

(2009) 08 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal No. 142 Of 2004 & LPA No. 143 Of 2004

New Century Communications & Ors.

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) JKJ 578 Supp

Hon'ble Judges : Barin Ghosh, J and Mohd.Yaqoob Mir, J

Bench : Division Bench

Advocate : M.Y.Bhat, Advocates appearing for the Parties

Judgement

Barin Ghosh, C J.

1. These two appeals arise out of a common judgment and order rendered by a Single Judge of this Court whereby and under two writ petitions

filed by several writ petitioners were dismissed only on the ground that the contracts which were interfered with by the orders impugned in the writ

petition contained an arbitration clause and, accordingly, the learned Judge, by the judgment and order under appeal, refused to exercise discretion

in entertaining the writ petitions.

2. Before we deal with the submissions made at the Bar, it would be appropriate on our part to highlight few of the admitted facts and

circumstances of the case.

3. The writ petitionersappellants wanted to produce Tele Films for and on behalf of Prasar Bharti. In order to do so, they were required to give

their proposals. Those were required to be scrutinized and, upon the proposals successfully going through scrutiny, agreements were required to

be entered into by the parties and, thereupon, Tele Films were required to be produced in terms of approved proposals and on the basis of agreements between the parties. Petitioners submitted their proposals. Those proposals were approved and accepted. After the proposals were approved and accepted, agreements were entered into by and between petitioners on one hand and Prasar Bharti on the other. Subsequent thereto, according to writ petitioners, no further progress was made; instead agreements entered by Prasar Bharti with respondent no. 8 were proceeded with. This resulted in filing of a writ petition by the petitioners. At about the same time, the approved proposals as well as agreements were kept in abeyance by Prasar Bharti on the ground that people associated in approving the proposals and entering into the agreements were under a judicial scanner. Some correspondence ensued between the parties and, ultimately, by the orders impugned in the writ petitions, it was held out by Prasar Bharti that the proposals, which stood approved, do not fulfil the needs and requirements of the TV channel for which the Tele Films, in terms of the proposals, were to be produced.

4. There is no dispute that each of these agreements contain an arbitration clause. As aforesaid, the learned Single Judge, noticing the arbitration clauses contained in the agreements in question, felt that it would not be appropriate to permit the writ petitions to be filed straightaway without exhausting the remedy of arbitration as provided in the agreements between the parties.

5. Before us, it has been submitted by learned counsel for appellants that arbitration clause contained in an agreement, which has been wrongfully brought to an end, is no bar to exercise of jurisdiction under Article 226 of the Constitution of India. Since jurisdiction under Article 226 of India has been conferred by the Constitution, the same is not interfereable either by an act of the parties or by any statutory obstacle. However, jurisdiction under Article 226 is a discretionary jurisdiction. As a result, it is necessary for the Courts, while exercising jurisdiction under Article 226 to take note of whether alternate efficacious remedy is available or not. If it is not available, the Court will exercise discretion in entertaining and deciding an application filed under Article 226 of the Constitution. In the event alternate efficacious remedy is available, that itself, however, is

not a bar for the Court to exercise jurisdiction under Article 226 of the Constitution of India. But, in the normal circumstances, it would refuse to exercise such jurisdiction when disputed questions of facts are to be gone in, when a question of title is to be determined, when a pronouncement would be required to be made before relief is granted, which could have direct bearing on appreciation of evidence, etc. In the event, however, despite availability of an alternate efficacious remedy, challenge is thrown to the arbitrary action of the State or an authority within the meaning of Article 12 of the Constitution of India, it would be appropriate on the part of the Court to exercise its discretionary jurisdiction under Article 226 of the Constitution.

6. The question is what is arbitrary. An action can be said to be arbitrary when the same is based on whims of the person who is the creator of the action complained of. An action will be arbitrary when there is no reasonable nexus thereof with the object intended to be achieved. An action, which is arbitrary, infringes Fundamental Right, for, arbitrariness is prohibited by Article 14 of the Constitution of India.

7. At the same time, when there is failure of principles of natural justice or when the vires of an act have been challenged, it goes without saying that the matter ought to be dealt with in exercise of discretionary jurisdiction under Article 226 of the Constitution of India. The action complained of, if is wholly without jurisdiction, i. e., the authority, whose action has been complained of, lacks inherent jurisdiction, the matter goes to the root and, accordingly, the same may also be decided in exercise of discretionary jurisdiction under Article 226 of the Constitution of India. In other cases, it would be appropriate on the part of the Writ Court to leave the parties to redress their grievances before the forum they have already chosen, or the forum which is available under ordinary law. High prerogative writs are required to be issued only in exceptional cases and not in every case, and in particular in those cases where the parties to the lis have agreed to a particular forum.

8. Learned counsel appearing on behalf of appellants cited before us a judgment of the Hon'ble Supreme Court rendered in HarbansLal Sahnia v. Indian Oil Corporation Limited reported in AIR 2003 SC 2120. In that case, the dealership of one HarbansLal Sahnia was cancelled by Indian Oil

Corporation for his failure to conform to the standard of test pertaining to oil stored in his petrol pump. The Hon'ble Court found, as a fact, that

ascertainment of the said standard, being contrary to law and having not been accepted by the Appellate Authority, could not be the logical or

reasonable ground for termination and, accordingly, in no uncertain terms, held that the impugned decision was arbitrary.

9. Learned counsel for appellant also cited before us a judgment of the Hon'ble Supreme Court rendered in *Onkar Lal Bajaj v. Union of India*

reported in 2003 (2) SCC 673. In that case, agreements entered by various Public Sector Oil Companies with various individuals for marketing

petrol, diesel, superior kerosene etc. was cancelled by one decision. The Government supported the decision on the ground that the said contracts

were allegedly given, as complained by various sections of people, on political considerations. The Hon'ble Supreme Court felt that it was not the

case, nor the records suggest, that each such grant was on political consideration. The Court then held that the decision which deals with all, brings

equals with unequals in the same class and that itself is arbitrary.

10. In the instant case, as aforesaid, there is nothing on record on which a pronouncement can be made that the action complained of was

arbitrary. It was an executory contract. By the decision impugned it was held out that the product to be made on execution is of no use for Prasar

Bharti. It may be a breach of contract but, in the absence of something else, cannot be said to be arbitrary. It had been and has been urged that the

decision complained of was of an incompetent committee. The decision complained of may be based on recommendation of an incompetent

committee, but the decision being that of Prasar Bharti, as depicted in the decision itself, it cannot be said that the decision is by an incompetent

authority having wholly no jurisdiction at all in the matter. It is true that in the writ petition it had been urged that by reason of what had been stated

in the writ petition, the petitioners at the invitation of Prasar Bharti altered their position and, accordingly, Prasar Bharti was estopped from what it

purported to do. Promissory estoppel, which is basically a shield or an effective defence, is also treated in India as a sword and can be enforced,

but the same need not be enforced only through writ petitions. The same can be enforced by filing suits as well as by approaching the arbitrator.

11. In the circumstances, refusal to exercise jurisdiction under Article 226 of the Constitution of India, as has been done by the judgment and

order under appeal on the ground that the parties to the lis have agreed to sort out their disputes and differences through arbitration, we are afraid,

is not interfereable.

12. The appeals, accordingly, fail and the same are dismissed.

13. It is made clear that it shall be open to the appellants to seek arbitration.