

(2017) 01 BOM CK 0185

In the Bombay High Court

Case No : 431 of 2016 IN NOTICE of MOTION NO 1459 of 2016 IN ARBITRATION PETITION (L) NO 89 of 2016

HRIM Finance and Securities Pvt. Ltd.

APPELLANT

Vs

Globe Capital Market Ltd.

RESPONDENT

Date of Decision : 25-01-2017

Acts Referred:

Code of Civil Procedure, 1908, Order 7Rule 10, Order 7Rule 10A, Order 23Rule 2 -
Arbitration Act, 1940, <a href=

Citation : (2017) 01 BOM CK 0185

Hon'ble Judges : Anoop V.Mohta, P.R.Bora

Bench : DIVISON BENCH

Advocate : Karl Tamboly, Sunil A. Vyas, Mansukhlal, Hiralal, Anurag Agrawal, Kokila Kalra

Final Decision : Dismissed

Judgement

1. Heard finally, by consent of the parties.
2. The Appellant has filed the present Appeal under Section 37 of the Arbitration and Conciliation (Amendment) Act, 2015, (for short, "The Arbitration (Amendment) Act"), whereby challenge is made to the order passed by the learned Single Judge dated 6th October, 2016, thereby after considering the rival submissions in the facts and circumstances of the case, by allowing the notice of motion in Arbitration Petition under Section 34 of the Arbitration Act, condoned the delay of 129 days, subject to payment of costs of Rs.25,000/-to the Respondent. The said amount was accordingly paid and accepted by the Respondent.
3. The learned Counsel appearing for the Respondent has raised basic submissions that in view of mandate of Section 34 of the Arbitration Act, there is no question of exercising jurisdiction of condoning the delay of this nature,

though the provisions of Section 14 of the Limitation Act is extended for condoning the delay on the foundation of sufficient cause stated to be shown by them. The filing of the first Arbitration Application under Section 34 of the Arbitration Act, in Delhi Court itself was not "Bonafide" and therefore, also exclusion so available under Section 14 of the Limitation Act, could not have been extended in the present case.

4. The relevant events as per the synopsis are as under :

i) On 25.02.2014, the impugned order was passed. On 28.02.2014, vide email dated 28.02.2014 the United Exchange of India Limited informed the petitioner about the passing of the impugned award and informed that the original award will be sent as soon as possible. On 10.03.2014, the petitioner receive the copy of original award.

ii) On 21.05.2014, the petitioner had filed the Arbitration Petition being Arbitration Appeal No.331 of 2014 before the District Judge, Patiala House Court, Delhi. On 28.10.2014, the Respondent appeared in the said petition. On 17.09.2015, the petition was directed to be returned with liberty to file afresh in the court of appropriate jurisdiction.

iii) On 24.09.2015, the petitioner applied for the certified copy of the entire file of the said petition and the documents and the proceedings. On 01.12.2015, the certified copy of the said petition got ready.

iv) On 02.12.2015, the lawyer of the petitioner at Delhi received the certified copy of the entire petition and the petitioner got it collected from his office on 7.12.2015. On 08.12.2015, the certified copy of the petition was sent by the petitioner to its Lawyer at Mumbai. On 09.12.2015, the lawyer of the petitioner at Delhi sent the soft copy of the petition to the lawyer at Mumbai for amending the petition according to format as per original side rules of Bombay High Court. On 18.12.2015, the Mumbai Lawyer asked the petitioner through email to prepare a synopsis in the case for submission alongwith the petition. On 22.12.2015, the petitioner prepared a synopsis as suggested by the Lawyer at Mumbai and sent the same through email to her. On 23.12.2015 to 04.01.2016, the Bombay High Court was on vacation. On 29.12.2015, the petitioner reminds the lawyer at Mumbai through email that the petition should be filed within time.

v) On 04.01.2016, after returning from vacation, the Lawyer at Mumbai sent the petition alongwith Vakalatnama in the format prescribed by Original Side Rules of Mumbai High Court. On 07.01.2016, the petitioner sent the petition alongwith vakalatnama duly signed to the lawyer at Mumbai. vi) On 11.01.2016, the Lawyer at Delhi advises Lawyer at Mumbai to add one paragraph relating to limitation in the petition. The petitioner took the fresh print out of the petition and sent the same to his lawyer at Mumbai. The lawyer at Mumbai prepared requisite sets of the petition along documents. On 20.01.2016, the petitioner filed the petition before the High Court at Bombay.

All the necessary emails and the correspondence are part of the record.

5. The relevant provision of Section 34(3) of the Arbitration Act is as under :

" An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

6. Section 14 of the Limitation Act 1963 reads as under:

" Exclusion of time of proceeding bonafide in Court without jurisdiction(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of subsection (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature."

7. The provision of Order VII Rule 10A of the Code of Civil Procedure (CPC), as relevant in the matter are reproduced as under:

" Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under subrule (1), the plaintiff may make an application to the Court

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under subrule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) given to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under subrule (3)

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under subrule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint."

8. Order VII Rule 10A of CPC is a procedure, which needs to be followed once the claim/application is returned for presentation to the proper Court. In the present case, it is the Court of Mumbai which has jurisdiction, in view of specific agreed clause between the parties.

9. In the present case, as recorded above, in the event the learned Additional District Judge, New Delhi has passed the order on 17th September, 2015 to the following effect :

"Present : Sh. Tushar, counsel for petitioner.

Sh. Manoj George, counsel for respondent.

Submissions on the point of territorial jurisdiction of this court heard. As per jurisdiction clause of Trading MemberClearing Member Agreement, this Court lacks territorial jurisdiction to try and entertain the present objection petition. The petition is accordingly, directed to be returned u/o 7 rule 10 of the Code of Civil Procedure with liberty to file afresh in the Court of appropriate jurisdiction. Ahlmad is directed to return the petition alongwith court fee after compliance of

necessary formalities. File be consigned to record room."

10. As events show, the original Petitioner/the Respondent took steps accordingly. As recorded, it is not a question of filing Section 34 Application, as per the procedure so prescribed by this Court of Original Side jurisdiction, as per the Rules and practice, but the fact that the learned Additional District Judge at Delhi, after considering the pleadings/objection so raised by the other side on the point of territorial jurisdiction has observed as under

" Lack of territorial jurisdiction and directed to return the plaint under Order VII Rule 10 of Code of Civil Procedure with liberty to file fresh suit in the Court of Appellate jurisdiction. It is also directed to return the Petition alongwith Court fees after compliance of necessary formalities. Therefore, various formalities required to be followed, in view of above order itself. Apart from the provision of Order VII Rule 10A, whereby in a given case after passing order under Order VII Rule 10, various procedural formalities required to be completed, which was admittedly not done in the present case. This includes even the fixing of date of appearance in the Court, where claim is to be filed after its report."

We are concerned with this procedure at this stage in the present matter, but the fact of further follow up of Order VII Rule 10, just cannot be overlooked while deciding the objection and/or submissions so raised, opposing the order passed by the learned Single Judge. Thus, the Apex Court considering the scheme of provisions of the Arbitration Act, specifically Section 34(3) and 43(1) r/w Sections 5,14 and 29(2) of the Limitation Act has elaborated and reiterated that the benefit of exclusion of time under Section 14 of the Limitation Act is available. Where application under Section 34(3) of the Arbitration Act, is moved/ filed in a Court without jurisdiction, the provisions of Section 5 of the Limitation Act, as such is not applicable. The Apex Court, in case of Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others, (2008)7 Supreme Court Cases 169, however, considering the scheme and object of both the Acts and provisions observed in paragraph No. 24 as under :

"..... The interpretation of Section 14 has to be liberal. The language of beneficial provision contained in Section 14 of the Limitation Act must be construed liberally so as to suppress the mischief and advance its object. Therefore, it is held that the provisions of Section 14 of the Limitation Act are applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

It is further observed that Section 14(2) of the Limitation Act is applicable to the proceedings under Section 34(1) of the Arbitration Act. The learned Counsel appearing for the Appellant has not resisted the same issue. However, submitted that the filing of Application in Delhi Court itself was not bonafide and therefore, there was no question of extending the said benefit/exclusion in the Petitioner's case, even after return of the plaint, still there is delay in filing the Application in the Bombay High Court. This, in our view, cannot be a matter of discussion in the

present facts and circumstances of the case, as the learned Judge while passing the order on 17th September, 2015, inspite of noting the objection has returned the plaint by passing order under Order VII Rule 10 of the CPC. The parties, therefore, has no choice, but to follow the further procedure. The Application for certified copy and receipt of those documents/papers on 2nd/ 7th December, 2015 is also not in dispute.

11. The procedure of filing an Application under section 34 of the Arbitration Act, is different in view of specific Rules of Bombay High Court (Original Side). Therefore, the Petition so filed in Delhi Court could not have been filed directly after return of the plaint/Application. After due deliberation and discussion, subject to the correspondence between the Lawyers from Mumbai and Delhi and in view of the office requirement and the format, ultimately on 20th January, 2016 the original Petitioner able to file the Petition in the High Court at Bombay. The learned Judge after considering the background and the fact has condoned the delay.

12. The submission that Arbitration Petition itself cannot be treated as a "plaint" as contemplated under Order VII Rule 10 of the CPC and therefore, those provisions ought not to have been invoked while passing the order of return of the Application is not acceptable. The order passed by the learned Judge at Delhi remained in tact till this date. The concerned parties have acted upon the same. Whether it is an Application and/or whether it is a suit, we are not inclined to consider it for deciding the present matter referring to Section 14 of the Limitation Act read with Section 34 of the Arbitration Act. Factually, it was returned by invoking Order VII Rule 10 of the CPC. The parties therefore, are bound to follow the next procedure prescribed under CPC.

13. Merely because application was filed at Delhi High Court, though knowing fully, the agreed jurisdiction clause of Mumbai that itself, in our view, may not be the reason to overlook the fact that the aspect of filing of such Application at different places on the foundation of alleged cause of action or part cause of action is always a matter of discussion.

14. The fact of filing of First Petition within 90 days, as contemplated under Section 34 of the Arbitration Act, is not in dispute. In the background so referred above, this is a case of resubmission of Arbitration Petition for want of territorial jurisdiction. The bonafide is shown by filing the First Application within 90 days. The procedural aspects, which required to be followed by the parties, as there is always difference and/or different procedure in filing such Application in different Courts/High Court. This is in the background that as per the practice of the Bombay High Court Rules, the office will accept and permit to lodge the Application, only if it is as per the rule and the requisite format.

15. In this background, the important aspect, which also cannot be overlooked that the mandate of 120 days, as contemplated under the provisions, was already lost or over, on the date, when the learned Judge at Delhi on 17th

September, 2015 ordered to return the Application with liberty to file fresh. The documents so filed alongwith the original Application at Delhi, including the certified copy of the Award was part of the same.

16. It is submitted that in view of Section 14 of the Limitation Act, the Application should have been filed at the most within 33 days, after order dated 17th September, 2015 and/or even after 7th December, 2015, when the party/ Respondent got the certified copy of the entire portion. Even on that date, as recorded, a period of 120 days were already over. The Court at Delhi never ordered to file the Application, as it is and/or not directed the Court at Mumbai to accept the Application, as it is. The completion of formalities, in view of the procedural requirement, in our view, in the present facts and circumstances, just can not be overlooked to accept the case of the Appellant that action/application so filed was not bonafide and/or with malafide intention to delay the execution of the Award, which was passed on 25th February, 2014.

17. The filing of Application under Section 34 of the Arbitration Act, itself amounts to automatic stay of the Award, (stated to be an automatic) and therefore, by this mechanism the Respondent able to postpone the execution of the Award is also the submission. There is some substance in this submission. However, this is, in any way, no reason not to grant the opportunity, as granted by the learned Single Judge. The Petitioner thereby will get the opportunity to contest the Award, in accordance with law.

18. Therefore, taking overall view of the matter, considering the well reasoned order passed by the learned Single Judge and considering the scope of Section 37 of the Arbitration Act, there is no perversity and/or illegality in the impugned order and therefore, no case is made out to interfere with the order.

19. The Appeal is dismissed accordingly.

20. No costs.