
(1996) 10 BOM CK 0108
In the Bombay High Court
Case No : Arbitration Petition No. 2 of 1993

Corn Products Company (India) Limited	APPELLANT
Vs	
Ayaz Ghadiya and Another	RESPONDENT

Date of Decision : 08-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 2, 20, 3, 30, 33
Limitation Act, 1963 — Article 137

Citation : AIR 1997 Bom 331 : (1997) 3 ALLMR 91 : (1997) 3 BomCR 83 :
(1996) 98 BOMLR 902 : (1997) 2 MhLj 83

Hon'ble Judges : S.M. Jhunjunwala, J

Bench : Single Bench

Advocate : Virag V. Tulzapurkar, V.R. Dhoond and Jaideep Mitra, instructed by Crawford Bayley and Company, for the Appellant; S.R. Simhan, instructed by . Darryl B. Pereira, for the Respondent

Judgement

S.M. Jhunjunwala, J.—By this Petition, the Petitioners seek declaration that there is no valid, binding or subsisting arbitration agreement between the Petition and the 1st Respondent and that the invocation of arbitration pursuant to the arbitration clause contained in the Agreement Exhibits A and B to the petition is illegal, invalid, of no effect and not binding on the Petitioners. The Petitioners also seek declaration that the reference of the disputes and differences between the Petitioner and the 1st Respondent to 2nd Respondent as sole arbitrator is invalid, void and of no effect and not binding on the petitioners. The Petitioners also seek the relief to have the reference to arbitration to the 2nd Respondent set aside. In the alternative, the Petitioners seek declaration that the appointment of the 2nd Respondent as sole arbitrator is invalid, illegal, of no effect and not binding on the Petitioners and the same be revoked and/or set aside.

2. The petitioners are a company incorporated under the Indian Companies Act, 1913. The Petitioners carry on business as manufacturers and sellers of various consumer food products including jams, syrups and squashes under several

brand names, one of them being Rex. The 1st Respondent carries on business in the name and style of Century Foods as the sole proprietor limited thereof. The 2nd Respondent has been appointed as the sole Arbitrator by the 1st Respondent in respect of certain disputes which according to the 1st Respondent have arisen between the 1st Respondent and the Petitioners.

3. On 11th December, 1987, an agreement was entered into by and between the Petitioners and the 1st Respondent, a copy whereof is annexed as Exhibit A to the Petition, which agreement is hereinafter referred to as "the First Agreement". The duration of the First Agreement contained an arbitration agreement between the Petitioners and the 1st Respondent. The said First Agreement expired by efflux of time after the period of one year from 11th December, 1987. On 2nd January, 1989, another agreement was entered into by and between the petitioners and the 1st Respondent, a copy whereof is annexed as Exhibit B to the Petition, which agreement is hereinafter referred to as "the Second Agreement". The duration of the second Agreement was also for one year. Clause 7. 4 of the Second agreement contained an arbitration agreement between the Petitioner and the 1st Respondent. By a letter dated 3rd January, 1989, the Second Agreement was extended to cover the sale of orange squash and pineapple syrup also, as mentioned therein, which was treated as Supplementary Agreement to the Second Agreement. By letter dated 26th May, 1989, the 1st Respondent admitted and acknowledged his liability to pay to the Petitioners the sum of Rs. 1,71,638.90 and his liability for replacement of 370 dozens jars of 500 Gms. jams which replacement the 1st Respondent was required to make but did not do so. According to the petitioners, the said amount of Rs. 1,71,638.90 was due by the 1st Respondent to the Petitioners in respect of the said First Agreement.

4. It is the case of the Petitioners that the accounts between the Petitioners and the 1st Respondent were settled at a meeting held on 11th July 1989 at which the minutes were drawn up and signed by the parties. As per the minutes of the said meeting, a sum of Rs. 2,70,000/- was mutually agreed as payable by the Petitioners to the 1st Respondent in respect of claims relating to both the said Agreements upto 31st May, 1989. It is also the case of the Petitioners that the Petitioner have made payment of the said sum of Rs. 2,70,000/- to the 1st Respondent by two cheques for Rs. 1,35,000/-, each dated 18th July, 1988.

5. According to the Petitioners, despite the Petitioners having paid the said sum of Rs 2,70,000/- to the 1st Respondent in full and final settlement of all the claims upto 31st May, 1989, the 1st Respondent wrongfully filed a winding up Petition bearing No. 225 of 1991 against the Petitioners in this Court to have the Petitioners' Company Act, 1956 on the ground that the Petitioners have not been able to discharge the debt allegedly due to the 1st Respondent to the extent of Rs. 39,99,620/-. The said Company Petition was, however, withdrawn on 2nd May, 1991. Therefore the 1st Respondent filed five separate winding up Petitions against the Petitioners bearing Nos. 335 of 1992 350 of 1992, 367 of 1992 477

of 1992 and 568 of 1992 respectively. The said winding up Petitions were dismissed by the Order dated 24th June, 1993 and Appeals preferred therefrom were also dismissed as not being pressed as per the Order dated 21st September, 1993 of the Appellate Court. The 1st Respondent also filed four summary suits against the Petitioners, one being suit No. 4543 of 1992 in the Bombay City Civil Court at Bombay and the remaining three being Suit Nos. 2194 of 1992 3159 of 1992 and 3160 of 1992 in this Court. In all these suits, unconditional leave has been granted to the Petitioners to defend the same and the said suits are still pending.

6. By letter dated 7th August, 1992 addressed to the Petitioners, the 1st Respondent invoked arbitration on the basis of the arbitration agreement contained in the First and the second Agreement and appointed the 2nd Respondent as the Arbitrator. The 1st Respondent called upon the Petitioners to concur in appointment of the 2nd Respondent as the sole arbitrator or alternatively, to appoint an Arbitrator to act as co-arbitrator along with the 2nd Respondent. By the said letter, the 1st Respondent gave notice to the Petitioners that if the Petitioners did not concur in appointment of the 2nd Respondent as the sole arbitrator or did not appoint an arbitrator to act as co-arbitrator along with the 2nd Respondent within the time specified therein, the 2nd Respondent would enter upon the reference and arbitrate on he disputes as sole arbitrator. By their Advocates' letter dated 20th August, 1992, the Petitioners replied to the said letter dated 7th August, 1992 and inter alia contended that the arbitration clauses contained in the said First and Second Agreements were vague. The Petitioners declined to concur in the appointment of the 2nd Respondent as the sole arbitrator. The Petitioners denied that the 1st Respondent had any claim against the Petitioners more particularly in view of the settlement arrived at between the parties as recorded in the minutes of the meeting held on 11th July, 1989. By his letter dated 1st September, 1992, the 1st Respondent replied to the said letter dated 20th August, 1992 and reiterated the statement made in the letter dated 7th August, 1992. On 7th September, 1992 the 2nd Respondent addressed a letter to the 1st Respondent and the Petitioners intimating that he had entered upon the reference and had fixed the preliminary meeting for being held on 24th September, 1992. In the meeting held on 24th September, 1992 the Petitioners objected to the jurisdiction of the arbitrator and contended that the Petitioners had not concurred in the appointment of the 2nd Respondent as the sole arbitrator. The 2nd Respondent held that his appointment as the sole arbitrator was valid and legal and informed the parties that he intended to proceed with the reference. The 2nd Respondent gave directions to the parties to file the Statement of Claims and Written Statement within the time mentioned in the minutes of the meeting held on 24th September, 1992. The next meeting was fixed on 7th January 1993. On 4th December, 1993 the petitioners have filed the present Petition for the reliefs as aforesaid.

7. Mr. Tulzapurkar, learned Counsel appearing for the Petitioners, has submitted that the arbitration clauses contained in the said First and Second Agreements

are vague and as such, the same are not enforceable. The arbitration clause as contained in the said First Agreement reads as under :--

"Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall at the option of either party hereto be settled by arbitration in accordance with the Rules of Arbitration then in force in the State of, Maharashtra and judgment on the award rendered may be entered by any Court having jurisdiction thereof. Such arbitration shall be held in Bombay. The parties agree to share equally any expense incurred in such arbitration."

The arbitration clause as contained in the said Second Agreement is similar to the arbitration clause contained in the said First Agreement and reads as under :--

"Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall at the option of either party hereto be settled by arbitration in accordance with the Rules of Arbitration then in force in the State of Maharashtra and judgment on the award rendered may be entered by any Court having jurisdiction thereof. Such arbitration shall be held in Bombay. The parties agree to share equally any expense incurred in such arbitration."

As per the aforesaid arbitration clauses contained in the said First and the Second Agreements, any controversy or claim arising out of or relating to the said Agreements were to be settled by arbitration in accordance with the Rules of Arbitration then in force in the State of Maharashtra. Mr. Tulzapurkar submitted that since there are no Rules of Arbitration in force in the State of Maharashtra, the arbitration clause as contained in the said First and the Second Agreements being vague are not enforceable. It is correct that the said arbitration clauses in the said First and Second Agreements did record that the controversy or claims arising out of or relating to the said Agreements were to be settled by arbitration in accordance with the Rules of Arbitration in force in the State of Maharashtra but it appears that the parties to the said Agreements intended to have the controversy or claims arising out of or relating to the said Agreements settled by arbitration in accordance with the provisions in the Arbitration Act, 1940 which is also made applicable to the state of Maharashtra. Merely because it is mentioned in the said arbitration clauses that the arbitration is to take place in accordance with the Rules of Arbitration in force in the State of Maharashtra, it cannot be said that the said arbitration clauses were vague or that the same were not enforceable. The intention of parties has to be taken into consideration and the arbitration clauses are to be construed liberally.

8. Mr. Tulzapurkar further submitted that by act of initiation of proceedings in Court either by filing winding up petitions or instituting summary suits against the Petitioners, the 1st Respondent had given up the right to have the dispute adjudicated by reference to arbitration and hence the question of 1st Respondent making reference to arbitration, in the facts and circumstances of the case, did not arise. It is correct that an agreement to arbitrate can be brought to an end

by express or implied consent. The conduct of the party to an arbitration agreement may, in a given circumstances evidence willingness to give up the agreement to arbitrate. An arbitration agreement can be terminated by abandonment on the part of the claimant but a distinction must be drawn between abandonment of the claim and abandonment of agreement to arbitrate. If the claimant elects to bring the agreement to an end, the obligation to put forward the claim to arbitration comes to an end but the claim by itself may survive which the claimant may assert by instituting proceedings in a Court of law if the claim has not become barred by limitation. Merely, because petitions to have the Petitioners' Company wound up under the provisions of The Companies Act, 1956 were filed by the 1st Respondent, it is not possible to hold that the 1st Respondent had abandoned the arbitration agreement since the institution of winding up proceeding is a statutory right given under the provisions of the Companies Act, 1956 and is not a recovery proceeding which can be equated with filing of a suit in a Court of law. However, if a suit in a Court of law is filed over a claim which is also intended to be referred to arbitration by the claimant, it is possible to hold that by instituting the suit in respect of the claim intended to be referred to arbitration by the claimant, abandoned the arbitration agreement. Though, it is submitted on behalf of the Petitioners that the claims in the pending suits filed by the 1st Respondent against the Petitioner also form part of the claims which the 1st Respondent intend to refer to arbitration, there is nothing to show that the claims in the pending suits are intended to be referred to arbitration. Moreover, the letter dated 7th August, 1992 invoking the arbitration makes it explicit that with regard to certain claims not forming part of the claims in the suits already instituted, the 1st Respondent intended to make reference to arbitration. Hence, in the facts of the case, it is not possible to hold that by act of initiation of the proceedings in Court by way of filing the winding up Petitions and institution of suits, the 1st Respondent has abandoned his right to have the disputes adjudicated by reference to arbitration.

9. Mr. Tulzapurkar further submitted that the alleged claims of the 1st Respondent against the Petitioners in respect whereof the 1st Respondent invoked the arbitration by letter dated 7th August, 1993, were barred by limitation and as such, the 1st Respondent had no right to invoke arbitration as purported to have been done by the 1st Respondent. Mr. Tulzapurkar further submitted that the alleged claim of the 1st Respondent against the Petitioners under the said First Agreement were barred by limitation as on 7th August, 1992 and the question of making reference thereof to arbitration or the 2nd Respondent entering upon the reference in respect thereof did not arise. In this connection, it may be mentioned that a dispute or a difference does not cease to be subsisting because it is barred by time. A time-barred claim can form the subject matter of reference and the distinction, however, is to be made between an arbitration agreement entered into about the time-barred claim and a reference made on the basis of an arbitration clause after expiry of the period of limitation. In the latter case, no reference can be made as the right to claim

ceases to subsist and the relief with respect to the dispute has become time-barred. It may also be mentioned here that application u/s 33 of the Act other than the application to get the Award set aside is governed by Article 137 of The Limitation Act, 1963 and the period prescribed in Article 137 is three years from the date when the right to apply occurs. In view of the period of one year for the said First Agreement commencing from 11th December, 1987, it is obvious that the said period expired on 11th December 1988. Any Claim under the said First Agreement became barred by limitation of expiration of period of three years from 11th December, 1988. Invocation of arbitration in respect of any claim of the 1st Respondent against the Petitioners under the said First Agreement by the said letter dated 7th August, 1992 was barred by limitation as the right of the 1st Respondent to make reference to arbitration in respect of such claim became barred by limitation.

10. Mr. Tulzapurkar then submitted that the appointment of the 2nd Respondent as the sole arbitrator was invalid and as such, the 2nd Respondent could not enter upon the reference. The arbitration clauses contained in the said Agreements do not provide for the number of arbitrators and the mode of their appointment. As such, it is to be presumed that the reference was intended to a single arbitrator by reason of provisions of paragraph 1 of the First Schedule to the Act. In such circumstances the mode of appointment is to be necessarily by consent of parties and if the parties do not concur in the appointment the Court will make that appointment. In the case of National Small Industries Corporation Ltd. Vs. National Metal Craft and Others, , on which the reliance has been placed by Mr. Tulzapurkar, It has been held that where a party to an agreement with an arbitration clause which provided only for reference of the disputes to arbitration appointed an arbitrator to settle certain disputes and informed the other party about the appointment of the arbitrator and the arbitrator appointed started functioning, the appointment was invalid for not obtaining the consent of the other party to such appointment and for not following the procedure u/s 8 or in alternative procedure u/s 20 of the Act on the other party failing to concur in the appointment. I am in agreement with the view expressed by the Delhi High Court in the said case. In view of fact that the arbitration clauses contained in the said Agreements do not provide for the number of arbitrators, as aforesaid, the reference was intended to a sole arbitrator whose appointment was to be made with the concurrence of the parties. Section 8 of the Act does provide that if the other party who is called upon to concur in the appointment of the arbitrator does not concur in the appointment within 15 days after service of the notice of the party appointing the arbitrator, the Court may on the application of the party who gave the notice and after giving the other party an opportunity of being heard, ,appoint an arbitrator who shall have like power to act in the reference and make an award as if he had been appointed by consent of the parties. Since on the Petitioners refusing to concur in the appointment of the 2nd Respondent as the sole arbitrator, the 1st Respondent did not apply to the Court for appointment of an arbitrator, the appointment of the 2nd Respondent as the sole

arbitrator, in the facts of the case, is invalid and as such, the 2nd Respondent has no right to enter upon the reference. Similar view taken by the Calcutta High Court in the case of India Hosiery Works Vs. Bharat Woollen Mills Ltd., , has been considered by the Delhi High Court in the case of National Small Industries Corporation Ltd. Vs. National Metal Craft and Others, Though Mr. Tulzapukar has submitted that all the alleged claims to be referred to arbitration by the 1st Respondent were settled by accord and satisfaction and nothing survived for being referred to arbitration, it is not possible to conclude that all the claims intended to be referred to arbitration by the 1st Respondent were settled in the meeting held on 11th July, 1989 and the said Agreement stood discharged.

11. Mr. Simhan, learned Counsel appearing for the 1st Respondent, submitted that the Petition is misconceived and as much not maintainable since, in the submission of the learned Counsel, Section 33 of the Act contains procedural provisions and does not permit party to have substantial declaration. The submission made by the learned Counsel is devoid of any merit since u/s 33 of the Act any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or to have the effect thereof determined can apply to the Court and the Court is to decide the question on affidavits. The Division Bench of our Court in the case of Shri Vallabh Pitte Vs. Narsingdas Govindram Kalani, , has held that where there is a dispute as to the existence of a contract of arbitration, the parties may choose to adopt one or the other courses mentioned in paragraph 15 of the judgment and one of such courses mentioned is that such party who denies the existence of the arbitration agreement may, if he chooses, approach the Court u/s 33 of the Act and have it declared that there is in fact no arbitration agreement in existence and obtain stay of the proceedings of the arbitration. Hence, in my view, the petition is maintainable.

In the result, I pass the following order:-

(a) In respect of the claims of the 1st Respondent, if any, against the Petitioners arising out of or under the said First Agreement, the right of the 1st Respondent to make reference thereof to arbitration is barred by limitation and as such, no reference to arbitration could be made by the 1st Respondent;

(b) The appointment of the 2nd Respondent as the sole arbitrator is invalid and the reference of the disputes and differences between the Petitioners and the 1st Respondent to the 2nd Respondent is also invalid and of no effect in law;

(c) The petition, is accordingly disposed of with no order as to costs.

12. Ordered accordingly.