***, the Supreme Court decided that an order passed by an arbitral tribunal under Section 25(a) of the Act (terminating arbitral proceedings for default in filing a statement of claim) can be challenged under Article 227. The Supreme Court reasoned that private tribunals, such as arbitral tribunals, exercise quasi-judicial power. Further, the Act confers statutory powers and obligations on an arbitral tribunal. Therefore, there was no distinction between an arbitral tribunal and a tribunal constituted under a statute for the purposes of Article 227.

Since ***SREI Infrastructure*** was decided by a bench of two judges, they were clearly bound by the seven-judge judgment in ***SBP*** and could not have extended Article 227 jurisdiction over arbitral tribunals. However, while ***SBP*** was pointed out to the Supreme Court, the judgment did not deal

with it at all.

Thereafter, in 2019, a three-judge bench of the Supreme Court in ***M/S Deep Industries v. Oil and Natural Gas Corporation Limited and Anr.*** considered the question again – albeit in the context of exercising Article 227 jurisdiction in arbitration-related court proceedings. The Supreme Court, referring to the judgment in ***SBP***, noted the scheme of the Act, particularly Section 5 (limited judicial intervention) and Section 37 (limited right of appeal), as well as the object of speedy dispute resolution. The Supreme Court thereafter tried to balance this scheme with the constitutional remedy under Article 227. It accepted that petitions under Article 227 could be filed against judgments/orders in arbitration-related court proceedings. It is important to point out here that the Supreme Court neither considered the decision in ***SREI Infrastructure*** nor accepted that Article 227 jurisdiction could extend directly to arbitral tribunals' orders. However, by omitting to explicitly clarify this position, the Supreme Court kept the door open for adventurous litigants to pursue relief under Article 227 directly against arbitral tribunals' orders.

This problem was further complicated when another three-judge bench of the Supreme Court in ***Punjab State Power Corporation Limited v. Emta Coal Limited and Anr.*** applied the decision in ***Deep Industries*** to a case where jurisdiction under Article 227 was exercised directly against an arbitral tribunal's order. The Supreme Court appeared to have not considered that ***Deep Industries*** had not ruled in favour of the exercise of supervisory jurisdiction over arbitral tribunal's orders. Thus, quite possibly unintentionally, it expanded the jurisdiction under Article 227 to orders against arbitral tribunals.

The subsequent decision of a two-judge bench in ***Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and Anr.*** reiterated this position. However, on its facts, ***Bhaven Construction*** ultimately held that Article 227 could not be used to interfere with the arbitral tribunal's order deciding on a challenge to its jurisdiction.

The decisions in ***SREI Infrastructure***, ***Emta Coal***, and ***Bhaven Construction*** having not considered the larger bench decision in ***SBP***, are evidently per incuriam. The Supreme Court in the latter two decisions could have strictly adhered to the line drawn in ***Deep Industries*** and kept the scope of Article 227 jurisdiction limited to arbitration-related court proceedings. Instead, even while emphasising the need for minimal judicial intervention in arbitration, the Supreme Court opened the door for direct interference with arbitral tribunals' orders – thereby placing the proverbial Damocles' sword over arbitration proceedings.

Why Article 227 jurisdiction should not extend to arbitral tribunals' orders

The supervisory jurisdiction under Article 227 was bestowed over tribunals that are created by statute or at least exercise the sovereign's function of justice delivery. But does Article 227 permit the exercise of supervisory jurisdiction over orders of arbitral tribunals? In our view, neither the Act nor Article 227 contemplate such direct interference with orders passed by arbitral tribunals.

The Supreme Court in ***SREI Infrastructure*** reasoned that arbitral tribunals should be subject to Article 227 jurisdiction since they exercised quasi-judicial power. However, this reasoning is flawed. While the Act gives legal recognition and support to an arbitral tribunal and its exercise of powers, it does not confer upon the arbitral tribunal the state's power of justice dispensation, nor

does it transfer the civil courts' jurisdiction. The arbitral tribunal remains a private tribunal and its constitution is dependent upon the arbitration agreement between the parties. This reasoning was also the basis for the decision in ***SBP*** on non-intervention by High Courts against orders of arbitral tribunals. ***Deep Industries*** also adopts this approach in ***SBP***.

It is interesting to note that in an earlier decision in ***Rohtas Industries Ltd. v. Rohtas Industries Staff Union***, the Supreme Court had held that the order of an arbitral tribunal created by party consent under the Industrial Disputes Act, 1947 ("**IDA**") was amenable to Article 227 jurisdiction. However, this was because: (a) under the IDA, such tribunal could bind persons not parties to the reference or agreement; and (b) the entire arbitration exercise and the force of the award stemmed from the IDA. Therefore, an arbitral tribunal under the IDA was held to be part of "the sovereign's dispensation of justice" bringing it within the scope of "tribunal" under Article 227. That is not the case with arbitral tribunals deciding private disputes.

The exercise of jurisdiction under Article 227 against arbitral tribunals' orders also relegates the legislative policy of non-intervention and making arbitrations time-sensitive to mere lip service. All arbitral orders including case management/ procedural orders will be potentially vulnerable to challenge under Article 227. It is to avoid this that the Act consciously limits challenges under Section 37 to certain orders of the arbitral tribunals only and permits other challenges to be brought as part of the challenge to the award. Allowing challenges under Article 227 against arbitral tribunals' orders circumvents Section 37 and the legislative objective, and could derail/delay the whole arbitration process. The Division Bench's order in the Amazon-Future dispute is a prime example. Thus, even though the Supreme Court has attempted to restrict the exercise of jurisdiction under Article 227 in successive decisions, the restrictions are tantamount to closing the stable doors after the horses have bolted.

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