
(2006) 06 BOM CK 0092
In the Bombay High Court
Case No : Arbtrn. Petition No. 198 of 2006

Bharat Petroleum Corporation Ltd.

APPELLANT

Vs

Reliance Industries Ltd.

RESPONDENT

Date of Decision : 21-06-2006

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 39

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 2(2)

Citation : (2006) 5 MhLj 624

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : P.K. Samdani, instructed by Udwardia and Udeshi, for the Appellant;
S.C. Gupte, for the Respondent

Judgement

S.J. Vazifdar, J.—The petitioner seeks an order making an award dated 15-9-2000 a rule of this Court and for a decree in terms of the said award u/s 17 of the Arbitration Act, 1940.

2. By the said award, the arbitrator awarded a sum of about Rs. 44 Crores in favour of the petitioner together with interest thereon at the rate of 11% per annum from 8-11-1994 till payment and a sum of Rs. 1,51,000/- towards costs.

3. The respondent filed Arbitration Petition No. 150 of 2001 to challenge the award. The petition was dismissed by an order dated 28-1-2002. Appeal No. 473 of 2002 filed by the respondent against the order dated 28-1-2002 was dismissed by an order dated 2-7-2002. The Appeal Court concluded its judgment in the following terms

Appellants are granted six week time to comply with the awards.

4. Against the order of the Appeal Court, the petitioner filed a Petition for Special Leave to appeal to the Supreme Court. The Supreme Court, by an order dated 14-8-2003 admitted the Appeal and noted:

Learned counsel for the appellant does not press for stay in any one of the appeals. It is so recorded.

5. It is in these circumstances, that the present petition has been filed.

6. The petition was resisted by Mr. Gupte on behalf of the respondent, only on the ground that the petitioner's Appeal against the said award is pending in the Supreme Court of India.

7. The above facts demonstrate three things. The respondent's challenge to the award failed before the learned Single Judge and the Appeal Court of this Court. Secondly, an application for stay of the execution of the award was obviously made on behalf of the respondent before the Appeal Court, which was disposed of by the Appeal Court, granting the respondent six weeks time to comply with the award. Thirdly, the application to continue that stay though made, was not pressed before the Supreme Court.

8. There is no dispute about the fact that the petitioner would normally be entitled to a decree in terms of the award. The only question is whether the pendency of the Appeal in the Supreme Court debars this Court from making the award a rule of this Court and passing a decree in terms thereof ?

9. Section 17 of the Arbitration Act reads as under:

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

10. In *Madan Lal Vs. Sunderlal and Another*, , after considering the scheme of the Act and setting out Section 17, the Supreme Court held as under:

(7). This analysis of the relevant provisions of the Act contained in Chapter II which apply *mutatis mutandis* to arbitrations of the other two types shows that the Court has to pronounce judgment in accordance with the award if it sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, or if it sees no cause to set aside the award. The Court has to wait for the time given to a party to make an application for setting aside the award and where such an application has been made (to) the Court has to decide it first and if it rejects it the Court proceeds to pronounce judgment according to the award. It is clear, therefore, from Section 17 that an application to set aside the award is contemplated therein and it is only when no such application has been made within the time allowed or if such an application has been made within the time allowed or if such an application has been filed and has been rejected that the Court proceeds to pronounce judgment in terms of the award.

(emphasis supplied)

11. The Supreme Court has expressly held that the Court "has to" pronounce judgment in accordance with the award if it sees no cause to remit or set aside the same. It does not permit the Court any discretion in the matter.

12. In *Scottish Union and National Insurance Co. Vs. Sm. Saraswati Sajnani*, , the Calcutta High Court held:

(4)... The scheme of the Act is that after the award is made it has to be filed in Court. When it is filed in Court, the Court dealing with the award is given power to remit or to set it aside and when it sees no reason to remit or to set it aside, it is directed to proceed to pass judgment on award. All these things under the Act are to be done by the Court dealing with the award. The Court is either to remit or set aside the award and in case when the Court finds no reason to do either, to pass a judgment in terms of the award. The Court is not called upon, in my judgment, under the Act, to wait and find out whether its order refusing to remit or to set aside the award has become final and unassailable in the sense that the time for appeal is gone or that the appeal if taken is dismissed in order to assume jurisdiction to proceed to pronounce judgment in accordance with the award. The Court dealing with the award is not required to look beyond itself and proceed to deal with the matter on the footing that so far as it is concerned there is an order of refusal irrespective of the fact that an appeal might be taken or has been taken against the order or that the order passed by the Court might be set aside."

(5)... The language of Section 17 of the Act does not indicate any intention that judgment upon award can only be pronounced after the order refusing to set aside the award has become final. The language on the other hand indicates that the next step to be taken by the Court after refusing to set aside the award is to pass a judgment in terms of the award and to give an extremely artificial construction to as to prevent the Court from making the award a rule of the Court for an indefinite period of time.

The judgment of the Calcutta High Court is consistent with the ratio of the judgment in *Madan Lal v. Sunder Lal* (supra).

13. Mr. Gupte, however, relied upon a judgment of a learned Single Judge of this Court (Ashok Agarwal, J.) in *Walchandnagar Industries Limited v. Nashik Sahakari Sakhar Karkhana Ltd* 1990 Mh.L.J. 1021 The learned Single Judge did not concur with the judgment of the Calcutta High Court in *Scottish Union and National Insurance Co. v. Smt. Saraswati Sajnani* (supra).

14. I would preface quoting paragraphs 6 and 7 of the judgment in *Walchandnagar Industries Ltd.*, strongly relied upon by Mr. Gupte, with two observations. Firstly the learned Judges attention was not invited to the judgment of the Supreme Court in *Madan Lal's* case (supra). Secondly the learned Judge has not held as an absolute proposition of law that where an

Appeal is pending against an order dismissing a petition u/s 30 of the Arbitration Act, 1940 to set aside an award, the Single Judge is bound to reject an application u/s 17 to make an award a rule of the Court and to pass a decree in terms thereof. The learned Judge has held that it would depend upon the facts and circumstances of each case. This is clear from paragraph 5 of the judgment where the learned Judge has held:

5.... Mr. Bharucha also pointed out a judgment delivered by me in Notice of Motion No. 2534 of 1989 in Award No. 3 of 1989 dated 5th June, 1990. In that case the defendants in their appeal against the order rejecting the petition for setting aside the award applied for stay and the Appellate Court was pleased to stay the operation of the impugned order on condition of depositing a certain amount. Being aggrieved, the defendants carried the matter to the Supreme Court but their SLP was dismissed. They moved the Appellate Court for clarification. By its order the Appeal Court clarified that the order of stay was clearly conditional and if there was no deposit as ordered then there is no order of stay. In the aforesaid facts, I passed a decree in terms of the Award.

15. In the facts and circumstances of the present case, based on the observations in paragraph 5 of the judgment in Walchandnagar Industries Limited and on the unreported judgment of the learned Judge referred to therein, it would in any event be improper on my part to reject the petition.

As noted earlier, an application for stay was in fact made to the Appeal Court when the respondent's Appeal was dismissed. This application was disposed of by the Appeal Court granting the respondents six weeks to comply with the award. To reject this petition, would be contrary to the order of the Appeal Court and tantamount to an interference with the jurisdiction of the Appeal Court, which was already invoked by the respondents including, and in particular, on the question of stay. To reject the petition, would indeed constitute a continuation of the stay.

16. Further, the matter is now before the Supreme Court. To reject this petition on the ground that the matter is before the Supreme Court, would indirectly amount to the High Court exercising powers in respect of a matter pending in the Supreme Court in which an application for stay was also involved though not pressed. The remedy, if any, of the respondent would be before the Supreme Court of India or, in any event, before the Appeal Court, and not before this Court.

17. Mr. Gupte however strongly relied upon paragraphs 6 and 7 of the judgment in Walchandnagar Industries which read as under:

6. It can no longer be disputed that an appeal is a continuation of suit or original proceedings. The question that a Court has to consider u/s 17 is whether it sees no cause to remit the award or any of the matters referred to arbitration for consideration or to set aside the award. When a petition for setting aside the award is pending in appeal, whether this can be sufficient circumstance for

refusing to proceed to pronounce judgment according to the award and to pass a decree in terms thereof. It has to be noted that though an order setting aside or refusing to set aside an award is made appealable u/s 39 of the Arbitration Act, no appeal is maintainable against a decree passed in terms of the award except on the limited grounds provided u/s 17 viz. that the decree is in excess of, or not otherwise in accordance with, the award. In my view, an order refusing to set aside the award cannot be construed as a decree as defined u/s 2(2) of the Civil Procedure Code. An order setting aside or refusing to set aside an award is entirely distinct from a judgment that is to be pronounced in terms of the Award and a decree to be passed upon the said judgment. Section 17 itself makes a distinction between the two. The order setting aside or refusing to set aside the award is made appealable u/s 39 of the Arbitration Act whereas a judgment and decree which are pronounced in terms of the award is made appealable only on limited grounds as provided u/s 17. If appeal is continuation of the suit or the original proceedings, I fail to see how the plaintiffs would be entitled to a decree in terms of the Award which is subject-matter of the pending appeal. It would be futile, in my view, to pass a conditional decree, as suggested by Mr. Bharucha, being dependent on the decision in appeal. Hence if the Court which is considering an application u/s 17 of the Arbitration Act for pronouncing of judgment in terms of the award and for passing of a decree thereupon is informed of the pendency of an appeal against an order refusing to set aside an award the same would be good cause to refuse to give reliefs to the plaintiff of the decree in terms of the award. The Court while exercising jurisdiction u/s 17 is not bound merely on account of the dismissal of application to set aside an award to pass a decree in terms of the award. The passing of a decree is not automatic. It is not a mere ministerial function to be performed on the dismissal of an application for setting aside the award. Rule 788 of the original side rules enjoins upon a plaintiff before taking out a Notice of Motion for judgment in terms of an award to obtain a certificate from the Prothonotary and Senior Master that no application has been made to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, or if made, that it has been disallowed. Indeed, the plaintiffs in the present case have obtained a certificate from the Prothonotary and Senior Master and the same informs the Court that the appeal filed by the defendants against the order refusing to set aside the award is pending. In my judgment, it would not be proper to pass a decree in terms of the award during the pendency of the said appeal."

"7. In regard to the decision in the case of *Scottish Union and National Insurance Co. v. Saraswati Sajnani* (supra) relied upon by Mr. Bharucha, I am afraid I am unable to concur with the observations that the Court is not called upon under the Act to wait and find out whether its order refusing to remit or to set aside the award has become final and unassailable in the sense that the time for appeal is gone or that the appeal if taken is dismissed in order to assume jurisdiction to proceed to pronounce judgment in accordance with the award. The Court dealing

with the award is not required to look beyond itself and proceed to deal with the matter on the footing that so far as it is concerned there is an order of refusal irrespective of the fact that an appeal might be taken or has been taken against the order or that the order passed by the Court might be set aside. I am also unable to concur with the view that Order 41, Rule 5 of the CPC applies and the plaintiffs are entitled to a decree on the ground that the Appeal Court has not passed an order of stay of the operation of the order refusing to set aside an award. I also do not concur with the view that the moment the award is set aside on appeal the award is gone and the judgment and decree passed in terms of the award would be not in accordance with the award which has become non-existent as observed in the above case. In my view, it would be in appropriate or an exercise in futility to pass a decree and make it conditional upon the decision of the appeal namely that the decree would be valid and executable if the appeal is dismissed and would be invalid and stand vitiated in the event of the appeal being allowed.

18. It is pertinent to note that the attention of the learned Single Judge of this Court in Walchandnagar Industries Limited v. Nashik Sahakari Sakhar Karkhana Ltd. (supra) was not invited to the judgment of the Supreme Court in Madan Lal v. Sunder Lal. The judgment in Walchandnagar Industries Limited is therefore per-incursion and contrary to the judgment of the Supreme Court.

19. In the circumstances, the petition is made absolute in terms of prayer (a).

20. At the request of Mr. Gupte, the judgment and order is stayed for eight weeks from today.