(2007) 11 BOM CK 0076

In the Bombay High Court

Case No : Arbitration Petition No. 377 of 2007

Delta Distilleries Limited — APPELLANT

Vs

Shaw Wallace and Company Ltd., Shaw Wallace Distilleries Limited and United Spirits Limited — RESPONDENT

Date of Decision : 27-11-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 31, 34
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4
Companies Act, 1956 — Section 391, 391(4), 394
Industrial Disputes Act, 1947 — Section 10
Limitation Act, 1963 — Article 120, 121, 137

Citation : (2008) 1 ALLMR 589 : (2008) 3 ARBLR 265 : (2009) 148 CompCas 809 : (2008) 1 MhLj 899

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : C.U. Singh and P.K. Sawant, instructed by C.T. Chandratre, for the Appellant; Shiraz Rustomji, instructed by Desai and Diwanji, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—A reference to arbitration under the Arbitration and Conciliation Act, 1996, is pending before the Hon''ble Mrs.Justice Sujata Manohar as sole Arbitrator. The arbitral proceedings have commenced and the first witness of the claimants, the Respondents herein, is under cross-examination. On 10th July 2007, an application was filed on behalf of the Respondents seeking to implead the Third Respondent instead and in place of the Second Respondent. The application was allowed by the Learned Arbitrator on 1st July 2007. The decision of the Arbitrator has been questioned in these proceedings. The Act contemplates a challenge to an arbitral award u/s 34, an arbitral award being defined to include an interim award u/s 2(c). The contention of the Petitioner is that the decision of the Arbitrator constitutes an interim award in view of the principle enunciated in the judgment of the Supreme Court in McDermott

International Inc. Vs. Burn Standard Co. Ltd. and Others, thus:

The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined u/s 2(c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

For the purposes of these proceedings Counsel appearing on behalf of the Petitioner and Counsel appearing on behalf of the Respondents are ad idem on the position that the decision of the Arbitrator is final on the matters which it covers. Consequently, submissions have been urged by the contesting parties on the merits of the challenge. The decision of the Arbitrator falls for consideration within the parameters set out in Section 34 of the Act.

2. The facts of the present case which need to be noted are that a Company by the name of Shaw Wallace Distilleries Ltd. was originally the second claimant in the reference to arbitration. By an 1 (2006) 11 SCC 181 order dated 26th March 2003, this Court sanctioned a Scheme of Amalgamation under Sections 391 and 394 of the Companies'' Act, 1956, by which that Company merged with a Company by the name of Maharashtra Distilleries Ltd. The name of the transferee was changed on 12th May 2003 to Shaw Wallace Distilleries Ltd. Thereafter, in pursuance of orders passed by this Court on 7th August 2006 and 5th September 2006, Shaw Wallace Distilleries Ltd. merged with a Company by the name of Mc Dowell & Co. Ltd. in pursuance of a Scheme sanctioned by this Court under Sections 391 and 394 of the Companies'' Act, 1956. The name of the transferee was changed on 17th October 2006 to United Spirits Ltd. United Spirits Ltd. is the Third Respondent to these proceedings. On 10th July 2007, United Spirits Ltd. applied to be substituted in place of the second claimant to the arbitral proceedings, Shaw Wallace Distilleries Ltd. The application was allowed by the Arbitrator. The decision of the Arbitrator is questioned in these proceedings.

3. The submissions urged on behalf of the Petitioner are to the following effect:

-(i) Upon sanctioning of the Scheme of Amalgamation by this Court, the original second claimant ceased to have any existence in the eyes of law; (ii) The claim of the second claimant must be deemed to have abated upon the sanctioning of the Scheme of Amalgamation; (iii) An application for bringing on the record the successor or merged Company ought to have been made within the period prescribed by Articles 120 and 121 of the Schedule to the Limitation Act, 1963 or at any rate within the period prescribed by Article 137; and (iv) The application that was moved before the Arbitrator was in any event beyond a period of three years from the date of the order of this Court dated 26th March 2003 sanctioning the Scheme of Amalgamation and was, therefore, beyond limitation.

4. In considering the tenability of the aforesaid submissions, it would, at the

outset, be necessary to advert to some of the material facts. In pursuance of the reference to arbitration that was made on or about 17th May 2002, the first claimant to the arbitral proceedings is Shaw Wallace & Co.Ltd. (the First Respondent) and the second claimant is Shaw Wallace Distilleries Ltd. The Petitioner who is the Respondent to the arbitral proceedings has also filed a counter claim against the two Companies. The statement of claim was filed on 11th March 2003. On 26th March 2003, the first Scheme of Amalgamation was sanctioned by this Court under Sections 391 and 394 of the Companies'' Act, 1956. The effective date under the Scheme was 10th April 2003. In pursuance of the Scheme thus sanctioned, the second claimant merged with Maharashtra Distilleries Ltd. Clause 6.1 of the Scheme provides thus:

6.1 Upon the coming into effect of the Scheme: All suits, actions and proceedings of whatsoever nature by or against the Transferor Company pending and/or arising on or before the Effective Date shall be continued and be enforced and/or proceeded with by or against the Transferee Company as effectually as if the same had been pending and/or arising against the Transferee Company.

The name of the transferee was changed on 12th May 2003 from Maharashtra Distilleries Ltd. to Shaw Wallace Distilleries Ltd. Subsequently, on 7th August 2006 and 5th September 2006, the transferee in the first Scheme of Amalgamation came to be merged with McDowell & Co. Ltd. in pursuance of the orders passed by this Court under the Companies'' Act, 1956 sanctioning the Scheme. Clause 17.1 of the Scheme provides thus:

17.1 If any suit, appeal or other proceeding of whatever nature by or against the Transferor Company(ies) is pending, the same shall not abate or be discontinued or in any way be prejudicially affected by reason of the arrangement by anything contained in this Scheme, but the said suit, appeal or other legal proceedings may be continued, prosecuted and enforced by or against McD in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against the Transferor Company(ies) as if this Scheme had not been made.

5. Both the Schemes of Amalgamation contemplate that upon the enforcement of the Scheme, suits, actions and proceedings by or against the transferor Company which were pending on the effective date would be continued, enforced and be proceeded with by or against the Transferee Company. The provisions contained respectively in Clauses 6.1 and 17.1 of the two schemes sanctioned by the Company Court are in consonance with the enabling power conferred upon the Court by Section 394(1). Section 394 inter alia contains a reference to the provisions which may be contained in a scheme of arrangement. One of them is the continuation of suits and legal proceedings instituted by or against the Transferor Company against the Transferee.

6. A two stage process of amalgamation took place - the first by which the second claimant merged with Maharashtra Distilleries Ltd. and the second by

which the Transferee in the first scheme merged with McDowell & Co.Ltd. (The name of McDowell & Co. Ltd. was changed to United Spirits Ltd., the Third Respondent). The Third Respondent, United Spirits Ltd., is a corporate body which is the successor in interest. The fallacy in the argument of the Petitioner lies in the hypothesis that proceedings instituted by a Company which has merged with another in the course of a Scheme of Amalgamation must, in law, be treated as having abated. The concept of abatement arises in the context of the provisions of Order 22 of the Code of Civil Procedure, 1908. Rule 3 of Order 22 provides as follows:

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff. -(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

The effect of a Scheme of Amalgamation, as held by the Supreme Court in Singer India Ltd. Vs. Chander Mohan Chadha and Others, is that as a result of amalgamation of two Companies into one, "the Transferor Company loses its entity as it ceases to have its business". The respective rights or liabilities are determined under the Scheme of Amalgamation but the corporate entity of the Transferor Company ceases to exist with effect from the date the amalgamation is made effective. The concept of abatement is inapposite where a merger takes place in the course of a Scheme of Amalgamation in pursuance of a sanction received from the Company Court. The transferor in such a case merges with the transferee who becomes the successor in interest of the assets, liabilities and business to the extent contemplated in the Scheme. There is in other words a devolution of interest. In law, what takes place in the course of a Scheme of Amalgamation is the devolution of the interest of the Transferor upon the Transferee.

7. Rule 10 of Order 22 contemplates that in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. The principle which underlies Order 22 Rule 10 is that the trial of a suit does not get disbanded merely as a result of a devolution of the interest of a party to the proceedings upon another during the pendency of the suit. In the context of a suit brought by or against a person in a representative character, the Supreme Court formulated the principle thus in Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela

Shiam Dass,

This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule. The word "interest" which is mentioned in this rule means interest in the property i.e., the subject matter of the suit and the interest is the interest of the person who was the party to the suit.

8. In Bhagwan Dass Chopra Vs. United Bank of India and Others, the Supreme Court held that the principle which is embodied in Order 22 Rule 10 of the Code of Civil Procedure, 1908 would apply to a situation where during the pendency of a reference u/s 10 of the Industrial Disputes Act, 1947, a devolution of interest had taken place as a result of the merger of one entity with another. Mr.Justice E.S Venkataramiah (as the Learned Chief Justice then was) speaking for the Court, observed as follows:

It is, however, necessary to evolve a reasonable procedure to deal with a case where a devolution of interest takes place during the pendency of a proceeding arising under the Industrial Disputes Act, 1947. In the circumstances, it is reasonable to hold that in every case of transfer, devolution, merger, take over or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a private treaty, or a judicial order or under a law, the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, take over or amalgamation as the case may be, may have taken place. It follows that subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding filed against the transferor company or corporation by a third party and that whatever steps have already taken place in those proceedings will continue to operate against and be binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule 10 of Order 22 of the Civil P. C., 1908 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provision governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation.

9. The judgment of the Supreme Court in Rikhu Dev''s case (supra) is also authority for the proposition that where a devolution of interest within the meaning of Order 22 Rule 10 has taken place, a successor can be brought on the record notwithstanding the fact that the period of limitation for an application under Order 22 Rule 3 had elapsed. The reason for that is that such an application is obviously not one under Order 22 Rule 3 of the Code of Civil Procedure, 1908. Several High Courts have consistently followed the position that where a devolution of interest within the meaning of Order 22 Rule 10 of the Code of Civil Procedure, 1908, has taken place no period of limitation is prescribed and the successor upon whom the interest has devolved can be brought on the record at any time before a final decree is passed. A Learned Single Judge of the Andhra Pradesh High Court held thus in Chakrala Venkateswaralu Vs. Golla Anjaiah (Died) L.R. Golla Kondiah, :

From these rulings it is clear that Order 22 Rule 10 applies to the legal representatives to be brought on record in the final decree proceedings if one of the plaintiffs or the defendants dies after the preliminary decree was passed and in such a case there will not be any period of limitation for bringing the legal representatives on record in the final decree proceedings and they can be brought on record at any time before the final decree was passed.

The same view has been taken by a Division Bench of the Punjab High Court in Roshan Lal Kunja Mal and Others Vs. Kapur Chand and Others, a Learned Single Judge of the Delhi High Court in Smt.Pushpa Kumari v. Dewan Chand Trust AIR 1983 Delhi 14 and by a Learned Single Judge of the Madhya Pradesh High Court in Sitaram Dua Vs. Saraswati Devi Sainy and Others,

10. Consequently, the Learned Arbitrator was not in error in allowing the application for bringing the Third Respondent on the record. The interest of the second claimant to the arbitral proceedings has devolved upon the Third Respondent in pursuance of the orders passed by this Court sanctioning the two Schemes of Amalgamation under Sections 391 and 394 of the Companies'' Act, 1956. The concept of abatement is not attracted to a situation where as a result of a Scheme of Amalgamation, the corporate personality of the claimant has ceased to exist, there being a devolution of interest upon the transferee. Upon a devolution of interest the transferee upon whom the interest is devolved is entitled to be impleaded. Indeed the transferee in this case would also be liable to be impleaded to the counter claim, which has also been done. These steps have to be taken and have been taken prior to the conclusion of the proceedings. Strictly speaking, the provisions of the Code of Civil Procedure, 1908 do not apply to arbitral proceedings, but even on principles analogous to those of Order

22 Rule 10, the Arbitrator was within the exercise of jurisdiction in permitting the Third Respondent as the successor entity to be brought on the record as a result of the events that had taken place after the statement of claim was filed. There is, therefore, no merit in the challenge. The petition is dismissed.

