$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 14th May, 2019
Decided on: 16th May, 2019

\+ **Review Petition No.196/2019 in**
W.P.(C) 2236/2019

INTERNATIONAL CENTRE FOR
ALTERNATIVE DISPUTE RESOLUTION ..... Petitioner
Through: Mr.Dushyant Dave, Sr.Adv. with Mr.A.S.Chandhiok, Sr.Adv. with Mr.R.K. Rathore, Mr.S.K. Verma, Mr.Ritesh Agarwal, Ms.Ramya Kutty, Mr.Sohel Rishabh, and Mr.Tushar Jaku, Advocates.

Versus

UNION OF INDIA AND ORS. ..... Respondents
Through: Ms. Maninder Acharya, ASG & Mr.Ripu Daman Bhardwaj, CGSC for UOI with Mr. Rajiv Mani, Joint Secretary in person.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

: **Rajendra Menon, Chief Justice**

C.M.No.21626/2019 *(exemptions)*

Allowed, subject to all just exceptions.

C.M.No.21627/2019 *(delay in filing review petition)*

For the reasons stated in the application, the delay in filing the review petition is condoned and the application is disposed of.

Review Petition No.196/2019

1. This review petition has been filed under Order XLVII Rule 1 read with Section 114 and Section 151 of the Code of Civil Procedure, 1908 for

review/recall of an interim order passed by us on 7th March, 2019 in a pending Writ Petition (C) No.2236/2019.

2. On 7th March, 2019, we issued show cause notice on the writ petition, so also considered the stay application being C.M.No.10490/2019. Notice was issued on the application for stay and on the same day oral submissions on the applications were heard and an order, interim in nature was passed.

3. The petitioner society (ICADR), in the writ petition has challenged an ordinance issued by the Government of India on 2nd March, 2019, namely, the New Delhi International Arbitration Centre Ordinance, 2019 (for short 'the Ordinance') by which the New Delhi International Arbitration Centre was established and incorporated for the purpose of creating an independent and autonomous regime for institutionalized arbitration and for acquisition and transfer of the undertakings of the ICADR which stood vested in the New Delhi Arbitration Centre. Sh.Dushyant Dave, the learned Senior Counsel appearing for ICADR had made various submissions before us and *prima facie* it was his contention, after narrating certain facts which were recorded in the order, that the power to promulgate ordinance could not have been exercised as there was no exceptional circumstance nor can it be used as a substitute for law making authority by a duly elected legislature. He argued that during the pendency of a Bill before the Rajya Sabha promulgation of the ordinance under Article 123 was unsustainable and primarily relied upon various cases including the law laid down by the Supreme Court in the case of ***Krishna Kumar Singh & Ors. Vs. State of Bihar & Ors.***, **(2017) 3 SCC 1** to say that the ordinance has been promulgated on extraneous considerations and is unsustainable.

4. Ms.Maninder Acharya, the learned ASG refuted the contentions and

orally rebutted the same.

5. After considering the submissions made, in Para-11 of the order dated 7th March, 2019, we took note of the judgment rendered by the Supreme Court in the case of *Krishan Kumar Singh (supra)*, particularly para-105 of the said judgment and in Para-12 dealt with the issue in the following manner and granted certain interim protection to the petitioner. Para-12 of the order dated 7th March, 2019 reads as under:-

> "12. Having noted the position of law and the rival submissions advanced before us, it is the submission of Mr.Dave as has been noted above that the Ordinance has been issued on extraneous consideration being based on presumptions i.e. irrelevant material and not in accordance with Article 123 of the Constitution of India. At the same time, we are conscious of the fact that the respondents have a commitment to report to the World Bank about the parameters, for ease of doing business (as on May 01, 2019) which according to Ms. Acharya includes the setting up a world class Arbitration Centre. But, the plea of Mr.Dave that the issue with regard to the legality of the Ordinance can be gone into only after the respondents place on record the circumstances, which led to the promulgation of the Ordinance, as according to Ms.Acharya, the limited scope of judicial review is to see whether satisfaction arrived at in promulgating the Ordinance was actuated by an oblique motive or satisfaction in a particular case constitutes a fraud, is appealing. So, this Court is of the view, to balance the equities including when some arbitration cases are still pending adjudication, it shall be appropriate that the order dated March 02, 2019 issued by the Deputy Secretary, Government of India appointing Dr. Rajiv Mani, Joint Secretary & Legal Advisor, Department of Legal Affairs, Ministry of Law & Justice as the custodian of the undertakings of the International Centre for Alternative Dispute Resolution need to be stayed. Ordered accordingly. At the same time, in view of the statement made by Mr. Dave, we clarify that the respondents shall be at liberty to utilize the

facilities of the petitioner Society to the extent required by them." *(emphasis supplied)*

6. Now after filing a short affidavit, this review application has been filed and it is the case of the respondents that even though they had filed a Special Leave Petition before the Hon'ble Supreme Court being SLP (C) No.8437/2019 titled *Union of India & Ors. Vs. International Centre for Alternative Dispute Resolution* but the Hon'ble Supreme Court could not take up the SLP for consideration in spite of the fact that it was listed on three occasions as one or other Lordships of the Hon'ble Supreme Court recused from hearing of the matter. It is contended in the application that on 13th January, 2017, respondent No.2 has constituted a High Level Committee headed by Hon'ble Mr.Justice (Retd.) B.N. Srikrishna, a former judge of the Supreme Court to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a road map for making India 'a robust centre for international and domestic arbitration'. It is stated that taking into consideration, the recommendation made by the Committee and the recommendations of certain Parliamentary Committees, the decision in question has been taken. By indicating the recommendations of the Committee, namely, Justice Srikrishna Committee, it is pointed out that the ICADR was set up in 1995 under the aegis of respondent No.2 with the object of promoting Alternate Dispute Resolution Method, an initial corpus of Rs.3 crore was granted by the Government. Thereafter, grants to the tune of more than Rs.27 crores were also granted by Central Government but since its inception in 1995 the petitioner society has only dealt with 55 cases of arbitration and only 10 are currently pending as per the Annual Report for

2017-18. The report of the High Level Committee dated 30th July, 2017 relied upon is reproduced hereinbelow:

> "Firstly, the ICADR has failed to keep pace with the dynamic nature of arbitration. Despite having a Governing Council consisting of eminent lawyers and judges, the body has not been able to actively engage and embrace developments in the arbitration ecosystem and create a reputation for excellence. There seems to be a complete failure of the organisation to address and market themselves to prospective parties at the stage of contract formation which is essential for an arbitral institution. This is apparent from the fact that despite two decades of its functioning, the ICADR's caseload has been very low. To date, the ICADR has not been specified as the institution of choice for administering arbitrations in a significant number of government / PSU contracts.
>
> Second, the present Governing Council of the ICADR is too large and cannot effectively coordinate governance of the institution. There is a need for a young, talented CEO with experience and expertise in arbitrations who can provide it the necessary leadership and vision for it to succeed.
>
> Third, the ICADR Rules have not kept pace with developments in arbitration law worldwide. While competing institutions have revised their rules to include provisions concerning joinder, consolidation of arbitral proceedings, emergency arbitrators, etc., the ICADR Rules, despite their (only) revision in 2016, have failed to include these provisions. This is surprising considering that it conducts regular national and international level conferences, including conferences on the changing nature of arbitration, with the latest being in 2016 as well.
>
> Fourth, while the ICADR appears to have sufficient infrastructure to support arbitration hearings including arbitration rooms, waiting lounges for arbitrators, library facilities and video conferencing facilities, these appear to be

> put to limited use. The design of the arbitration rooms need to be modified to suit arbitrations rather than mirroring a courtroom format. If the ICADR can be promoted as a venue for arbitration hearings, it might result in increased visibility for the institution." *(emphasis supplied)*

7. The recommendations of the Department Related Parliamentary Standing Committee has been referred to and it is stated that after taking note of all these factors on record, the New Delhi International Arbitration Centre Bill, 2018 was drafted. After its approval by the Cabinet it was introduced in the Lok Sabha on 5th January, 2018. It was passed by the Lok Sabha on 4th January, 2019. Even though the bill was listed in the List of Businesses of the Rajya Sabha, it could not be taken up for consideration as the 248th Session of Rajya Sabha concluded and the Bill could not be taken up. It is stated that the Government of India in league with 50 nations in terms of the Policy for 'Ease of Doing Business' is now required to take action and, therefore, the decision was taken for passing the Ordinance.

Relying upon various aspects of the matter and by referring to Para-105.13 of the principles laid down in the case of *Krishna Kumar's Case* (supra), the submission made is that once the President has exercised the power under Article 123 based on considerations which are relevant and justified, the satisfaction arrived at by the President in promulgating the ordinance cannot be subjected to judicial review and taking note of all these factors it is submitted that the order be reviewed, stay be modified, the ICADR be permitted to be taken over and it is further stated that the Custodian appointed would permit the pending arbitration proceedings to be carried out in accordance to the procedure contemplated and there would be no hindrance to the same and pointing out the commitment made to the World

Bank about the parameters for 'Ease of Doing Business' which has already lapsed on 1st May, 2019, it is stated that the review application be allowed.

8. Shri Dushyant Dave, learned Senior Counsel refuted the aforesaid. He also referred to Para-12 of the order in question passed on 7th March, 2019, the grounds raised in the application for review and submitted that they are all the same grounds which were canvassed before us on 7th March, 2019. Nothing new is pointed out and, therefore, it is argued that the review application is not maintainable.

9. He also relied upon the judgment rendered in the case of *Krishna Kumar's Case* (supra), the principles laid down therein and the fact that once the Parliament was in session, the Ordinance under Article 123 of the Constitution could not be issued and as the power exercised in promulgating the ordinance, according to him, is a unconstitutional act, a prima facie case is made out and after taking note of all these factors, once the interim protection is granted the same need not be or should not be modified or recalled.

10. He further invites our attention to the judgment of the Supreme Court in the case of ***Zenit Mataplast Private Ltd. Vs. State of Maharashtra & Ors***; **(2009) 10 SCC 388**, Para-29 thereof to say that when a litigant approaches the Court complaining about statutory or constitutional authority acting in a arbitrary or biased manner, the Court must examine the averments made in the application, form a tentative opinion and after assessing *prima facie* case pass an order interim in nature making certain temporary arrangement to preserve status quo in the matter. It is argued that in this case *prima facie* being satisfied with the exercise of power under Section 123 being not proper, interim protection has been granted, therefore,

at this stage, no case for review or recall is made out. It is submitted that based on the examination of *prima facie* case and other considerations, once the interim order was passed, the same does not warrant any reconsideration. He further argues that the Court can lay down the matter for final hearing immediately after the ensuing summer vacation in the month of July and at this stage looking into the facts and circumstances and the legal provisions and principles as detailed hereinabove, it is argued by learned senior counsel that no case for review or recall or modification of the order is made out.

11. We have considered the rival contentions and we find that while passing the order on 7th March, 2019, we did take note of the submissions made, the position of law, namely, Para-105 of the judgment rendered in the case of *Krishna Kumar* (supra) and the submission made by Shri Dave, learned Senior Counsel to the extent that the ordinance has been issued on extraneous consideration being based on presumption or irrelevant material and that it is not in accordance with the requirement of Article 123 and being conscious of the commitment made by the Government of India in its report to the World Bank, we were at the stage of the considered view that the issue with regard to legality of the ordinance could be gone into only after the respondents place on record circumstances which led to promulgation of the Ordinance and after considering the limited scope of the judicial review, that is, as to whether satisfaction arrived at in promulgating the ordinance was actuated by oblique motive or satisfaction is tainted with fraud and is appealing, we granted the interim protection.

12. But now, on going through the short affidavit filed by the respondents and the facts that have come on record, we find that the scope of judicial review with regard to the satisfaction of the President under Article 123 is

laid down in para 105.13 by the Hon'ble Supreme Court in the case of *Krishan Kumar* (supra) the following manner:

> "105.13. The satisfaction of the President Under Article 123 and of the Governor Under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of Clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all." *(emphasis supplied)*

13. Now available on record, by the affidavit of the Union of India, are the recommendations of the Law Commission, that is, 246th Report recommending further encouragement and establishment of culture of institutional arbitration in India, the report of the Justice B.N. Srikrishna Committee which consisted of retired judges of the Supreme Court, Sitting Judges of the Supreme Court, Senior Advocates, one of whom is now an Hon'ble Judge of the Supreme Court and various other authorities and the recommendations made by the Parliamentary Committee which formed the basis of taking the decision to promulgate the Bill in question. That apart, in the report submitted by the High Level Committee to review the institutionalization and arbitration mechanism in India, that is, the report dated 30th July, 2017 submitted by the Justice B.N.Srikrishna Committee, the four observations made with regard to the petitioner society as reproduced hereinabove is relevant. It is after taking note of all these factors and the 84th Report of the Parliamentary Standing Committee that the

impugned decision to promulgate the Ordinance was taken.

14. Once these are the factors which have now come on record by way of the short counter affidavit and the material placed on record, we find that the decision taken to promulgate the Ordinance is based on substantive material, *prima facie* it cannot be said that it is actuated by any oblique motive, the satisfaction arrived at are based on relevant material and, therefore, keeping in view the observations made by us in Para-12 of our order and the material which has now come before us and when the same is evaluated in the backdrop of the scope of judicial review into such matters, crystallized by the Supreme Court in Para- 105.13 of the judgment rendered in the case of *Krishna Kumar* (supra), we are of the considered view that now in the light of these materials that have come on record, it can be said that the satisfaction arrived at for promulgating the ordinance are based on certain relevant material and, therefore, *prima* facie judicial review of the order may be beyond jurisdiction of the Court.

15. As far as the contention of the learned Senior Counsel Sh.Dave to the effect that when the Parliament was in session, power under Article 123 could not be exercised is concerned, we find that the Bill was introduced in the Lok Sabha on 5th January, 2018. It was passed by the House on 4th January, 2019. The Bill was then listed in the List of Businesses in the Rajya Sabha but could not be taken up for consideration in the 248th Session as the Parliament was adjourned *sine die* on 13th February, 2019. Looking into the urgency in the matter, the Union Cabinet met on 28th February, 2019 and the Ordinance in question was promulgated on 2nd March, 2019 by the Hon'ble President in exercise of the power conferred under Clause (1) of Article 123 of the Constitution.

16. As already noted hereinabove, law laid down by the Supreme Court in Para-105.13 of *Krishna Kumar's case* (supra) contemplates that the power conferred upon the President under Article 123 is legislative in character. The power is conditional in nature even though it can be exercised only when the Parliament is not in session and subject to satisfaction of the President in case circumstances exist which render it necessary to take immediate action. In this case we find that the Union of India has produced various material which goes to show that circumstances did exist which made it necessary to take immediate action in the matter and if that be the consideration, in our considered view, the act of the Union *prima facie* cannot be faulted with.

17. Taking note of all these factors, we allow this application, the interim order 7th March, 2019 staying the operation of the order passed the Dy. Secretary, Government of India dated 2nd March, 2019, stands vacated. We permit the authorities to proceed to take action in accordance with a aforesaid order subject to final decision of this Writ Petition and with the further direction that all the pending arbitration cases with the petitioner society (ICADR) shall be permitted to be carried out in the same manner as they were being done prior to the issuance of the impugned Ordinance and further seminars, conferences and other training activities as is already fixed by the petitioner society shall be permitted to be carried out in accordance with the schedule already fixed and all assistance for the same shall be provided by the Custodian appointed by the impugned order.

18. With the aforesaid, the review application is allowed.

19. The parties are directed to conclude the pleadings before the next date of hearing

20. List on 25th July, 2019 before the Roster Bench for hearing.

Dasti under the signature of the Court Master.

CHIEF JUSTICE

V. KAMESWAR RAO, J

MAY 16, 2019
'anb'