

Reserved**Court No. - 2****Case :- MATTERS UNDER ARTICLE 227 No. - 9901 of 2024****Petitioner :- Sanjeev Kumar Agarwal****Respondent :- Sudhir Mohan Agrawal****Counsel for Petitioner :- Rishabh Agarwal, Tarun Agrawal****Hon'ble Piyush Agrawal, J.**

1. Heard Sri Tarun Agrawal, learned counsel for the petitioner and Sri Tanmay Sadh, learned counsel for the respondent.
2. By means of the present writ petition the petitioner has assailed the order dated 3.8.2024 passed by the Commercial Court, Agra in Arbitration Misc. Case No. 1 of 2024.
3. Learned counsel for the petitioner submits that the petitioner and respondent were in dispute over the assets of the firm, M/s Bajrang Ice & Cold Storage, Etmadpur, Agra. He further submits that the dispute was referred to the Arbitrator by order dated 13.9.2022 passed by this Court in Arbitration Application No. 89 of 2021. He further submits that in the proceedings before the Arbitrator the petitioner sought examination of Sri Rajiv Agarwal, sole witness of the retirement-cum-conversion deed dated 1.4.2005, which according to the petitioner is a vital document.
4. He further submits that on 19.5.2023 an application for examination of Sri Rajiv Agarwal was moved before the Arbitrator. In pursuance thereof the order dated 19.5.2023 was passed issuing summons to Sri Rajiv Agarwal. Thereafter the petitioner moved a application under section 27 of the Arbitration and Conciliation Act, 1996 (in short the 'Act') for enforcement of the summon. During the pendency of the said application the Arbitrator on different dates, after noting the pendency of the said application deferred the hearing but by the impugned order the commercial court has rejected the application of the petitioner on the ground that no prior approval as required under section 27 of

the Act was taken by the Arbitrator.

5. He further submits that the impugned order has wrongly been passed as before 'approval' prior word is not mentioned. In support of his contention he has relied upon the judgment of the Apex Court in **Bajaj Hindustan Limited vs. State of Uttar Pradesh and others** (2016) 12 SCC 613).

6. Learned counsel for the respondent submits that the present writ petition is not maintainable in view of section 5 of the Act. He further submits that the petitioner has equally efficacious remedy under sections 34 and 37 of the Act. At this stage the present writ petition is not maintainable.

7. Rebutting the said submission, learned counsel for the petitioner submits that the writ petition is maintainable in view of the judgment of the Apex Court in **Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and another** (2020) 15 SCC 706. He further submits that the impugned order is bad and is liable to be set aside.

8. After hearing the learned counsel for the parties, the Court has perused the record.

9. It is not in dispute that the application for summoning Sri Rajiv Agarwal who was the sole witness, was filed on 19.7.2023. The Arbitrator on various dates has noticed the pendency of the said application and the matter was adjourned. The said fact is clear from Annexure 4, at pages 33, 35 and 38. The Arbitrator has noticed the pendency of the said application but the impugned order has been passed rejecting the application only on the ground that there is no prior approval of the Tribunal. In paragraph nos. 6 and 7 the Apex Court in **Bajaj Hindustan Limited** (supra) has held as under:

6.From the aforesaid facts, what emerges is that there is no evasion of any tax. The claim of the appellant that it had paid the tax at the time of removal of the bags from the Godown is not disputed by the Assessing Authority. In fact, as mentioned above, while granting ex-post facto approval, the Assessing Authority had satisfied itself about the due payment of the entire tax at the time of removal of the bags and that there was no evasion of tax. In these circumstances, we have to consider as to whether ex-post facto approval amount to sufficient compliance of the proviso to sub-section (1) of Section 3 A of the Act. The issue is no more res-integra and has been authoritatively determined by a series of judgment of this Court. It would be sufficient to refer to the judgment in the case of Ashok Kumar Das and Ors. vs. University of Burdwan & Ors. (2010) 3 SCC 616. The discussion contained in paragraphs 10 to 12

and 15 of the said judgment squarely applies to the present case and therefore, we reproduce the same.

10. The learned counsel for the respondents Nos. 1 to 3, on the other hand, submitted that Section 21

(xiii) used the expression "approval of the State Government" and not "prior approval of the State Government" and it has been held by this Court in *U. P. Avas Evam Vikas Parishad & Anr. vs. Friends Co-operative Housing Society Ltd. & Anr.* [(1995) Supp. (3)SCC 456] and High Court of Judicature for *Rajasthan v. P.P. Singh & Anr.* [(2003) 4 SCC 239] that when an approval is required, an action holds good and only if it is disapproved it loses its force. He further submitted that promotions made on the basis of Resolution of the Executive Council of the University adopted on 26.06.1995, therefore, hold good and now that the State Government has approved the Resolution of the Executive Council of the University adopted on 26.06.1995 by order dated 10.10.2002, the promotions made on the basis of the Resolution dated 26.06.1995 of the Executive Council of the University hold good and cannot be set aside by this Court.

11. In *Black's Law Dictionary (Fifth Edition)*, the word "approval" has been explained thus:

"Approval- The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another."

Hence, approval to an act or decision can also be subsequent to the act or decision.

12. In *U. P. Avas Evam Vikas Parishad* (supra), this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:(SCC pp.458-59) "6. This Court in *Life Insurance Corpn. of India vs. Escorts Ltd.* [(1986) 1 SCC 264], considering the distinction between "special permission" and "general permission", previous approval" or "prior approval" in para 63 held that: (SCC p.313) '63.....we are conscious that the word `prior' or `previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into [Section 29\(1\)](#) of the Act."

Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act. As to the word 'approval' in [Section 32\(2\)\(b\)](#) of the *Industrial Disputes Act*, it was stated in *Lord Krishna Textiles Mills Ltd. v. Workmen* [AIR 1961 SC 860], that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in [Section 33\(1\)](#)."

15. The words used in Section 21 (xiii) are not "with the permission of the State Government" nor "with the prior approval of the State Government", but "with the

approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise.

7. As is clear from the above, the dictionary meaning of the word 'approval' includes ratifying of the action, ratification obviously can be given ex-post facto approval. Another aspect which is highlighted is a difference between approval and permission by Assessing Authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the Assessing Authority. The Court also pointed out that if in those cases where prior approval is required, expression 'prior' has to be in the particular provision. In the proviso to sub-section (1) of [Section 3-A](#) word 'prior' is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant. We, therefore, allow this appeal and set aside the impugned judgment of the High Court as well as the penalty. No order as to costs.

10. From the perusal of the aforementioned judgment, the Apex Court has clearly stated that after and before the word 'approval' prior is not mentioned. The word 'approval' includes ratifying of the action or approval can be granted later but on the that basis it would not mean that before filing the application under section 27 prior approval is mandatory. In the case in hand, an application has been moved, if the same is allowed, it will be subject to approval of the Tribunal but it cannot be rejected on the ground that before filing of the said application prior approval must be there, the order, in view of the said fact, cannot be sustained in the eye of law.

11. However, so far as objection raised about the maintainability is concerned, the Apex Court in paragraph nos,. 17 and 21 has held as under:

17) 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 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.

21) *It is true that in Punjab Agro Industries Corporation Limited (supra), this Court distinguished SBP & Co. (supra) stating that it will not apply to a case of a non-appointment of an Arbitrator. This Court held:*

“9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section 11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP & Co. does not bar such a writ petition. The observations of this Court in SBP & Co. that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice.”

What is important to note is that the observations of this Court in this judgment were for the reason that no provision for appeal had been given by statute against the orders passed under Section 11, which is why the High Court’s supervisory jurisdiction should first be invoked before coming to this Court under Article 136. Given the facts of the present case, this case is equally distinguishable for the reason that in this case the 227 jurisdiction has been exercised by the High Court only after a first appeal was dismissed under Section 37 of the Act.

12. From a perusal of the aforementioned paragraphs it is clear that Article 226/227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act, therefore, the present writ petition is maintainable.

13. In view of the above, the impugned order cannot be sustained and is hereby quashed.

14. The writ petition succeeds and is allowed.

Order Date :- 4.10.2024

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