

(2013) 01 BOM CK 0108

In the Bombay High Court

Case No : Arbitration Petition No. 1277 of 2010

Dharmesh S. Salian, Sole Proprietor, M/s. Y.S. International and Mrs. Yogini Dharmesh Salian APPELLANT

Vs

Travel Agents Federation of India (TAFI) RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 16, 34
Contract Act, 1872 — Section 69, 70

Citation : (2013) 01 BOM CK 0108

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Usha Srivastava, for the Appellant; Naushad Engineer a/w Mr. Darshan Mehta instructed by y M/s. Dhruve Liladhar and Co., for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioners-original Opponents have challenged award dated 15 April 2010, by invoking Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act), passed by the sole Arbitrator, in favour of the Respondent-original Claimant, appointed by the Chief Justice, after hearing both the parties in Petition u/s 11 of the Arbitration Act. The operative part of the Award is as under:-

Opponents do pay claimants a sum of Rs. 74,92,859/- together with interest thereon at 18% per annum from 28/05/2004 till realization.

The Opponents do pay costs of Rs. 87,500/- as Arbitrator's fees paid by the claimants and Rs. 75,000/- as costs on account of legal fees and expenses, a total sum of Rs. 1,62,500/-.

2. The learned Arbitrator has crystalized the facts and events succinctly in the following words. Those facts are sufficient to decide the present Petition.

Claimants are a society registered under the Society's Registration Act and a

Public Trust under Bombay Public Trust Act.

2. Members of the claimants are Travel Agents Opponent No. 1 is one such Travel Agent as Sole proprietor of the Firm M/s. Y.S. International. Opponent No. 2 is a guarantor under joint fixed deposit/Bank Guarantee Scheme of Travel Agents Federation of India (TAFI). This is a scheme under which the Members (Travel Agents) are given Air Tickets (Ticket Stock) by International Air Transport Association (IATA) for sale and payment after sale is made by the Members to IATA. However, IATA insists on Bank Guarantee by way of Security.

3. Claimants formulated a Scheme under which Travel Agents who become Members of TAFI need not give independent Guarantee. That is given by TAFI on behalf of its Members who join the scheme and deposit requisite amount with TAFI which in turn gave necessary guarantee to IATA.

4. Opponent No. 1 became a Member of TAFI in 1997 and joined the scheme in 2003 December. He gave sum of Rs. 6,00,000/- to TAFI by way of deposit. This amount along with the other amounts from Members so received is invested in Fixed Deposits by Claimants. As a result of this opponent got benefit of having Ticket Stock without giving any separate security.

5. There was a default committed by Opponent No. 1 and sum of Rs. 80,92,859/- remained unpaid to IATA. IATA reminded the opponent and finally gave an ultimatum to TAFI. This amount was under the circumstances paid by TAFI on 28/05/2004. The claimants claimed this amount from opponent and since it was not paid they requested for an arbitration as stipulated by the contract between the claimants and the Respondent. They also claimed the amount on the ground that it was paid "to honor claimant's contractual obligations and to save the reputation and goodwill of the Claimants.

6. Since the payment was not made to the claimants by the opponent and request for appointment of an Arbitrator was not responded the High Court was moved for appointment of an Arbitrator. By order dated 27/02/2009 High Court appointed an Arbitrator.

7. The intervening development is stated to understand the contention raised on behalf of the Opponent. The High Court has passed an earlier order dated 25/08/2006 in the Arbitration application and declined to appoint Arbitrator on the ground that remedy was to file a Civil Suit. The matter was carried to the Supreme Court and the Supreme Court set aside that order of the High Court dated 25/08/2006 and directed the High Court to consider afresh the application filed by the Claimants u/Sec. 11 of the Arbitration Act and "to take steps for appointment of an Arbitrator". That is how order dated 27/02/2009 appointing an Arbitrator came to be passed.

8.

9.However what has happened in this case is that the Supreme Court has considered the relevant provisions of the Scheme (Agreement) and held that the

earlier order of the High Court dated 25/08/2006 was not correct and set it aside and gave reasons in support. It is now futile to still argue that the Arbitrator has no jurisdiction.

10. "No useful purpose will be served in asking the High Court to reinterpret the provisions of the agreement which we can ourselves do".

Thereafter Supreme Court did it and found it necessary to direct the High Court to appoint an Arbitrator as the Opponent had not accepted the appointment of Arbitrator proposed by the Claimants. Supreme Court directed the High Court to take steps for appointment of an Arbitrator.

3. The learned counsel appearing for the Petitioners has relied on Maharshi Dayanand University and Another Vs. Anand Coop. L/C Society Ltd. and Another, and thereby contended that the Arbitrator ought to have decide the issue of jurisdiction as raised, in view of Section 16 of the Arbitration Act. The facts and circumstances are distinct and distinguishable. In the present case, in view of above admitted position including the order passed by the Hon"ble Supreme Court, I am inclined to observe that the dispute with regard to the existence of Arbitration clause and appointment of Arbitrator, have attained the finality. There is no question even in view of Section 16 of the Arbitration Act for the Arbitrator to permit and/or re-decide the issues. All the parties are bound by the clear decision given by the Supreme Court referring to the agreement between the parties. The issues have rightly observed even by the Arbitrator with regard to the existence of Arbitration agreement and the jurisdiction, attained finality.

4. The Hon"ble Supreme Court recently in Alva Aluminium Ltd., Bangkok Vs. Gabriel India Limited, has observed in this regard, considering all these sections as under:-

20. So also the parties may without approaching the Chief Justice refer the matters in dispute to the nominated Tribunal including the question whether there exists an arbitration agreement. In any such case also the Arbitral Tribunal can determine the existence of the arbitration agreement. Suffice it to say that the power available to the Arbitral Tribunal u/s 16 of the Act does not imply that the issue can be or ought to be left to be determined by the Arbitral Tribunal even in cases where one of the parties has filed a petition u/s 11 of the Act and the other party oppose the making of a reference on the ground that there exists no arbitration agreement between them. It is quite evident that the question whether or not an arbitration agreement exists between the parties will have to be answered for it is only if the answer to that question is in the affirmative that the Chief Justice or his designate can pass an order of reference of the disputes for adjudication. Question (1) is answered accordingly.

5. In Reva Electric Car Company P. Ltd. Vs. Green Mobil, the Supreme Court has observed as under:-

29. In view of the aforesaid authoritative dicta, the submission of Ms Ahmadi has

to be accepted that in a petition under Sections 11(4), (5), (6) and (9) of the Arbitration Act, 1996, it is for the Chief Justice of India/his designate to decide about the existence of a valid arbitration agreement. Now let me examine the facts in the present case keeping in view the aforesaid well-settled principles.

6. It is relevant to note that the order passed by the Hon^{ble} the Chief Justice of appointing the sole Arbitrator, has also attained finality, based upon which the sole Arbitrator was appointed. Central Bank of India Vs. Vrajlal Kapurchand Gandhi and Another, . No fresh challenge in this regard is permitted to be raised in Section 34 Petition for the first time. Order dated 27 February 2009, passed by the Hon^{ble} the Chief Justice in Section 11 Petition of the Arbitration Act, is also relevant, which reads as under:-

5. In view of clause 11 of the Arbitration and Conciliation Act, 1996, the application is allowed. In my opinion, there is no valid objection raised by the respondents for appointment of an sole Arbitrator. Consequently, Mr. R.G. Sindhkar, Retired Judge of Bombay High Court is hereby appointed as the sole Arbitrator to look into the matter and proceed with the arbitration proceedings and dispose of the same in accordance with law, as expeditiously as possible.

7. The learned Arbitrator, considering the agreement between the parties, right in observing that the claim so filed is maintainable. The following observations are also, in my view, need no interference.

11. The second limb of the objection to the Arbitrator's jurisdiction is that the agreement expired and therefore arbitration cannot be resorted to. Reliance is placed on point No. 1 page No. 3 of the Scheme. It say that it shall be valid from 01/01/2003 and shall be terminated on 31/12/2003. It further mentions that "however notwithstanding anything contained herein IATA and TAFI shall be entitled to make claims from members upto and including 31/03/2004...".

12. Therefore the claimants and also IATA were entitled to make claims from the Members upto and including 31/03/2004.

13. It must be noted that IATA made a claim of Rs. 80,92,859/- and the claimants are claiming Rs. 74,92,859/-(after deducting Rs. 6,00,000/- paid as deposit). There is no denial that this amount was payable to IATA. In the written statement it is stated the Respondents are not aware of the demand made by the opponents. What is further stated is that the sold Tickets got cancelled. There is material in the form of exchange of letters (notices) and in letter dated 22/05/2004 the Respondent's Solicitors informed claimants Advocate "It is a fact that their clients were incapacitated from honouring their commitments to IATA because of factors entirely out of their control. It also mentions that this information was communicated to claimants" Advocate and claimants were requested to "bear with them".

14. By letter dated 28/05/2004 claimants make payment of Rs. 80,92,859/- to IATA. In the last communication on record and is dated 22/07/2005 also there is

no denial about the quantum. No evidence is forthcoming on the point of cancellation of sold Tickets."

16.The copy of renewal between TAFI and IATA is produced and since the parties had agreed in these arbitration proceedings that the matter be decided on the pleading and documents that document is taken into consideration.

8. Having once observed based upon the material available on record, there exists binding agreement between the parties and the claim so raised is arbitrable and falls within the ambit of the contract between the parties and further the claimant-Respondent has made payment as recorded in letters dated 28 May 2004 and 22 July 2005 and as there is no denial to the quantum of the payment so made to IATA and as there is no contra material placed on record by the Petitioner, the award so passed with the interest just cannot be stated to be contrary to law. In my view, the award is just proper and reasonable. The award cannot be stated to be perverse and/or contrary to the law. The learned Arbitrator has also in fact, considered Section 69 and 70 of the Indian Contract Act and also the Judgment of *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, The learned Arbitrator right in coming to the conclusion that apart from Section 69, Section 70 of the Contract Act is also relevant to grant/ award the amount in favour of the Respondent.

9. The Apex Court recently in *Hindustan Copper Ltd. Vs. Monarch Gold Mining Company Ltd.*, while dealing with Section 11 of the Arbitration Act, has observed as under:-

14.....

44.If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim."..... It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

10. The direction against the surety based upon the Surety Bond executed by Opponent No. 2 also cannot be stated to be bad in law.

11. The rejection of the counter-claim for want of evidence and/or argument has attained finality. There is no specific challenge raised on that ground also.

12. So far as the costs is concerned, it is just fair and reasonable, need no interference.

13. What remains is the award of interest @ 18% p.a. from 28 May 2004 till realization. The learned counsel appearing for the Respondent has also pointed out clause (b) of the agreement which entitle them to claim the agreed rate of

interest at 18% per annum till the date of re-payment. The learned Arbitrator, therefore, has awarded the same. It is within the purview of the agreement itself apart from the provisions of law and, therefore, need no interference. In the result, the Petition is dismissed. There shall be no order as to costs.