
(2006) 10 P&H CK 0077
In the Punjab And Haryana At Chandigarh
Case No : CR No. 4956 of 2006

Liberty Shoes Limited

APPELLANT

Vs

Harish Kumar Gupta and Another

RESPONDENT

Date of Decision : 10-10-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(5), 2(1), 31(6)
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (2006) 4 ARBLR 225 : (2007) 1 RCR(Civil) 3

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : Ashok Aggarwal and P.S. Rana, for the Appellant; R.K. Gupta and Sunish Bindlish, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—Sarvshri Harish Kumar Gupta and Satish Kumar Gupta, two partners of the firm-M/s. Liberty Enterprises, had filed Civil Suit No. 76 of 2003 in the court of learned Civil Judge (Senior Division), Karnal, for declaration and permanent injunction, wherein some of the defendants/partners filed an application u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for referring the parties to arbitration as per arbitration clause No. 15 contained in the partnership deed dated January 29, 2002 which reads as under:

That in case of any dispute between the parties with regard to the interpretations of this deed or any other matter relating to the affairs of the firm, the same shall be referred to an arbitrator mutually agreed upon between the parties in accordance with the provisions of the Indian Arbitration Act.

2. The application was allowed by the learned Civil Judge vide order dated 6th of October, 2003 and accordingly the matter was directed to be referred to the arbitrator to decide the dispute between the parties to the following effect:

As a sequel to the above discussions, the matter is liable to be referred to the arbitrator on the following terms and conditions:

(i) The partners of the firm-M/s. Liberty Enterprises shall appoint an arbitrator by mutual consent within a period of two months. In case the parties have failed to appoint any arbitrator by mutual consent, then anyone may approach the court for the appointment of arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996.

(ii) The arbitrator, thereafter, shall complete the arbitral proceedings within a period of four months.

(iii) Till the arbitration proceedings are completed the partners of M/s. Liberty Enterprises shall not act upon the agreement of franchise dated 31.03.2003 and would preserve the property, reputation and goodwill of M/s. Liberty Enterprises.

(iv) The pleadings and the orders passed during the proceedings of the present case shall have no bearings on the arbitral proceedings.

3. The said order dated 6th of October, 2003 was challenged by both the parties by way of two civil revisions and Civil Revision No. 4974 of 2003 was admitted on 10th of September, 2004 and the following order was passed:

The present case is identical to Civil Revision No. 5609 of 2003. It is substantially between the same parties. The aforementioned revision stands admitted on 19.08.2004 and the operation of the terms and conditions mentioned in para No. 11 of that case were ordered to be stayed.

As the present case is absolutely the same, therefore, this petition is admitted. The terms and conditions as mentioned in para No. 19(ii) of the order passed by the learned trial court shall remain stayed. The revision petition shall be posted for final hearing on 25.01.2005.

Both the parties are agreed that an arbitrator be appointed. Accordingly, as per the consensus of the court as well as counsel for the parties, Hon''ble Mr. Justice A.L. Bahri is appointed as arbitrator, who will decide the matter.

4. The reading of this order would show that this Court has retained control over the arbitral proceedings as the stay order granted by this Court is an order u/s 9 of the Arbitration and Conciliation Act, 1996.

5. The respondents in this revision petition filed a claim petition before the learned arbitrator and impleaded the petitioner herein as respondent No. 11 in the said claim petition.

6. The present petitioner-M/s. Liberty Shoes Limited moved an application for deletion of its name from the array of the parties on the ground that it was not a party to the arbitration agreement contained in partnership deed dated 29.01.2002. The learned arbitrator was pleased to pass the following order on April 2, 2006:

By this order, application filed by M/s. Liberty Shoes Limited for deleting its name from the array of parties in the present arbitration proceedings is being disposed of.

The basis for moving this application is that M/s. Liberty Shoes Limited is not a party to the arbitration agreement entered into between the partners of M/s. Liberty Enterprises under the clauses of which arbitration proceedings have been initiated. It is further stated that M/s. Liberty Shoes Limited has been unnecessarily sought to be impleaded as a party and that in the absence of arbitration agreement between the claimants and M/s. Liberty Shoes Limited, the arbitral tribunal will have no jurisdiction as against M/s. Liberty Shoes Limited.

M/s. Harish Kumar Gupta and another, partners of M/s. Liberty Enterprises, a partnership concern, other partners being Dinesh Kumar and others, filed an application u/s 8 of the Arbitration and Conciliation Act for appointment of arbitrator with respect to the dispute having arisen between the partners. In nutshell, the dispute relates to transferring franchise rights by Dinesh Kumar and others, partners of M/s. Liberty Enterprises, in favour of M/s. Liberty Shoes Limited. In fact, the contract of franchise is being disputed by Harish Kumar Gupta and others, partners of M/s. Liberty Enterprises.

Along with the application for appointment of arbitrator, injunction was claimed by Harish Kumar Gupta and others for not giving effect to the franchise rights agreement. Then ultimately the matter came up before the High Court. In one of the revisions pending in the High Court, the undersigned was appointed as arbitrator. That is how, arbitration proceedings commenced.

Statement of claim was filed by Harish Kumar Gupta and others and reply has been filed raising counter-claim as well by Dinesh Kumar and others. Since M/s. Liberty Shoes Limited was also shown as a party in the statement of claim and was also shown as party in the original application filed u/s 8 of the Arbitration and Conciliation Act, on notice having been given to M/s. Liberty Shoes Limited the present application has been filed for deleting its name.

On behalf of Harish Kumar Gupta and others, written note of arguments on the application aforesaid has been submitted, raising several points which are briefly noticed as under:

Firstly, the application is not supported by Board Resolution of M/s. Liberty Shoes Limited (a company) and any affidavit in support of the allegations levelled therein. Secondly, M/s. Liberty Shoes Limited has assigned unto itself the arbitration clause contained in the partnership deed in view of agreement of franchise as it is proclaiming having taken over M/s. Liberty Enterprises. Copy of their letter dated 04.04.2003 in this respect is produced. On the basis of impugned franchise agreement dated 31.03.2003, M/s. Liberty Shoes Limited claims to have taken over the business of M/s. Liberty Enterprises. Thus, impliedly they would be bound by the arbitration agreement contained in the partnership deed of M/s. Liberty Enterprises. Thirdly, it is stated that behind the

corporate veil, M/s. Liberty Shoes Limited and M/s. Liberty Enterprises are governed and controlled by the same person and thus, M/s. Liberty Shoes Limited is bound by the arbitration agreement. With respect to the scope of the arbitration proceedings, it is asserted that all matters relating to the business of M/s. Liberty Enterprises are to be gone into in the arbitration proceedings and creation of franchise would be one of them. Further, it is stated that by their own act and conduct, M/s. Liberty Shoes Limited acquiesced to be a party to the arbitration proceedings. Finally, it is asserted that M/s. Liberty Shoes Limited is a necessary party keeping in view the facts of the case.

Both parties addressed arguments and submitted some judgments in support of their arguments. However, it is not considered necessary to refer to all points raised by the parties. In view of the judgment of the Delhi High Court in OMP No. 175 of 2003 (Dr. A.S. Bindra v. Punjab Agro Industries Limited) decided on 24.02.2005 holding that the provisions of Order 1 Rule 10 CPC would not be applicable to the arbitration proceedings under the Arbitration and Conciliation Act and that objection of the parties can well be gone into u/s 16 of the Arbitration and Conciliation Act, the application for deleting the name of one of the parties in the arbitration proceedings cannot be entertained.

M/s. Liberty Shoes Limited was impleaded as a party in an application u/s 8 of the Arbitration and Conciliation Act and in the revision petition filed in the High Court in which appointment of arbitrator was ordered, M/s. Liberty Shoes Limited was shown as a party. Thus, at this stage, M/s. Liberty Shoes Limited cannot be ordered to be deleted from the array of parties. It is so ordered.

The other questions which are debated at this stage need not be gone into. While disposing of the arbitration matter finally, the question as to whether franchise agreement has been validly executed by M/s. Liberty Enterprises and their partners Dinesh Kumar and others, will be gone into and if the answer is in the negative, its effect would be gone into. Further question as to whether such a finding by the tribunal, if at all given, will be binding on M/s. Liberty Shoes Limited or not, will be decided at that stage. Likewise, the question debated whether M/s. Liberty Shoes Limited is not a party to the arbitration agreement can well be gone into and its effect. Thus, all these questions are left open at this stage. While dismissing the application, M/s. Liberty Shoes Limited is called upon, if so advised, to file written statement in detail otherwise their objection raised in the application will be decided at the appropriate stage as stated above.

7. The petitioner moved an application u/s 34 of the Act for setting aside the order passed by the learned arbitrator referred to above by terming it as an interim award. The learned Additional District Judge, Karnal, dismissed the said application by holding that the matter was sub judice before the Hon"ble High Court and, therefore, the application filed by the petitioner u/s 34 of the Act for setting aside interim award dated 02.04.2006 could only be maintainable before the Hon"ble High Court and the same was not maintainable before him. Accordingly, the application was returned to the petitioner for presentation before

the proper court.

8. The petitioner herein has challenged the said order primarily on the ground that u/s 34 of the Act, recourse to a court against an arbitral award can be made only by an application for setting aside the said award in accordance with Sub-section (2) and Sub-section (3) of Section 34 of the Act. Section 2(1)(e) of the Act defines the "court" as under:

"Court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes;

9. The contention of the learned Counsel for the petitioner was that as this Court had not exercised powers under its original jurisdiction, the petition, therefore, could lie to the principal civil court of original jurisdiction, i.e. District Judge and, therefore, it was not open to the learned Additional District Judge to have returned the petition. There is force in this contention as this Court has appointed arbitrator in exercise of revisional jurisdiction against the order passed by the Civil Judge referring the parties to arbitration in terms of the arbitration agreement. Therefore, the order impugned cannot be sustained. It cannot be said that merely because the revision petitions are pending, the High Court has retained the control over the arbitration proceedings in view of the decision of the Hon'ble Supreme Court in the case of National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. and Another, . Paras 7, 8 and 9 of the judgment read as under:

7. Before considering the said argument of the applicant and the two decisions referred to hereinabove, it is necessary for us to note the contents of the order whereby this Court had appointed Hon'ble Mr. Justice A.M. Ahmadi as the sole arbitrator. That order was made by this Court on 23.04.1999 in the above said civil appeal and the relevant portion of the order reads thus:

"Parties agree that Mr. Justice A.M. Ahmadi, Former Chief Justice of this Court, be appointed as an arbitrator. In view of this agreement between the parties, we allow this appeal, set aside the judgment of the High Court and appoint Mr. Justice A.M. Ahmadi as the sole arbitrator. The fees and expenses of the arbitrator shall be fixed by the arbitrator in consultation with the parties. The learned arbitrator is requested to conclude the proceedings within four months from the date he enters upon the arbitration. No order as to costs."

8. It is to be noted that as per the above order, this Court has not retained any power or control over the arbitration proceedings while appointing the arbitrator by consent of parties; on the contrary, it seems this Court has merely recorded a submission of the parties as to their agreement in appointing a particular arbitrator. Even the time-limit fixed therein is only a request to the learned arbitrator to conclude the proceedings within three (sic four) months from the

day he enters upon the arbitration and it is not a mandate in the sense that the failure to do so would have entitled the parties to approach this Court for suitable remedy. On facts, it is admitted that the learned arbitrator has extended the time suo motu a few times before making the award, without reference to this Court, therefore, it is clear on facts of this case that it is the arbitrator who had the control over the proceedings and not this Court. Therefore, in our opinion, the two judgments relied on by the applicant do not help the applicant because in those judgments this Court had held that while appointing an arbitrator this Court had retained control over the arbitral proceedings, therefore, under the provisions of the 1940 Act, it was this Court which could entertain an application for making the award a rule of the court and not any other court.

9. The next question to be considered by us in this application is whether the dispute having arisen prior to the coming into force of the 1996 Act and the proceedings having continued under the provisions of the 1996 Act, would the provisions of the 1940 Act still be applicable for making an application for the modification of the award, and if so, before which court. First part of this issue need not detain us because of the admitted fact that by consent of the parties provisions of the 1996 Act have been made applicable to the proceedings, which is in conformity with Section 85(2)(a) of 1996 Act, hence, it is futile to contend that for the purpose of challenge to the award the 1940 Act will apply. Hence, we reject this contention. In regard to the forum before which the application for modification or setting aside the award is concerned, we find no difficulty in coming to the conclusion that in view of the provisions of Section 34 read with Section 2(1)(e) of the 1996 Act it is not this Court which has the jurisdiction to entertain an application for modification of the award and it could only be the principal civil court of original jurisdiction as contemplated u/s 2(1)(e) of the Act, therefore, in our opinion, this application is not maintainable before this Court.

10. The Hon''ble Supreme Court in the case of Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, has been pleased to lay down as under:

Even if the Member of Board of Revenue had no power to issue direction for giving notice for refund of the excess amount paid, no exception can be taken to the said order if it is found that legally the appellant was paid excess compensation under the Act.

Thus, it is held that the order of the learned Member of Board of Revenue directing action to be taken for refund of the excess compensation was valid and proper though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant.

11. It has to be considered whether any useful purpose would be served in remanding the case back to the learned Additional District Judge for retrial on merit, as in my opinion, the petition u/s 34 of the Act was not competent since the order passed by the arbitrator could not be said to be an interim award.

Accordingly, the parties were directed to address arguments on the point as to whether the order passed by the learned arbitrator could be said to be an interim award.

12. Mr. Ashok Aggarwal, Senior Advocate, appearing with Mr. P.S. Rana, Advocate, for the petitioner, contended that the order passed by the arbitrator could not be said to be one u/s 16 of the Act, to debar the petitioner from challenging the same. The contention of the learned senior counsel for the petitioner was that it was an interim award. In support of his contention, the learned senior counsel for the petitioner referred to definition of "arbitral award" as given u/s 2(1)(c) of the Act to contend that the "arbitral award" includes an interim award and, therefore, the application moved by the petitioner u/s 34 was maintainable in view of Section 34(2)(a) of the Act which reads as under:

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that Part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or.

13. Learned senior counsel for the petitioner placed reliance on the judgment of the Hon''ble Supreme Court in the case of Satwant Singh Sodhi Vs. State of Punjab and Others, to contend that the order passed by the learned arbitrator has to be treated to be an interim award as it has finally determined the rights of the parties and is to be treated as a complete award and would continue to have the effect even after the final award is delivered. However, no such inference can be drawn from the judgment of the Hon''ble Supreme Court as in the present case by way of impugned order no rights of the parties to the matter in dispute have been decided. Section 31(6) of the Act is clear that only those matters qua

which the reference is made and part thereof is decided, the same can be said to be an interim award and no other order passed by the arbitrator can be said to be an interim award, which can be challenged u/s 34 of the Act.

14. The contention of the learned senior counsel for the petitioner was that as interim award was not defined and, therefore, any order in connection with arbitral proceedings would be deemed to be an interim award. He also made a special reference to Section 31(6) of the Act, which reads as under:

The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

15. I have considered this argument of the learned Counsel for the petitioner and find no force in the same.

16. The impugned order passed by the arbitrator can, by no stretch of imagination, be said to have been passed on a matter referred to it with respect of which the arbitrator can make a final arbitral award. The application moved by the petitioner was more or less in the nature of challenge to the jurisdiction of the arbitrator qua the petitioner and would, therefore, be prima facie covered u/s 16 of the Act. In case the said plea was accepted, it was open to the respondents to file an appeal against the said order u/s 37 of the Act, whereas the rejection of the said application cannot be the subject matter of appeal and the parties can only challenge the said decision when final award is made u/s 34 of the Act.

17. On the other hand, Mr. R.K. Gupta and Mr. Sunish Bindlish, learned Counsel, appearing for the caveator-respondents, contended that the order passed by the arbitrator holding that it had jurisdiction to entertain the dispute could not be challenged before any judicial authority in view of Section 5 of the Act. Learned Counsel further contended that no appeal against the said order was competent nor the order passed by the arbitrator could be said to be an interim award. In support of this contention, learned Counsel for the respondents placed reliance on the judgment of the Hon'ble Delhi High Court, reported in Union of India and Another Vs. M/s East Coast Boat Builders and Engineers Ltd., . Paras 16,17,17A and 20 (paras 16,17,18 and 21 of Arb. LR) of the said judgment read as under:

16. I have carefully considered the respective contentions of the learned Counsel for the parties and have gone through the provisions of the Arbitration and Conciliation Act, 1996 as well as the relevant provisions of the British Arbitration Act, 1996, the UNCITRAL Model Law and Rules and the commentary of Russell on Arbitration Act. For reasons given in the following paragraphs, I am of the view, that this petition is not maintainable as no appeal is provided under the Act against the impugned order and that the impugned order is not an interim award and thus not challengeable u/s 34 of the Act.

17. No doubt the Preamble of the Act says that it is expedient to make laws respecting arbitration and conciliation taking into account the UNCITRAL Model

Law and Rules but it cannot be said that each and every provision of the said Model Law and Rules forms part of the Act. Those Model Law and Rules were in fact taken into account while drafting and enacting the Act but whatever has been enacted is the law on arbitration enforceable in India. It may be a fact that the British Arbitration Act, 1996 contains a provision that if the arbitral tribunal rules on jurisdiction in its favour, the order would be an award and thus challengeable in courts but any such provision in the British Act enacted on the lines of said Model Law and Rules cannot be binding in the country of India where the provisions of the Indian Act do not conform to the provisions of the British Act on the point under consideration. In my opinion, had there been lacunae in the provisions of the Indian Arbitration Act on the point at issue or if it contained such provisions which are capable of two or more different interpretations then of course internal aid of the Preamble to the Act could be taken for interpreting such provision and then the relevant provisions of the said Model Law and Rules could be read so as to interpret that provision because while enacting the Indian Act, said Model Law and Rules were taken into account. I, however, do not find any such lacunae or confusion. The provisions on the relevant point at issue are unambiguous. The scheme of the Act is in clear terms. Provisions of Section 37 appear to have been consciously enacted not to provide relief to the aggrieved party at that stage of arbitral proceedings where the arbitral tribunal decides the issue of jurisdiction in its favour. Otherwise, Section 37 of the Act would have been enacted differently. To my mind, Section 37 had been enacted in that manner only to minimise the supervisory role of courts in the arbitral process at that stage.

17A. In my opinion, the impugned order is not an interim award. The terms "award" or "arbitral award" have not been defined in the General Clauses Act, 1897. In the Arbitration and Conciliation Act, 1996, though the term "arbitral award" has been defined but the definition is only an inclusive definition, that is to say, the arbitral award includes an interim award. It is also to be seen that the term "interim award" has not been defined in the Act. Therefore, definition of interim award is to be found elsewhere. Their Lordships in *Uttam Singh Dugal and Co. Pvt. Ltd., New Delhi Vs. Hindustan Steel Ltd., Bhilai Steel Project, Bhilai*, and in *Anand Prakash and Another Vs. Assistant Registrar, Co-operative Societies and Others*, , held that an order in the nature of the impugned order cannot be termed as an interim award. I am in agreement with the observations in the aforesaid cases in holding that the impugned order is not an interim award.

20. Section 5 of the Act categorically provides that no judicial authority shall intervene except where so provided in Part I of the Act. On perusal of the provisions of Part I of the Act, it is apparent that nowhere it is provided that a court may intervene and entertain a petition challenging the order passed by arbitral tribunal u/s 16(5) taking a decision that the arbitral tribunal has jurisdiction to proceed with the arbitration case. In view of the prohibition contained in this section, I refrain to interfere.

18. Learned Counsel for the respondents also placed reliance on the judgments of the Hon'ble Gujarat High Court in *Nirma Ltd. Vs. Lurgi Energie Und Entsorgung GMBH and Others*, ; Allahabad High Court in *Anand Prakash and Another Vs. Assistant Registrar, Co-operative Societies and Others*, ; Madhya Pradesh High Court in *Uttam Singh Dugal and Co. Pvt. Ltd., New Delhi Vs. Hindustan Steel Ltd., Bhilai Steel Project, Bhilai*, ; and Bombay High Court in *M/s. Anuptech Equipments Private Ltd. Vs. M/s. Ganpati Co-op. Housing Society Ltd. and others*, which are to the same effect holding that an interim order is not an interim award against which objections u/s 34 of the Act are maintainable.

19. Learned Counsel for the respondents also argued that the arbitral tribunal/arbitrator had a right to decide whether it had a jurisdiction to proceed with the arbitration where there was any agreement between the parties or when any matter is referred to the tribunal, then it is not open to the judicial authority to interfere with the order passed by the arbitrator during the course of arbitration proceedings.

20. I have considered the arguments raised by the learned Counsel for the parties and find force in the contentions raised by the learned Counsel for the respondents.

21. The reading of the impugned order passed by the arbitrator shows that the arbitrator had rejected the application moved by the petitioner against deletion of its name by holding that it had the jurisdiction to proceed with the matter against the petitioner. The fact that the learned arbitrator has ordered the petitioner to file the written statement in detail if so advised, indicates that the learned arbitrator prima facie came to the conclusion that he had the jurisdiction to adjudicate upon the matter and, therefore, the order passed by the arbitrator is an interim order and not an interim award against which an application u/s 34 of the Act could be maintainable. The impugned order cannot be said to be an order with respect to which a final arbitral award is to be passed so as to bring it within the definition of interim award as is sought to be contended by the learned senior counsel for the petitioner. This Court in *Bhupinder Singh vs. Punjab State and Ors.* 2005 (3) PLR 742 has been pleased to lay down that in case the matter can be conclusively disposed of in a particular manner, then remanding the case for a fresh determination would be a futile exercise. In the present case also, once the petition u/s 34 of the Act is not competent against the impugned order, it would be a futile exercise to remand the case back to the learned Additional District Judge directing him to decide the matter afresh on merit.

22. For the foregoing reasons, the revision petition is dismissed.