

(2013) 10 BOM CK 0170

In the Bombay High Court

Case No : Appeal (L) No. 257 of 2013 in Arbitration Petition No. 1264 of 2012

Indian Oil Corporation Limited

APPELLANT

Vs

M/s. Saibaba Automobiles

RESPONDENT

Date of Decision : 10-10-2013

Acts Referred:

Citation : (2013) 10 BOM CK 0170

Hon'ble Judges : M.S. Sonak, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Tanmayi Gadre, instructed by RMG Law Associates, for the Appellant; M.S. Bhandari, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Admit. Learned counsel for the Respondent waives service. The appeal is taken up for hearing and final disposal, by consent and on the request of the learned counsel. The appeal arises from a judgment and order of a learned Single Judge dated 25 March 2013 on a petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("the Act"). The Respondent was a dealer of the Appellant in pursuance of a dealership agreement dated 20 April 1992. On 9 May 2003, the retail outlet was raided by the district administration/police authorities during the course of which a tanker which was unloading an unidentified product into the MS tank was seized. A case was filed under the Essential Commodities Act and a notice to show cause was issued on 14 May 2003 why action should not be initiated. By a letter dated 26 May 2003, the Respondent admitted that its manager had conspired with unauthorized persons and had arranged to put solvent into motor spirit. On 7 June 2003, finding the reply to be unsatisfactory, the retail outlet of the Respondent was closed for thirty days and a penalty of Rs. 20,000/- was imposed. The activity of sales at the retail outlet recommenced on 7 September 2003, but following a show cause notice issued by the district administration for the closure of the outlet, sales were suspended on 22 November 2003. On 14 June 2004, the State Government ordered resumption of

supplies. On 1 July 2004, a notice to show cause was issued to the Respondent why action should not be initiated for violating the dealership agreement on the allegation that a partnership had been entered into without the prior permission of the Appellant. Moreover, it is alleged that the original allottee of the petrol pump was in the employment of Nanded Municipal Corporation. A notice to show cause was issued on 14 January 2005 why action including termination should not be taken against the Respondent. The Respondent submitted a reply. The dealership was terminated on 24 February 2005.

2. The Respondent invoked the arbitration agreement contained in the dealership agreement and a sole arbitrator was appointed. The Respondent raised several claims including:

(i) A claim for Rs. 59.64 lakhs towards reconciliation of accounts for the period 1994-94 to 2002-03;

(ii) A claim for compensation towards loss in business profit of Rs. 32.00 lakhs for the period from 9 June 2003 to 9 February 2006;

(iii) A claim of Rs. 14.24 lakhs towards overhead charges from 9 June 2003 to 9 February 2006;

(iv) A claim of Rs. 10.00 lakhs towards cost of construction raised for the retail outlet;

(v) A claim of Rs. 2.00 lakhs for expenditure for the conversion of agricultural land into non-agriculture land;

(vi) A claim of Rs. 1.00 lakh for damage to the business reputation, goodwill and mental torture;

(vii) A claim of Rs. 28.63 lakhs towards interest on claim no. (i) above;

(viii) A claim of Rs. 1.00 lakh for costs of arbitration; and

(ix) Resumption of supply to the retail outlet.

3. The sole arbitrator held that in breach of the conditions governing the retail outlet, the original allottee had secured employment with the Municipal Corporation on 16 November 1988 and there was thereby a violation of clause-46 of the dealership agreement under which the allottee was required to take active part in the management of the retail outlet and to personally supervise the same. Moreover, clause-47(2) of the dealership agreement specifically debars the partners having a dealership from taking up any other employment. The sole arbitrator also found that unauthorizedly a deed of partnership had been entered into. The sole arbitrator, in consequence, upheld the termination of the contract and also came to the conclusion that the contract was not capable of specific performance being terminable by its very nature. In holding so, the sole arbitrator relied on the judgment of the Supreme Court in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, holding that a

contract which is by its very nature determinable cannot be the subject of specific performance in terms of Section 14(i)(c) of the Specific Relief Act. The sole arbitrator also rejected the claim for damages on the ground that the termination of the agreement was valid; the Respondent having committed a breach of the dealership agreement.

4. As regards the claim of Rs. 59.64 lakhs on a reconciliation of accounts for the period between 1994-94 and 2002-03, the sole arbitrator observed as follows:

4. The Respondents have submitted that the Claimants have not produced any documentary proofs, bills, invoices, delivery challans or any other writings whatsoever in support of its claim. I find that the Claimants have merely filed tabular statement prepared by them and made claim of the aforesaid amount of Rs. 59,64,654/- without filing any supporting documents such as bills, vouchers etc. in support of their case.

The sole arbitrator further noted that the Respondent had filed Parties Account Details ("PAD") for the period from 1 April 1993 to 31 March 2003 in support of the claim. However, the Respondent, it was held, had not explained as to how the statement filed by the Respondent in a tabular form can be correlated or reconciled with the PAD statements. The sole arbitrator noted that the Respondent had during the course of oral arguments not been able to explain the queries raised in respect of the balance shown in the PAD statements and the tabular statements. On this ground it was found that the claim of Rs. 59.64 lakhs was not supported by any documentary evidence and would have to be rejected.

5. A petition was filed u/s 34 of the Act by the Respondent. The learned Single Judge by the judgment and order which is impugned in these proceedings, rejected the challenge of the Respondent to the arbitral award on all counts save and except for one. The ground which has weighed with the learned Single Judge in setting aside the award relates to the claim of Rs. 59.64 lakhs on a reconciliation of the accounts of the period 1993-94 to 2002-03. Having setting aside the award, for reasons which we will shortly advert to, the learned Single Judge remanded the proceedings back to the learned arbitrator, who was directed to decide the claim afresh without being influenced by the findings recorded in the award.

6. The learned Single Judge was of the view that the findings rendered by the sole arbitrator indicated that "there was some communication gap on this issue whether explanation rendered by the Respondent was not sufficient." The learned Single Judge noted that it was not in dispute that the Respondent had produced a PAD statement and it was not the contention of the Appellant that these details were forged or fabricated. For these reasons, the award has been set aside and the proceedings have been remitted back to the sole arbitrator.

7. The first submission which has been urged on behalf of the Appellant is that the learned Single Judge had no jurisdiction u/s 34(4) of the Act to remand the proceedings back to the arbitral tribunal. The second submission is that the

learned Single Judge was wholly in error in setting aside the arbitral award since no ground within the meaning of Section 34 was made out. We will now proceed to consider the submissions.

8. Section 34(4) of the Act provides as follows:

34. Application for setting aside arbitral award.-(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

9. The nature of the jurisdiction u/s 34(4) is that the Court is empowered to adjourn the proceedings which have been instituted u/s 34 for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. In other words, once a petition u/s 34 is disposed of, there would be no occasion to take recourse to the power u/s 34(4). The object of Section 34(4) is to furnish an opportunity to the arbitral tribunal to resume the arbitral proceedings or to take action which would eliminate a ground for setting aside the arbitral award. Section 34(4) is, therefore, a provision in aid of or in support of an arbitral award. Hence, by its very nature, the provision cannot be invoked once an arbitral award is set aside.

10. In a judgment of this Court in Geojit Financial Services Limited (Presently known as Geojit BNP Paribas Financier Services Limited Vs. Kritika Nagpal², the provisions of Section 34(4) have been interpreted in the following observations:

14. Under sub-section 4 of Section 34, the Court is vested with the discretion, where it is appropriate and where the court is requested by a party, to adjourn the proceedings for a period of time. An adjournment is granted in order to furnish the arbitral tribunal with an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Tribunal will eliminate the grounds for setting aside the award. Subsection 4 of Section 34, therefore, does not contemplate a situation where the proceedings are remanded back to the arbitrator after setting aside the arbitral award. Once an arbitral award is set aside u/s 34, that brings to a conclusion a proceeding before the Court.

What sub-section 4 of Section 34 envisages is an opportunity to the arbitral tribunal to resume the arbitration proceedings or to take such other action as would eliminate the grounds for setting aside the award. Without meaning to be exhaustive, we can conceive of a situation where the arbitral tribunal has overlooked a particular item of claim on which parties have led evidence and have addressed arguments. A challenge to the arbitral award in such a case would be on the ground that the arbitral tribunal has failed to decide a claim

which was raised, controverted and submitted upon. The provisions of Section 34 enable the Court to adjourn the petition u/s 34 so that instead of setting aside the award, the arbitral tribunal can resume the proceedings and take necessary steps to eliminate a ground of challenge. Section 34(4), however, does not contemplate or vest a power in the Court to remand proceedings back to the arbitral tribunal once the Court has set aside the award. Once an award has been set aside, recourse cannot be taken to Section 34(4) since it is evident that the power can be exercised by the Court while adjourning a petition u/s 34.

15. The jurisdiction u/s 34(4) can be exercised in a manner which is strictly consistent with that provision. The equitable jurisdiction which the Court exercises under Article 226 of the Constitution is clearly inapposite when dealing with a petition u/s 34. The learned Single Judge has relied upon his earlier decision in *Angel Capital and Debt Market Limited Vs. Sharad Munot*³, which seems to suggest that the Court has while setting aside an award a general power to remand the proceedings for reconsideration.

We clarify that this would not reflect the correct position in law.

In this view of the matter, the learned Single Judge was, in our view, not acting within jurisdiction in issuing an order of remand.

11. That apart, we find merit in the contention of the learned counsel for the Appellant that the ground on which the award has been set aside, would not fall within the parameters of Section 34 of the Act. u/s 34, an arbitral award can, inter alia, be set aside on the ground that the award is in conflict with public policy {Section 34(2)(b)(i)}. The only other provision which may be of some relevance is Section 34(2)(iii) where a party making an application is able to demonstrate that he was otherwise unable to present his case. However, as we shall indicate, neither of the grounds was attracted. Before the arbitral tribunal, as the record would indicate, the Respondent produced a tabular statement and the PAD statement in support of the claim. During the course of the arbitral proceedings, the Appellant had drawn the attention of the arbitral tribunal to the fact that:

- (i) The Respondent had not led any evidence in support of the PAD statements;
- (ii) The Respondent had not explained as to how the statement filed in the tabular form could be reconciled or correlated with the PAD statement;
- (iii) No explanation was forthcoming from the Respondent either in writing or during the course of arguments, despite a specific objection by the advocate of the Respondent to the effect that PAD statements did not show that an amount of Rs. 59.64 lakhs was due and payable; and
- (iv) Several discrepancies had been pointed out in the PAD statements vis-?-vis the tabular statement filed by the Respondent.

These objections are borne out from the written submissions which were placed

by the Appellant before the sole arbitrator. All that the Respondent stated in its written submission was that there was no necessity to place an explanation on the statement of account or to get it corrected where it appeared to be incorrect.

12. Now it is in this background that the finding of the arbitral tribunal would have to be appreciated. The sole arbitrator held that there was a failure on the part of the Respondent to prove documents such as bills, invoices, delivery challans or any other writings in support of its claim. The Respondent was found to have filed a tabular statement without any supporting document in support of the case. The arbitral tribunal recorded that no reconciliation of PAD statements with the tabular statement was forthcoming and that the Respondent had not been able to explain the queries raised during the course of the proceedings. This finding of the arbitral tribunal is based on the record. No ground for interference u/s 34 of the Act was made out.

13. The learned Single Judge has exercised the jurisdiction u/s 34 on the basis that there was a communication gap during the course of the arbitral proceedings. This, in our view, is absolutely no reason or justification to enlarge the scope of interference in respect of an arbitral award in exercise of the jurisdiction u/s 34 of the Act. The parties were before the arbitral tribunal. The Respondent did not lead oral evidence. The burden to substantiate its claim by tendering a sufficient explanation was on the Respondent. No reconciliation of the PAD statements with the tabular statement was forthcoming. Having regard to this position, we are of the view that interference of the learned Single Judge in the arbitral award u/s 34 was not warranted. For these reasons, we have come to the conclusion that the appeal would have to be allowed. The appeal is accordingly allowed insofar as the learned Single Judge, by the impugned judgment and order has set aside the arbitral award and has remanded back the proceedings. We clarify that since the appeal by the present Appellant against the order of the learned Single Judge is confined only to that aspect, we have not expressed any opinion on the rest of the judgment and order which is in support of the Appellant. The appeal is accordingly disposed of. There shall be no order as to costs.

2 Appeal No. 35 of 2013 and group decided on 25 June 2013

3 Arbitration Petition No. 972 of 2009 decided on 31 August 2012