

(1998) 09 BOM CK 0064

In the Bombay High Court

Case No : Arbitration Petition No. 212 of 1998

Kapal R. Mehra and others

APPELLANT

Vs

Bhupendra M. Bheda and others

RESPONDENT

Date of Decision : 08-09-1998

Acts Referred:

Arbitration Act, 1940 — Section 28

Arbitration and Conciliation Act, 1996 — Section 10, 16, 2(4), 34(2), 37(2)

Securities Contracts (Regulation) Act, 1956 — Section 9

Citation : (1998) 4 ALLMR 544 : (1998) 4 BomCR 872

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

Bench : Single Bench

Advocate : D.D. Madan, instructed by Malvi Ranchoddas and Co, for the Appellant; Gautam Mehta, for the Respondent

Judgement

F.I. Rebello, J.—Admit. Respondents waive service. By consent heard forthwith.

2. The petition was argued at length earlier. The matter was adjourned for further hearing today as a point pertaining to legality of constitution of the Arbitral Tribunal was in issue in another proceeding. That point has been decided by me, by Judgment delivered on 7th September, 1998 in Arbitration Petition No. 130 of 1998, Vinay Bubna Vs. Yogesh Mehta and others, . This Court has held that an award by an Arbitral Tribunal constituted in contravention of section 10 of the Arbitration and Conciliation Act, 1996 is liable to be set aside u/s 34(2)(a)(v) of the Arbitration & Conciliation Act, 1996 which will be referred to as the Arbitration Act, 1996.

3. The present petition has been preferred against the Order dated 18-6-1998. By the said Order the arbitral tribunal had decided the objection raised by the petitioners herein regarding maintainability of the Arbitration. The Arbitral Tribunal held that the matter is under the jurisdiction of the Stock Exchange Arbitration and as such the matter will proceed further under rules, regulations, bye-laws of the Stock Exchange Mumbai. It is this order which is the subject

matter of the present petition.

4. u/s 5 no judicial authority shall intervene except where so provided. This Court u/s 34 can entertain a petition challenging an Award. The other remedy available is u/s 37 of the Arbitration & Conciliation Act, 1996. u/s 37 the Court is empowered to hear appeals from the orders set out u/s 37. Sub-section (2) of section 37 may be reproduced for the purpose of deciding the issue in question. Subsection (2) of the section 37 reads as under :

37(2) "An appeal shall also lie from an order of the Arbitral Tribunal -

(a) accepting the plea referred to in sub-section (2) or sub-section (3) or section 16 : or

(b) granting or refusing to grant an interim measure u/s 17.

We are concerned with the interpretation of Clause (a) of sub-section (2) of section 37. The objection raised by the petitioners was u/s 16, as to the competence of the Tribunal to rule on its own jurisdiction. Under sub-section (2) of section 16 a person desirous of objecting to the jurisdiction of the Arbitral Tribunal, must raise the objection not later than the submission of the statement of defence. The section further provides that the parties shall not be precluded from raising such a plea merely because such party appointed or participated in the appointment of an arbitrator. Sub-section (3) of section 16 provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. Sub-section (5) of section 16 is important inasmuch as it sets out that the arbitral tribunal shall decide the matter referred to in sub-section (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting the plea, to continue with the arbitral proceedings and make an arbitral award. In other words if the objection is rejected the arbitral tribunal has jurisdiction to continue the arbitral proceedings and make an arbitral award. Seen in this context and on examination of section 37 sub-section (2) it is clear that only in the event the arbitral tribunal accepts the plea, then an appeal is maintainable u/s 37. No appeal will be maintainable in the event the plea is rejected.

5. The Arbitration Act, 1996 has sought to remedy various procedural defects in the Arbitration Act, 1940 so as to provide for early resolving of the dispute. The purpose is clear, once the arbitral tribunal enters into reference, the award must be made as early as possible. In fact unlike the Arbitration Act, 1940, Schedule I which provided for a time frame and section 28 which provided for enlargements of time in making the award, no such period is laid down in the new Act. It is made clear that the above construction is based on the provisions of the Arbitration Act, 1940 and it does not refer to other arbitral proceedings protected under sub-section (4) of section 2 of the Arbitration & Conciliation Act, 1996. To that extent also it has put fetters on judicial authorities intervening during the course of the arbitral proceedings by virtue of section 5. Therefore, there are two

situations. One where the Arbitral Tribunal accepts the plea regarding want of jurisdiction in which case an appeal is provided u/s 37(2)(a). The other situation is when the plea is not accepted, in which case the tribunal will proceed with the reference and pass the final award. Such a final award on that count can be challenged by filing a petition u/s 34(2)(a)(v) by challenging the award. Therefore, I am clearly of the opinion that if the plea raised u/s 16 is not accepted no appeal is maintainable.

The present petition is filed u/s 34 of the Act. Will such a petition lie against a decision refusing to accept the plea of jurisdiction. Arbitral award, includes an interim award, therefore, can a challenge to the award be made on the ground that it is an interim award. If such a plea is upheld it would mean that though appeal is not available u/s 37(2)(a) the decision can be challenged u/s 34. If section 34 is read to mean to include every interim order or award the object and purpose behind section 37 would be defeated. Interim award has not been defined. Under sub section (5) of section 31 of the Arbitration Act, 1996, the Arbitral Tribunal can make an interim award on any matter in respect of which it can make a final award. Thus at an interim stage there can be determination of claim in respect of which a final award can be made. An award can be enforced as a decree by virtue of section 36 of the Act. An award is therefore, a final determination of the claim. An interim award will be such determination of a claim at an interim stage. A harmonious construction, therefore, of section 34 and 37 read co-jointly would mean only those orders can be challenged in respect of which a statutory remedy by way of appeal is provided u/s 37 of the Arbitration and Conciliation Act, 1996. An order u/s 16(5) does not constitute an arbitral award either interim or final and hence cannot be challenged u/s 34 of the Act. If accepting the contention of want of jurisdiction as an award, there would have been no need to provide an appeal u/s 37(2) of the Arbitral Act. In my view, therefore, the petition as filed is not maintainable.

6. Though I have held that an appeal is not maintainable at the hearing of the petition at the admission stage by consent it was agreed that other contentions raised in the petition would also be decided finally.

In the light of that the other submissions are as under :

It was the contention of the petitioners that there was no written agreement between the parties.

The dispute pertains to a reference between a member and a non member in terms of the bye-laws framed by the Bombay Stock Exchange. Section 2(4) of the Arbitration and Conciliation Act, 1996 saves provisions for arbitration under any other enactment. Such provisions for arbitration are saved under the Act notwithstanding section 7 of the Act which provides for agreement in writing. An Arbitration between a member and non member of the B.S.E. is regulated by the bye-laws framed by the B.S.E. u/s 9 of the Securities Contract (Regulations) Act, 1956. Therefore, though there is no agreement between the parties in view of

the bye-laws framed which provide for arbitration the provision for arbitration is an arbitration agreement under any other enactment. As such even a non member dealing in shares on the Bombay Stock Exchange is subject to the said bye-laws. The contention that there is no agreement has therefore, to be rejected.

7. It is also contended that the arbitral tribunal was biased. According to the petitioner this is for the reason that the objections raised by the petitioners have not been dealt with or for wrong recording of argument. The law pertaining to bias by now is well settled. Bias unlike the principle of audi alteram partem does not result in the Act becoming void but voidable. Participation by the parties in the proceedings can result in the plea of bias being waived. Bias can be personal or pertaining to the subject matter. Petitioners have failed to make out a case of bias. In the instant case at the highest it can be contended that the arbitrators have misconducted themselves. The award as yet to be passed. At the stage of deciding the issue of jurisdiction this aspect need not be gone into. Secondly the plea of wrong recording or failing to record the objections in my opinion cannot sound in bias. The said contention has therefore to be rejected.

Both the contentions are therefore rejected. As a consequence it must be held that the arbitral tribunal as constituted would have no jurisdiction to continue the arbitration proceedings as presently constituted. However, in the light of the fact that I have held that the present petition is filed is not maintainable, the petition as filed stands dismissed.

In the circumstances of the case, there shall however be no order as to costs.

8. It may be mentioned that at the request of the petitioners in the Arbitration Petition No. 130 of 1998 1998 Bom. the operation of the judgment has been stayed for a period of six weeks. That will also apply to all petitions wherein the issue of section 10 arises. The period of six weeks commences from the judgment of this Court in Arbitration Petition No. 130 of 1998.

9. Petition dismissed.