
(2012) 04 BOM CK 0054
In the Bombay High Court
Case No : Arbitration Appeal No. 12 of 2012

Leslie David Isaac

APPELLANT

Vs

Bahadur Bapuji Sanjana

RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(6), 17, 2

Citation : (2012) 04 BOM CK 0054

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : H. Toor instructed by Mr. Nandu Pawar, for the Appellant; D.D. Madon along with Mr. S. Shamim instructed by y Shamim and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—The Appellant, original Respondent has filed this Appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and thereby challenge is made to the interim order dated 22 December 2011 passed by the Arbitral Tribunal pending the arbitration proceeding between the parties u/s 17 of the Arbitration Act. The Appellant was absent when the impugned order was passed by the Tribunal. The operative part of the order is as follows : ORDER

I have considered the facts set out before and have gone through all the supporting documents presented before me and in the interest of preserving the assets and capital of the firm, the Respondent is directed as follows:

- 1). To redeposit the amounts of Rupees 12,00,000/with interest in the account of Elektronik Lab held with Central Bank of India, Byculla branch, bearing account no. 1029747736 and Rupees 32,00,000/with interest in the account of Elektronik Lab held with ICICI bank, bearing account no. 032305001098;
- 2). Respondent be restrained from interfering, obstructing or causing any hindrance in the ordinary course of business of the firm; and

3). Restrained from withdrawing any amounts from any of the firm's bank accounts without due permission of the arbitral tribunal.

The Appellant is now aware of the order, which is appealable u/s 37 of the Arbitration Act. There exists arbitration clause in the Deed of Partnership dated 5.5.1976 entered into and signed by the parties. All disputes and question whatever which shall either during the partnership or afterwards arise between any partner or partners and the representatives of any partner touching this deed or constructed or application thereof or any acts or things therein contained or any account valuation or division of assets or debts or liabilities to be made thereunder and to any act deed or commissions of any partners or as to any other matter in any way relating to the partnership business or the affairs thereof or the rights duties liabilities of any person under this deed shall be referred to a single arbitrator in case the parties agree upon otherwise to two arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Indian Arbitration Act of 1940 or any statutory modification thereof for the time being in force.

2. As there arose dispute between the partners of the firm, the Respondents by letter dated 5.5.2011 invoked the arbitration clause and unilaterally appointed a single/sole Arbitrator and called upon the Appellant to confirm the same. The meeting was fixed on 11.07.2011 by the Arbitrator. The Appellant resisted the appointment by his Advocate's letter dated 7.7.2011 and informed specifically that he would not participate in such arbitration proceedings. The Respondents Advocate received the said letter on 9.7.2011. As fixed, the Arbitrator on 11.07.2011 held the first meeting. The Appellant was absent. The Respondent did not disclose the receipt of the objection/letter of the Appellant dated 7.7.2011. The Arbitrator therefore noted that no reply from the Appellant. The Appellant thereafter by letter dated 2.08.2011 informed to the Arbitrator that the fact of their objection to the appointment was suppressed by the Respondent and further requested to desist and ceased from acting as an Arbitrator and also pointed out that such arbitration proceedings should not be binding on the Appellant.

3. The Arbitrator, however, proceeded further inspite of the objection and framed issue on 12.08.2011. On 29.09.2011 also held that she had jurisdiction to act as an Arbitrator. The Appellant, through the Advocate's letter dated 7.10.2011, reminded clause 12 of the Partnership Deed and also Section 11 of the Arbitration Act and thereby pointed out the disagreement over the appointment. The Respondent responded the same by letter dated 18.10.2011 and intimated that they would apply for exparte hearing. The Arbitrator fixed the hearing on interim application on 18.11.2011. The copy was received by the Appellant on 18.11.2011 itself. The Appellant never attended the arbitration proceedings in view of their objection from its inception.

4. The learned Arbitrator passed the exparte award on 22.12.2011 and directed to redeposit the amount with interest in the noted accounts of the Elektronik Lab

and further restrained the Appellant from interfering with the course of business of the firm and withdrawing any amount from any firm's account without due permission from the Arbitral Tribunal.

5. The Appellant filed the Appeal on 24.01.2012 and thereby submitted to declare the whole arbitration proceedings being null and void and therefore the order so passed, in view of the unilateral appointment of the Arbitral Tribunal by the Respondent itself was contrary to the agreed terms and conditions/clauses between the parties. There was no procedure and/or permission given to other side to appoint an Arbitrator unilaterally. The consent of both the parties was a must.

6. Admittedly, the Arbitrator was appointed unilaterally by the Respondent. The Arbitrator, though the Appellant was absent, on the basis of letters issued by the Appellant, decided that she has jurisdiction to proceed with the arbitration as contemplated u/s 16 of the Arbitration Act. The Arbitrator further has passed the impugned Award. At every stages, admittedly the Appellant was absent.

7. The learned senior counsel appearing for the Respondent has relied upon Section 16(6) of the Arbitration Act which is reproduced as under :

16. Competence of arbitral tribunal to rule on its jurisdiction.

(1).....

(6). A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

and thereby contended that once the learned Arbitrator decided her jurisdictional issue, the Appellant has no option but to challenge the same issue of jurisdiction along with final Award, if any, passed against by invoking Section 34 of the Arbitration Act. The Award so passed at this stage just cannot be gone into and/or cannot be permitted to be challenged on this ground at the instance of the Appellant. Such challenge is premature. The Appellant is bound by the Award so passed. He distinguished the case of Aoki India Ltd. vs. M/s. Mira International, 2006 (3) R.A.A. 517 (Mad) relied upon by the learned counsel appearing for the Appellant, whereby the Award passed by the Arbitrator found to be vitiated as the Arbitrator was unilaterally appointed in spite of objection. That was a case u/s 34 of Arbitration Act to set aside award passed by such sole Arbitrator. This distinguishable fact goes to the root of the present matter. The Appellant has invoked Section 37 of the Arbitration Act by challenging the interim order passed by the Arbitrator to direct the Appellant to deposit the amount in the account of the firm and further restraint orders though he is a partner of the firm.

8. The interim order so passed though on Section 17 application, it had element of grant of ex parte monetary order in favour of the Respondent against the Appellant. The Award, as defined u/s 2 (c) of Arbitration Act, include the interim award also. Section 34 permits and/or contemplates the challenge to the interim Award also. But at present we are concerned with Section 37 Appeal which is

maintainable against the interim order/measure on Section 17 application passed by the Arbitral Tribunal pending the arbitration proceedings.

9. The bar is created u/s 16(6) and/or Section 34, to say that the order of self jurisdiction decided by the Arbitrator can only be challenged while challenging the final Award passed by the Arbitrator. This in no way takes away the right of Appellate Court to consider the merit and demerit of the interim order passed by the Tribunal even referring to the issue of jurisdiction as contemplated u/s 16 of the Arbitration Act. There is no such bar and/or restriction created by the Arbitration Act that the Court being Appellate Court just cannot consider the submission so raised by the parties, one who has objected since inception, the unilateral appointment of the Arbitrator. Admittedly, the clause so referred above provides that any single/sole Arbitrator, if to be appointed, it should be by the consent of both the partners. The Appellant resisted the named Arbitrator since beginning and never accepted the said appointment by specific letters/communication raised objection even by intimation in writing to the sole Arbitrator. The sole Arbitrator was fully aware of the objection so raised.

10. The Appellant referred and strongly relied upon clause 15 of the Partnership Deed and Section 11 of the Arbitration Act. The Respondent, in such situation, as the Appellant was not willing to accept the named Arbitrator ought to have been invoked Section 11 of the Arbitration Act, to appoint the Arbitrator to settle their dispute. I am inclined to observe that such unilateral appointment of the Arbitrator by a party when resisted by the other side and as it is contrary to the arbitration clause itself is impermissible. It traduce the arbitration system. The objection of having arbitration clause itself is to appoint jointly selected Arbitrator to settle their dispute, through the agreed procedure. Having once agreed for appointment of Arbitrator jointly and in cases where there was resistance and objection from the other side, the constitution of the Arbitral Tribunal and the continuation of the proceedings by the Tribunal, in my view, certain is in breach of the contractual agreed terms and conditions between the parties.

11. The learned Arbitrator, though objected in writing, without waiting for the Appellant, passed the order even on jurisdiction in her own favour, still, in my view, the Court u/s 37 of the Arbitration Act is not prevented by any provision even Section 16(6) of the Arbitration Act read with Section 34 to consider the case of the Appellant on admitted position on record, that exparte interim award so passed need not be executed and/or need to be stayed, pending the challenge even if any as available u/s 16(6) read with Section 34 of the Arbitration Act. The bar, even if any, so created u/s 16(6) and/or Section 34 of Arbitration Act whereby the party against whom the issue of jurisdiction is decided by the Arbitrator against them is entitled to challenge the same along with other grounds u/s 34 of the Arbitration Act in no way sufficient to take away the rights of the Appellate Court u/s 17 to grant and consider in this background, the merit and demerit of the appointment of the Arbitral Tribunal as it goes to the root of the matter. Merely because the Appellate Court u/s 37 against the order passed

u/s 17 of the Arbitration Act cannot disturb and/or set aside the order passed by the Arbitrator u/s 16 confirming its jurisdiction, that itself cannot be the reason and/or takes away the Appellate Court's power to consider the case of the Appellant with regard to the jurisdiction at least for the time being till the Arbitral Tribunal decides all disputes and/or differences finally through the Award. To set aside the Award on this ground by the Court u/s 34 of the Arbitration Act is another issue, but the power of the Court u/s 37 of the Arbitration Act to stay the effect and operation of such interim award as the same has been passed by the Arbitrator without the consent of the other parties and thereby directions have been issued to deposit the amount and so also not to interfere with the business activities of the firm of which he is a partner, certainly can be tested.

12. Now the question is about the scope, purpose and the power of the Appellate Court u/s 37 of the Arbitration Act. Section 16 read with Section 34 cannot be equated with Section 17 read with Section 34 of the Arbitration Act. Both are on different foundation and purpose to achieve. Any order passed u/s 17 can be tested on its merit u/s 37 of the Arbitration Act. If case is made out, as present one, the Appellate Court, considering the objection with regard to the jurisdiction so raised and admittedly when the Arbitral Tribunal was constituted unilaterally by one party in breach of the arbitration clause itself, but respecting the scope of Section 16(6) and Section 34, without disturbing the issue of self jurisdiction has decided by the Arbitrator, but taking note of the said jurisdictional issue and as it goes to the root of the matter and in view of any bar, I am inclined to take a view that the Appellate Court u/s 37 is empowered to stay and/or suspend such interim order passed by the Tribunal pending final decision of the matter. The Tribunal, if can pass order u/s 17 of the Arbitration Act, the Appellate Court u/s 37 is entitled to accept and/or reverse the same. That, in no way, halt and/or obstruct the main hearing of the arbitration proceedings by the Arbitral Tribunal. However, all these points need to be considered while passing the final award by the Arbitrator.

13. In the result, the following order :

ORDER

- (a) The order dated 22 December 2011 is quashed and set aside.
- (b) The Tribunal to continue with the hearing of the main Arbitration Petition.
- (c) All points are kept open for challenge u/s 34 of the Arbitration Act.

The Arbitration Appeal is accordingly disposed of. There shall be no order as to costs.