

● **MEDIATION MATTERS**

Tricky tussles with state-run enterprises

LITIGATE NOT. Supreme Court weighs in on whether writ jurisdiction against state bodies can be invoked where arbitration is possible

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Arbitrations involving state enterprises have remained highly litigious in India.

Typically, such litigation involves applications for interim relief, extending the arbitral tribunal's mandate, setting aside the award, and appeals against orders of the court or the arbitral tribunal. However, there have been instances where litigants have invoked writ jurisdiction in contractual disputes that are otherwise governed by an agreement to arbitrate.

The writ jurisdiction encompasses public law litigation, which focuses on enforcing the fundamental rights against the state, including state authorities and entities. The inherent powers under writ jurisdiction are vested in the Supreme Court of India under Article 32 of the Constitution and in high courts across India under Article 226. The writ jurisdiction can only be exercised against bodies that constitute the state, and the ambit of writ powers is broader for the high courts than the Supreme Court.

The general rule is that the powers under writ jurisdiction cannot be invoked for matters where an efficacious alternative remedy exists, especially private contractual disputes.

This is where the question arises whether the writ jurisdiction can be invoked in matters otherwise amenable to arbitration. The legal position on this appears to have been crystallised by recent decisions of the Supreme Court.

EXCEPTIONAL RARITY

In *Bhaven Construction vs Executive Engineer Sardar Sarovar Narmada Nigam*, the Supreme Court discussed the interplay of arbitra-



GOVT AS OTHER PARTY. A writ jurisdiction can only be exercised against bodies that constitute the state ISTOCK.COM

tion against writ jurisdiction. The Supreme Court opined that the Arbitration and Conciliation Act, 1996, was enacted to prevent excessive judicial interference in the arbitral process. Thus, a court would be highly circumspect about interfering with the arbitral process. In a similar case in *Deep Industries Ltd vs ONGC*, the Supreme Court opined that the writ powers of a court should be exercised with exceptional rarity only when the petitioner is left without remedy under a statute, or bad faith is shown by one of the parties. Further, the bar for exercising writ powers becomes higher only in matters referable to arbitration, considering the legislative intent

behind the Arbitration Act.

In *Unitech Ltd vs Telangana State Industrial Infrastructure Corporation*, the issue was again discussed at length. The Supreme Court reiterated the law in *ABL International Ltd vs Export Credit Guarantee Corporation of India* to hold that, in appropriate cases, writ petitions under Articles 226 or 227 were maintainable for asserting contractual rights against the state or its instrumentalities. In the *Unitech* matter, the Supreme Court went on to carve out the exceptional case where the writ jurisdiction could be exercised despite the availability of an efficacious alternative remedy.

This includes matters where the

state or its instrumentality violates the mandate under Article 14 of the Constitution to act fairly and reasonably.

SCOPE OF INTERFERENCE

From the Arbitration Act's perspective, Section 5 provides that no judicial authority can intervene in the arbitral process unless so provided in Part I of the act. Further, Section 8 provides for referring matters to the arbitral tribunal if a judicial authority believes that the parties and their disputes are subject to an arbitration agreement. As such, the term 'judicial authority' is broad enough to encompass all the courts, including those exercising writ powers in India.

In *Surendra Kumar Singhal vs Arun Kumar Bhalotia*, the Delhi High Court, after going through numerous decisions of the Supreme Court, culled out the broad principles on the scope of interference in arbitration matters under Articles 226 or 227 of the Constitution.

First, the Delhi High Court opined that a petition under Article 226 or 227 is maintainable against an arbitral tribunal in exceptional circumstances. Though interference is permissible, unless the order patently lacks inherent jurisdiction, the writ court would not interfere. Second, Section 5 of the Arbitration Act would not be applicable in the exercise of the inherent writ powers under Article 227, which is a constitutional provision. While arriving at its decision, the Delhi High Court, in the *Surendra Kumar Singhal* case, opined that the efficiency of the arbitral process must not be allowed to be diminished.

The apparent jurisdictional overlap between writ courts and arbitral tribunals has been at the root of various legal issues. To deal with this, the Supreme Court, through its recent decisions, has attempted to lay down an objective threshold to differentiate between purely contractual matters and matters concerning patent illegality, manifest arbitrariness, and violation of fundamental rights. The recent decisions of the Supreme Court indicate that, generally, the courts would endeavour to preserve the sanctity of arbitration as a private dispute resolution mechanism adopted by the parties.

Thus, in a vast majority of cases, the parties would be referred to the recourse available under the arbitral regime of India, and the writ petitions would be dismissed. However, there may be a handful of exceptional circumstances where the inherent powers of a writ court may be exercised.

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