
(2002) 12 BOM CK 0042
In the Bombay High Court
Case No : Arbitration Petition No. 433 of 2002

Harinarayan G. Bajaj

APPELLANT

Vs

Shareddeal Financial Consultants Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 13-12-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 27, 34, 34(2)

Citation : AIR 2003 Bom 296 : (2003) 2 ARBLR 359 : (2003) 4 BomCR 139 : (2003) 2 MhLj 598

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : S.U. Kamdar, instructed by Ravi Goenka, for the Appellant; Ajay Khandar, for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—Heard forthwith.

In the course of arbitral proceedings which are pending, an order/decision came to be passed on 29th October, 2002. The petitioners had made an application u/s 27 of the Arbitration and Conciliation Act, 1996. u/s 27 of the Act of 1996 a party with the approval of the Arbitral Tribunal may apply to the Court for assistance in taking evidence. By application dated 6th June, 2002, petitioner prayed that the Arbitral Tribunal may be pleased to apply to the Court for assistance in taking evidence on documents referred to in para 6(C)(II). Those documents were documents under No. 1 to 8 under the Heading (C)(II). In the alternative the petitioners prayed, that the Tribunal be pleased to grant relief and/or approval to the petitioner herein to make an application to the Court for assistance in taking evidence of the nature mentioned in the prayer earlier referred to. The Arbitral Tribunal heard the parties and thereafter held that the applicant has not brought out any evidence to establish that the documents sought for were necessary to prove the case against the broker. It further held that the documents at best may be necessary to establish a case which the applicant seeks to make out against

the selling brokers. The Tribunal held that the Tribunal was not in any way concerned with that dispute, if any such dispute exists and accordingly rejected the said application u/s 27 of the Act. It is that order/decision, which the petitioner herein seeks to challenge as an award, invoking the provisions of Sections 18, 31 and 34 of the Act of 1996.

2. The challenge principally is that the said decision/order is an award. If an Award, it can be challenged u/s 34 of the Act of 1996. It will, therefore, have to be decided whether the order/decision dated 29th October, 2002 is an award which expression includes an interim award. If it is an Award, petition u/s 34 would be maintainable. If not, the Court cannot exercise jurisdiction u/s 34 and the parties will be left to challenge the order/decision when the award is finally made and if in law the challenge falls under one of the grounds set out in Section 34(2). It is also made clear that the correctness or otherwise of the said order/decision is not being gone into as the Court presently is only considering the issue whether the said order/decision, is an Award.

2-A. We may advert to certain provisions of the Arbitration and Conciliation Act, 1996 to find out whether the order/decision of the Arbitral Tribunal rejecting an application u/s 27 is an award/interim award as set out u/s 2(c) of the Act of 1996. Section 2(c) sets out that an arbitral award includes an interim award. What is an award by itself is not defined. Section 31 of the Act of 1996 sets out the requirements of an award including its form. It provides that an arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. It further requires that in any arbitral proceedings with more than one Arbitrator, the signature of the majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated. The next requirement is that the Award shall state the reasons upon which it is based except for the exceptions set out therein. It must also state the date and the place of arbitration. The subsequent requirements are procedural in nature of communicating the Award to the parties. We are really not concerned with that part. An Award considering Section 2(c) of the Act of 1996, therefore, includes an interim award, and as such will also have to satisfy the same requirements of Section 31 to be treated as an Award. Section 31(6) confers jurisdiction on the Arbitral Tribunal at any time during the arbitral proceedings, to make an interim Arbitral Award on any matter with respect to which it may make a final arbitral award. Section 37 provides for an Appeal against orders. The Uncitral Code also does not define an award. Russell on Arbitration (Twenty-First Edition) para. 6.001 defines an Award to mean :--

"In principle an award is a final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. Thus questions concerning the jurisdiction of the Tribunal or the choice of the applicable substantive law are suitable for determination by the issue of an award. Questions concerning the admissibility of evidence or the extent of discovery are

procedural in nature and are determined by the issue of an order or direction and not by an award. The distinction is important because an award can be the subject of a challenge or an appeal to the court, whereas an order or direction in itself cannot be so challenged."

Keren Tweeddale and Andrew Tweeddale in *A Practical Approach to "Arbitration Law"* explains an award thus :--

"The term "Award" is also defined in Article 2 as including an interim partial or final award. However, no further indication of what is an award is given. While there will generally be no uncertainty about an arbitral tribunal's final award there may be some uncertainty when considering a prior ruling in the arbitral proceedings. In *Societe Industriale Export-Import v. Societe GECI et GFC* 1993 Rev arb 303 the court was asked to determine whether three procedural orders were in fact awards. The arbitral tribunal had held that as it was competent to rule on its own jurisdiction, it could determine the applicable procedural rules and had rejected an application for suspension of the arbitral proceedings. The Paris Court of Appeal held that in each case the decisions of the arbitral tribunal were in fact awards because they constituted decisions of a jurisdictional nature. In England the courts have held that they have no jurisdiction to correct procedural errors : *K/S A/S Bill Biakh v. Hyundai Corporation* (1988) 1 LI Rep 187. It is implicit from *K/S A/S Bill Biakh v. Hyundai Corporation* and from *Three Valleys Water Committee v. Binnie and Partners* (1990) 52 BLR 42 that the English courts do not consider a pre-award ruling on a procedural matter as being an award."

3. The Act of 1996 u/s 16 has conferred a power on the Arbitral Tribunal to rule on its own jurisdiction. It is necessary to advert to this provision for assistance to enable the Court to find out whether the order passed u/s 16 would amount to an award considering the argument advanced. An order/decision u/s 16 is an order in respect of which an Appeal is provided u/s 37 of the Act of 1996. The power u/s 16 is the power in the Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of an arbitration agreement. In other words, issues pertaining to jurisdiction will be the subject matter of an order or decision u/s 16. In the event the Tribunal comes to a conclusion that it has no jurisdiction, the remedy under the Act is conferred u/s 37 which is an Appeal. If the Tribunal holds that it has jurisdiction that order or decision does not become final, but such order/decision can be subject to a challenge when the Award is finally challenged u/s 34. Section 34 provides that recourse to a Court against an Arbitral Award may be made only by an application for setting aside such an Award. It is, therefore, clear from the reading of Section 16 of the Act of 1996 that a decision that the Arbitral Tribunal has no jurisdiction or that there is no arbitral dispute, under the Act is not treated as an award. There is also no deeming fiction by which it is taken out from the definition of award. It is an order which if it culminates in the closure of proceedings an appeal is provided. If it does not terminate the proceedings, that

order/decision can be challenged when the Award itself is challenged. That is how on a proper construction or reading of that section the nature of the order will have to be considered. In *Hindustan Petroleum Corporation Ltd. v. Batliboi Environmental Engineers Ltd.*, decided on 4th December, 2000 in Arbitration Petition No. 280 of 1999 it was argued that an order u/s 16 could be independently challenged as an Award u/s 34. That contention was rejected by this Court by holding that it is not an order which could be challenged u/s 34, as Section 34 only permits challenge to an award. This will be relevant in answering the issue. Under the CPC 1908 an issue as to jurisdiction which is answered either u/s 9A as it stands in the State of Maharashtra or under Order XIV a decision on want of jurisdiction or no jurisdiction results in a decree which can be appealed. However, under the Act of 1996 a decision as to jurisdiction u/s 16 is not treated as an award. Against that order which results in termination of the arbitral reference an appeal is provided. In other words, though it may finally terminate the proceedings, it is not understood as an award as it does not finally decide the claim submitted for adjudication before the Arbitral Tribunal. This is being discussed for the reason, that termination of proceedings can only be in the manner as set out u/s 32 of the Act of 1996. The Act, therefore, provides for termination of proceedings other than by an award. u/s 32(1) the Arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under Sub-section (2). What proceedings can be terminated other than by an award under are set out under Sub-section (2) of Section 32. It amounts to termination (a) when the claimant withdraws the claim subject to the other requirement, (b) the parties agree on the termination of the proceedings or (c) the Arbitral Tribunal finds that the continuation of the proceedings as for any other reason became unnecessary or impossible. It is, therefore, clear that even in a case, where the Arbitral proceedings are terminated the termination of arbitral proceedings does not result in an Award. This distinction will have to be considered when one considers, what can be challenged u/s 34 as an Award. Section 34 is not a mere remedy in the matter of termination of proceedings. It is basically a remedy against an award either final or interim. The other guiding factor is u/s 37. Certain orders made under the Act are capable of being appealed u/s 37. u/s 37(1) an Appeal lies in respect of an order granting or refusing to grant any interim measure u/s 9. An Appeal also lies against setting aside or refusing to set aside an Award u/s 34. Under Sub-section (2) of Section 37 an Appeal lies against a plea under Sub-section (2) or Sub-section (3) of Section 16 which are pleas pertaining to jurisdiction as also against an order granting or refusing to grant interim measures u/s 17. Therefore, all orders/decisions passed under the Act of 1996 do not necessarily fall under the expression "Awards". It is only a decision/order which satisfies the requirements of Section 31 which is an Award. All others are orders and decisions in the course of the proceedings deciding procedural issues or terminating the arbitral proceedings themselves on the ground that the submission does not fall within the arbitral agreement or that there is no arbitral agreement or that there is no dispute required to be decided by the Arbitral Tribunal.

The Arbitration and Conciliation Act of 1996 has been drafted based on the Uncitral Model though our Parliament has made various departures from the Code. This has been recognised by the Apex Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., . It is not necessary to advert to the said judgment except to quote the following paragraph from the said judgment:--

"That the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Act and the Model Law are not identically drafted. u/s 11 the appointment of an arbitrator, in the event of a party to the arbitration agreement failing to carry out his obligation to appoint an arbitrator, is to be made by "the Chief Justice or any person or institution designated by him"; under Clause 11 of the Model Law it is to be made by a court. Section 34 of the Act is altogether different from Clause 34 of the Model Law. The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act and, especially, of Section 11 thereof."

4. Another relevant provision which will have to be noted is Section 5 of the Act of 1996. Section 5 provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. In other words a Court can only intervene if a power is conferred on the Court to interfere with the order or award and not otherwise. The corollary that follows is that all orders or decisions by the Arbitral Tribunal are not subject to challenge under the Act of 1996. When and how they can be challenged is not necessary to be answered in this case. What this Court, on the facts of this case, is called upon to answer is whether the order or decision rendered u/s 27 of the Act of 1996 is an interim award.

5. Considering what has been discussed earlier, it would be necessary to consider the position in law under the Act of 1940. Under the Act of 1940 "Award" was defined u/s 2(b), to mean an arbitration award. The Section at least did not provide or speak of an interim award. There is, however, judicial recognition that an Award could include an interim award as long as it met the requirements of an Award. See Satwant Singh Sodhi Vs. State of Punjab and Others, . The Apex Court in that case was considering as to the effect of an interim Award. The Court held that whether an interim award is final award or whether an interim award is final till the passing of the final award would depend on the form of the award. If an interim award is intended to finally determine the rights of the parties, it will have the force of a complete award and will continue to have effect even after the final award is delivered. When such an award is made the arbitrator becomes functus officio as regards the claims covered in such an award and such claims cannot be redetermined. It is, therefore, clear that under the Act of 1940 also it was judicially recognised that an Award includes an interim award, but an interim Award to be an award had to decide the claim finally. Once the claim is decided finally the Arbitral Tribunal could not adjudicate

further on that claim and became functus officio. It is not necessary to advert to other judgments considering the law as declared in Satwant Singh Sodhi (supra). What however, emerges is that a right or claim of the party is finally decided, and the Arbitral Tribunal insofar as the matter decided became functus officio. This must necessarily exclude procedural orders in the course of the arbitral proceedings.

6. It may be necessary to consider some other decisions in other jurisdictions, insofar as the meaning of an interim award and the power of passing an interim award. For that purpose some judgments passed under English Arbitration Act, 1950 may be considered. It may be noted that large number of interim awards have been passed basically in admiralty matters considering the nature of the disputes in such matters. In the case of Japan Line Ltd. v. Aggelinki Charis Compania Maritima S. A. and Davies and Potter (The "Angelic Grace") 1980 Vol. 1288, an interim award came to be passed. While answering the issue of interim award, Lord Denning referred to Section 14 of the Act of 1950 which provided for an interim award. The said provision reads as under :--

"Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he think fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award."

Dealing with the issue of interim award the learned Judge observed as under:--

"It seems to me that, in making an interim award, the arbitrators can and should look at all the circumstances of the case. They can look at the other two arbitrations as well as this one. They can apply the principle of equitable set off such as was considered in The Nanfri Federal Commerce v. Molena, (1978) 2 LI Rep. 132.

The right to pass an equitable interim award has been recognised. In SL Sethia Lines Ltd. v. Naviagro Maritime Corporation (The "Kostas Melas") (1981) 1 LI Re 18. Various contentions were in issue. Considering that, the Court noted that the development of the law one of which was passing of interim awards. The Court observed as under:--

"The second is the development of a practice among maritime arbitrators to make interim awards in respect of disputed hire during the currency of a time charter."

Dealing with the issue of the power of making an interim award the Court observed as under :--

"First, since the jurisdiction of an arbitrator is a jurisdiction to decide disputes, it follows that the power to make an award is a power to decide matters in dispute between the parties. An award, interim or final, can only be an award in respect of matters referred to the arbitrators for decision. It follows, therefore, that (in

the absence of some special agreement between the parties) a submission of disputes to arbitration will not generally give the arbitrators the power to order that one party shall pay a sum to the other, unless the arbitrators decide that sum is due and owing. Arbitrators can decide, by way of interim award, that a minimum sum is payable by one party to the other, if they decide that sum at least is due and owing; but they cannot generally order that one party should pay a minimum sum to another on account of claims, simply because on a rough look at the case it looks as though such a sum at least will prove to be payable, without actually deciding that sum is due and owing. So to order would result in a change in the parties' respective economic positions, without deciding any matter in dispute; generally speaking, arbitrators have no power to order such a change. The second point is this. An interim award can relate to any issue in the matters in dispute referred to the arbitrators; it may relate to an issue affecting the whole claim (e.g. the issue of liability, reserving the issue of quantum for a final award), or may relate to a part only of the claims or cross claims submitted to them for decision. It follows that arbitrators, even making an interim award, must specify the issue, or the claim or part of a claim, which is the subject matter of the interim award."

The learned Judge then proceeded to observe that in his judgment, arbitrators are fully entitled to make such an interim award, provided that in so doing they observe the ordinary principles applicable to such awards—in particular, namely that their award constitutes a decision upon a matter referred to them, and that they specify in their award the matter which has been decided and further more, that they do not, in disposing of the matter with expedition, infringe the general principle that they must act fairly. From the above under English law an interim award made must satisfy the following :--

- (i) an interim award can relate to any issue in the matters in dispute referred to the arbitrators; it may relate to an issue affecting the whole claim or may relate to a part only of the claims or cross claims submitted to them for decision.
- (ii) The Arbitrators in making an interim award must specify the issue or the claim or part of the claim which is the subject matter of the interim award.
- (iii) In disposing of the matter they should not infringe the general principle that they must act fairly.

7. As noted earlier Section 31(6) specifically confers a power on the Arbitral Tribunal to make an interim arbitral award or any matter with regard to which it may make a final arbitral award. Award itself has been defined to include an interim award. What then, therefore, is the extent of this expression "award" which has not been defined under the Act. We have earlier seen that the Act of 1996 uses various expressions. That Act is based on the Model law i.e. UNCITRAL CODE. The model law itself was drafted by experts in the field of arbitral commercial law. In these circumstances leading experts are of the view that Courts should give due regard to the specific expression used in the model law

and as adopted by the Legislatures of the adopting State. An important indication in holding what is an award, flows from the expression in matter with respect to which it may make a final arbitral award. In other words it must be in respect of claims or counter claims which have been subject matter of submission or reference to the arbitral tribunal. The various expressions used and as to what would constitute an award came up for consideration before this Court in M/s. Anuptech Equipments Private Ltd. Vs. M/s. Ganpati Co-op. Housing Society Ltd. and others, . Referring to the various expressions it has been held that the perusal of the various provisions would show that Act uses three different expressions which are arbitral award, order and decision. In M/s Anuptech Equipments Pvt. Ltd. (supra) the issue was of challenge to an order passed u/s 25(a) terminating the arbitral proceedings for failure to file statement. Considering the expression "Award" this is what was observed :--

"What that means is that the expression order and award are distinct and different. One is termination of proceedings without deciding the merits of the matter, the other is termination on merits. Therefore, it is clear that looking at the Act itself there is no provision to challenge certain orders or decisions."

After considering the further scheme of the Act including provision like Section 32 this Court observed that it is clear that the expression order and award are distinct and different.

The expression "award" in its widest amplitude could have been read to mean the termination of the arbitral reference or the proceedings before the Arbitral Tribunal as has been held in same jurisdictions referred to earlier. That, however, is not the position insofar as the Act of 1996 is concerned as Section 32 of the Act as noted earlier provides for termination of the arbitral proceedings either by an arbitral award or by the Arbitral Tribunal under Sub-section (2). Section 32 does not include within it for example termination of arbitral proceedings by the Arbitral Tribunal u/s 16(5) which pertains to jurisdiction of the Tribunal including ruling on objection with respect to the existence or the validity of the arbitration agreement. Therefore, an order culminating in termination of arbitral proceedings with respect to the existence or validity of the arbitration agreement is not an award. The expression "award" therefore, must mean something different from mere termination of proceedings. The award whether interim award or final considering the judgment of the Apex Court in Satwant Singh Sodhi (supra) the English judgments and the scheme of the Act of 1996 must mean the final determination of a claim, part of a claim or counter claim by the Arbitral Tribunal of a submission to the Arbitral Tribunal. That decision must be supported by reasons in terms of Section 31(3) unless otherwise provided for. It does not mean that a final or interim determination of a claim or part of the claim unsupported by reasons is not an award. It is an award which may be subject to challenge u/s 34. The award must be signed by the Arbitrators or by the majority of the Arbitrators, Considering Section 31(2) it must result in the Tribunal being rendered functus officio in respect of the subject matter of the

Award made by it and to that extent. It cannot further decide that part of the claim or counter-claim which it has adjudicated. Under the scheme of the Act of 1996 mere closure or termination of proceedings does not culminate into an Award. To sum up merely answering an issue which may arise before the Arbitral Tribunal and deciding it resulting in termination of the proceedings by itself would not amount to an award. For example the issue of jurisdiction which has to be decided u/s 16, yet does not form part of the expression "award", though in a challenge to an award where proceedings are continued rejecting the challenge to arbitrability or otherwise that order can be challenged whilst challenging the Award u/s 34 of the Act of 1996. The decision or order to be an award must result in final determination of the claim, part of the claim and/or counter-claim referred or submitted to arbitration and must normally meet the other requirements of Section 31 of which signing the award is mandatory. Only then can the Award be said to be either interim or final. All other orders or decisions would not fall within the expression award and consequently Section 34 would not be attracted.

This view is further fortified by the judgment of the Apex Court in the case of *Sanshin Chemicals Industry Vs. Oriental Carbons and Chemicals Ltd. and Others*, . In that matter the issue before the Apex Court was whether an incorrect decision as to venue of arbitration which had a bearing on the procedure ultimately followed in arbitral proceedings would be covered u/s 34(2). The Apex Court on arguments advanced and considering Section 34 and Section 2(c) noted as under :--

".....and an award being a final determination of a particular issue or claim in the arbitration and the issue regarding venue being of seminal importance for adjudication of the rights of the parties, the conclusion is irresistible that such decision by the Joint Committee of Arbitrators, must be held to be an interim award and as such amenable to be reviewed u/s 34 of the Act and consequently, the High Court committed serious error in holding to the contrary."

On behalf of the respondents in that case it was contended that to fall under the expression "award" and for that matter a decision to become an award, must be a determination of a particular issue or claim in the arbitration. Answering the issue the Court held that a decision which does not decide the claim would not amount to an Award and observed as under:--

"The ultimate arbitral award could be assailed on the grounds indicated in Sub-section (2) of Section 34 and an erroneous decision on the question of venue, which ultimately affected the procedure that has been followed in the arbitral proceeding, could come within the sweep of Section 34(2)"

It is, therefore, clear that every order or decision is not an Award. An order or decision in the course of proceedings which are continuing and in respect of which no remedy is provided under the Act could normally be challenged while challenging the Award u/s 34, provided the challenge was available u/s 34(2) of

the Act. In the instant case the order rejecting the application u/s 27 is a decision and/or order. It is not definitely an interim award. It would, therefore, be open to the petitioner if finally aggrieved by an award to challenge the Award in which the order has merged, u/s 34(2) if in law a challenge would be available u/s 34(2) of the Act.

8. With the above discussion petition stands rejected. However, in the circumstances of the case there shall be no order as to costs.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.