

(2011) 11 BOM CK 0133
In the Bombay High Court
Case No : Arbitration Petition No. 364 of 2009

Chaudhary Transport

APPELLANT

Vs

Hindustan Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 19, 31, 4, 5
Bombay Sales Tax Act, 1959 — Section 39, 39(1)
Limitation Act, 1963 — Article 59, 3, 3(1)

Citation : (2012) 6 BomCR 415 : (2012) 2 MhLj 646

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Kailas S. Dewal with Mr. S.R. Agarkar, for the Appellant; Nilesh Modi with Ms. Deepali Thakore instructed by y Rustomji and Ginwala, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and challenged Award dated 25 February 2009 whereby all his claims and the counter claims of the Respondent have been rejected.

2. The basic facts are as under :

On 19.05.2003, the Petitioner and Respondent entered into a Transport Agreement for a period of two years from 1/9/2002 till 31/08/2004. On 30/12/2003, the Respondent received a notice u/s 39 of the Bombay Sales Tax Act, 1959 to pay all the amounts due to the Petitioner to Sales Tax Authorities. On 29/01/2004 the Respondent received a letter from Sales Tax Officer to handover cheque to Sales Tax Inspector. On 03/02/2004 the Respondent wrote to the Petitioner informing about the notice received by them on 30/12/2003 and 29/01/2004. On 15/03/2004 the Respondent wrote to Sales Tax Authorities enclosing a cheque of Rs. 7,01,216/-. On 23/06/2004, the Deputy Commissioner

of Sales Tax wrote to the Respondent directing them to communicate exact amount due from the Respondent to the Petitioner. On 21/07/2004, the Respondent wrote to Deputy Commissioner of Sales Tax informing them that amount of Rs. 12,75,458/was outstanding to the credit of the Petitioner. On 21/07/2004, the Respondent wrote to the Petitioner informing about the Notice dated 23rd June 2004 from the Deputy Commissioner of Sales Tax. On 31/08/2004 the Contract came to an end by efflux of time. On 21/12/2004 a notice u/s 39(1)(a) from Deputy Commissioner, Sales Tax directing HPCL of provisional attachment and further not to pay any amount due to the Petitioner unless the said notice is withdrawn. On 27/08/2007 a letter from Chartered Accountant of the Petitioner to the Respondent requesting to release (a) Transport charges amounting to Rs. 12,75,458/; (b) Security Deposit of Rs. 50,000/and (c) Bank Guarantee of Rs. 1,50,000/. On 31/10/2007 the Bombay High Court in Writ Petition No. 5755 of 2007 set aside the demand notice and the provisional attachment of the Sales Tax Authorities. Therefore, Rs. 19,67,976/ was paid to the Petitioner by the Respondent. On 01/02/2008, the Petitioner requested for appointment of a sole Arbitrator. The Petitioner filed claim before the learned Arbitrator of Rs. 1,90,00,000/without any documentary evidence. On 25/05/2009 the learned Arbitrator has passed the Award.

3. It is relevant to note the clauses of Bulk Pol Road Transport Agreement dated 19052003 which are as under :

Clause 4(b): In case any of the tank lorries is not made available by the Carrier on any day, Company would be free to use the services of any other tank lorry and recover the difference in transportation charges from the Carrier.

Clause 6(g): The Company has not guaranteed any minimum billings/mileage or loads for any period whatsoever. Hence, Company will not be responsible for their inability in offering any load on any day or during any particular period and no idle charges etc would be payable.

Clause 13(b): The Carrier shall not cause or allow any change in the constitution of its firm without obtaining the previous written consent of the Company. Clause

15: This Agreement would be valid for period of tow years w.e.f. 1.9.2002 with option of Company to extend the same by one year on same terms and conditions. However, Company reserves the right to terminate this Agreement by giving two months advance notice without being liable to give any reason or pay any compensation.

4. Admittedly, there is an arbitration clause based upon which by consent of the parties, the sole Arbitrator was appointed on 1.02.2008. Both the parties have filed their claims as well as counter claims along with their supporting documents. The Petitioner/original claimant did not lead any evidence before the Arbitrator. There was no even procedure of admission of documents followed. There was no specific procedure of proceedings in the arbitration was agreed. The Arbitrator therefore is bound to follow the basic principle of law and as

contemplated u/s 19 of the Arbitration Act.

5. I have in Sahyadri Earthmovers Vs. L and T Finance Limited and Another, observed as under :

6 Section 19 of the Arbitration Act, which is reproduced contemplates when the parties agree on a particular procedure to be followed by the Arbitral Tribunal, all are bound to follow the same, but in its absence, the Arbitral Tribunal is bound to conduct the proceeding in the manner it considers appropriate. It also means that the Arbitrator has power to determine the admissibility, relevance, materiality and weight in evidence though the provisions of the CPC and/or Indian Evidence Act, are not binding upon the Tribunal.

The same view has been expressed in Radha Krshna Films Ltd. Vs. Jyoti Film Distributors Pvt. Ltd. and Motion Pictures Association, .

6. I have already observed in Oil and Natural Gas Corporation Limited Vs. Oil Country Tubular Limited, the principles which the Arbitrator needs to follow while granting the compensation, if any. Those are as under :

The observations that other side to prove that the claimant has not suffered any loss or damage itself contemplates necessity of leading evidence by both the parties. The burden is always on the parties who claimed compensation to prove actual loss, even for the reasonable compensation. The other doctrines; "Mitigation of loss", "Burden of proof", "Onus of proof" and "Shift of burden" just cannot be overlooked by the Court or the Arbitrator, while determining the reasonable compensation.

(h) The Court's power and the scope u/s 34 is quite limited. Therefore, the view expressed through the reasoned award, based upon the possible and plausible interpretation of the clause and after due scrutiny of the evidence and the documents and in accordance with law, cannot be stated to be contrary to law or the record, or perverse and/or against the public policy.

7. Admittedly, the contract in question between the parties was for a period of two years from 1.09.2002 to 31.08.2004, which was extendable at the discretion of the Respondent for one year. Admittedly, there was no such extension granted by the Respondent.

8. Upto February 2004, as per the Agreement, the Respondent made the payment in the account of the Petitioner, but to the Sales Tax Department, as the Respondent received notice dated 30/12/2003 u/s 39 of the Bombay Sales Tax Act, 1959, to pay all the amount payable to the Petitioner, to the Sales Tax Department. In view of mandate of the provisions and the directions, the Respondent from time to time, made the payment upto February 2004, to the Sales Tax Department.

9. It appears that the Respondent, in view of various reasons apart from the above, not provided the work/load to the Petitioner regularly. It is relevant to

note here that as per clause 7 there was no liability upon the Respondent to provide the work even during this period. The aspect of not providing the details of change of partnership by the Petitioner is also relevant.

10. If contract expires by efflux of time and if it is not extended, there is no question of existence of the binding terms and conditions for either of the parties. In the present case, the last date of the contract was 31.08.2004. In my view, therefore, if there was no extension and as noted, which was within the discretion of the Respondent, there was no question of waiting for anything for any purpose and basically even for the so called NOC as contained therein.

11. There was no reason for the Petitioner to even wait for any no objection certificate from the Respondent for doing similar work of others. Whatever unpaid due if any for the work done ought to have been claimed within a period of three years, if not paid by the petitioner. This aspect of the limitation, in my view, goes to the root of the matter.

12. Considering the mandate of Section 3 of the Limitation Act, I have noted in Sealand Shipping and Export Pvt. Ltd. Vs. Kinshyship Services (India) Pvt. Ltd., as under :

25 The Apex Court, while dealing with Section 3 of the Limitation Act, in Kamlesh Babu and Others Vs. Lajpat Rai Sharma and Others, observed as under :

16. Having considered the submissions made on behalf of the respective parties, the decisions cited by them and the relevant law on the subject, we are unable to accept Ms Srivastava's submissions mainly on two counts. Firstly, the facts disclosed clearly indicate that neither the first appellate court nor the High Court took notice of Section 3(1) of the Limitation Act, 1963, which reads as follows:

3. Bar of limitation.(1) subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

Even in the decision of this Court in State of Punjab Vs. Darshan Singh, , the said provision does not appear to have been brought to the notice of the Hon'ble Judges who decided the matter.

17. It is well settled that Section 3(1) of the Limitation Act casts a duty upon the court to dismiss a suit or an appeal application, if made after the prescribed period, although, limitation is not set up a defence.

18. In the instant case, such a defence has been set up in the written statement though no issue was framed in that regard. However, when the trial court had in terms of the mandate of Section 3(1) come to a finding that the suit was barred by limitation, it was the duty of the first appellate court and also of the High Court to go into the said question and to decide the same before reversing the judgment of the trial court on the various issues framed in the suit. Even though

the various issues were decided in favour of the plaintiff, both by the first appellate court and the High Court, the same were of no avail since the suit continued to remain barred under Article 59 of the Limitation Act, 1963.

27. It is settled that the plea of limitation, prevent claiming the party from recovering the amount/claim though he has a right to claim the same. It debars the remedy and not the claim. Therefore, the Arbitrator under the Arbitration Act also bound to consider this aspect of limitation at least at the time of awarding the claim so raised by either of the parties, but within the limit of Limitation Act. In my view, there is no question of invoking doctrine of "waiver" and/or "no interference by the Court" as contemplated u/s 4 and/or 5 of the Arbitration Act, specially at the time of awarding/granting/passing the final Award. The arbitration proceedings and the power of Arbitrator with this regard, are not exceptional to that. The Arbitrator is bound to pass award within the framework of substantive as well as procedural laws. THE CONDUCT OF THE PARTIES BEFORE THE ARBITRATOR OF NOT PRESSING THE ISSUE, AT THE RELEVANT TIME, BUT AGITATE THE SAME IN THE COURT u/s 34 OR ANY OTHER TIME.

29. Strikingly, in the present case, though plea was raised and as events reflect the claim as well as counter claim so raised was not considered from the point of view of limitation. Even the issue was not framed though plea was raised. The arbitration proceedings based upon the other issues on merit proceeded and the parties led evidence accordingly. The claimants, however in Section 34 Petition, has raised specific plea of limitation, based upon the events as well as the documents available on the record. Both the Counsel made their respective submissions; supporting as well as opposing the plea of limitation. Even the respective authorities were cited to support their claim/counter claim. As per the settled law, if Court is under obligation, to consider the plea of limitation in view of Section 3 of the Act read with decisions of the Supreme Court as well as various other High Courts and as, if the limitation issue goes to the root of the claim/matter, there is no reason that the Court even in the Petition u/s 34, should not consider the same merely because the parties, for whatever may be the reason, had chosen not to press the point before the Arbitrator, but now agitating the issue in Section 34 Petition by raising specific ground to that effect. I am of the view that in view of the Supreme Court judgments, the Court is under obligation, to consider the plea of limitation so raised, though not pressed before the Arbitrator in a Petition u/s 34 and need to pass appropriate order accordingly in accordance with law.

30. I may add that not pressing the point of limitation which goes to the root of the matter, at the first given opportunity, can cause serious prejudice to the proceedings and the litigant. The party and the counsel are under obligation to get such plea decided at the earliest stage of the case. A waiver of such plea is unjust, unfair and cause hardship to all and, therefore, must be avoided.

13. Importantly, without raising any issue with regard to the limitation, both the parties proceeded and so also the Arbitrator. By consent of the parties, the issue

with regard to the limitation just cannot be overlooked even by the Arbitrator. It is not question of fact and/or law but in a situation like this where admittedly the contract was terminated by efflux of time on 31.08.2005 and it was never extended at any point of time, the reference of dispute so raised and basically with regard to the claim of Rs. 1.90 crores without supporting evidence/ documents and/or no oral evidence even to support those documents on record, in my view, is totally contrary to the provisions of law, as well as, the basic principles of grant of compensation or damages if any. The Arbitrator, therefore, has rejected the demand of business loss of Rs. 1.90 crores from February 2004 as claimed. The Arbitrator has rightly observed that such claims in absence of receipts of bills, invoices, bank statements, cash memos and other supporting documents, just cannot be granted. This also follows the rejection of claim of interest on such amount.

14. The Respondent, in view of above undisputed position on record was under no obligation to provide or grant any no objection certificate, after lapse of more than three years. The claim was untenable.

15. The party one who entered into an agreement, based upon any partnership deed needs to submit any change in the same. The Respondent/other side cannot be stated to be under obligation to collect the details of such changed partnership. The Arbitrator, even otherwise, as the contract was terminated automatically and as claimant failed to produce the reconstituted deed of partnership, has rightly rejected the said issue.

16. The Petitioner, as recorded, has filed a writ petition in the High Court against the Sales Tax Department. By an order dated 31.10.2007, the High Court directed the Respondent to refund the amount of the Bank Guarantee and security deposit. The Respondent, as recorded above, were under obligation to follow the Sales Tax Department's notices as well as directions issued from time to time. Even otherwise, they could not have released this amount without the proper permission or direction from the Sales Tax Department. Therefore, pursuant to order dated 31.10.2007 the Respondent made the payment, though after six months. This fact is also not in dispute. In the result, the Petitioner got the amount of security deposit and the bank guarantee, which were also part of the claim.

17. It is necessary to observe that merely because Sales Tax Department issued directions from time to time and the Respondent followed the same and made the payment accordingly and the Petition was allowed as referred above, that itself cannot be the ground to reconsider the beyond time claims of the Petitioner. Therefore the total dismissal of claims cannot be stated to be perverse and/or contrary to law.

18. The Arbitrator ultimately even rejected the counter claims of the Respondent as the same were also not supported by any documents.

19. Lastly, the submission was also made in the Court referring to document

dated 7.7.2007, whereby the Petitioner instructed the Respondent not to remit any outstanding amount of Rs. 21 lacs as the validity of the notice dated 21.12.2004 issued u/s 39(1)(a) had expired. There were no such claims and counter claims raised along with material on record at the relevant time, even before the Arbitrator. I see there is no reason to entertain or accept such contention now in Section 34 Petition for the first time as the same is impermissible and also for the above reasons.

20. Resultantly, as the reasoning are well within the frame work of law and the record and there is no perversity and/or illegality of any kind, the Arbitration Petition is dismissed. There shall be no order as to costs.