
(2019) 07 BOM CK 0082

In the Bombay High Court

Case No : Arbitration Petition No. 556, 557 Of 2017

Mohammed Kader Hassan

APPELLANT

Vs

Gokulam Chit & Finance Co. (P) Ltd

RESPONDENT

Date of Decision : 18-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 16, 34
Chit Funds Act, 1982 — Section 2(r), 2(j), 3, 64, 64(1), 64(3)
Indian Contract Act, 1872 — Section 23

Citation : (2019) 07 BOM CK 0082

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Shriram Kulkarni, Vrushali Kabare, Vivek Patil, Makrand Kale, Amit Singh

Final Decision : Allowed

Judgement

1. By these two petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996, the Petitioner has impugned the arbitral awards, both dated 13 January 2017, thereby allowing claims made by the Respondent. By consent of the parties, both these arbitration petitions were heard together and are being disposed off by a common order. The facts giving rise to these petitions are as follows :Â?

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2. The Respondent is a NonÂBanking Financial Company, incorporated under the Indian Companies Act, 1956. The petitioner is a

member/subscriber/surety of the Chit Fund Scheme framed by the Respondent, under the provisions of the Chit Funds Act, 1982. It is the case of the

Respondent that the Petitioner was a successful bidder for the relevant month and was paid a sum of Rs.3,95,000, vide cheque dated 20 December

2007. The Petitioner was liable to pay the monthly installments as fixed or the reduced amount which is arrived at after holding the months bidding during the entire tenure of the scheme. It is the case of the Respondent that the Petitioner paid a sum of Rs.2,93,500 including the dividend and still there was a balance of Rs.2,06,500 due and payable by the Petitioner to the Respondent towards the said chit funds along with interest amount of Rs.5,69,940, totalling to a sum of Rs.7,76,440 since 2015.

3. The Respondent filed statement of claim before the learned Arbitrator against the Petitioner inter alia praying for an aggregate sum of Rs.7,76,440 together with interest thereon and costs. The Petitioner filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 on 7 November 2016 and filed the written statement in the month of November 2016. There was no reply filed by the Respondent to the said application filed by the Petitioner under Section 16. The Respondent filed the affidavit of evidence dated 23 November 2016 before the Arbitrator. It is the case of the Petitioner that without giving any opportunity to cross examine the said witness and also to lead evidence, the learned Arbitrator passed the award on 13 January 2017, directing the Petitioner to pay a sum of Rs.7,76,440 with interest at the rate of 18 per cent per annum from 3 October 2015 till payment and/or realization. The Petitioner had filed his written arguments before the learned Arbitrator on 30 December 2016.

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4. The Petitioner and the Respondent had entered into an agreement dated 8 January 2008, which provided for an arbitration clause. It is the case of the Respondent that the Petitioner committed a default in the payment of the balance subscription. The monthly subscription of the alleged chit group was Rs.25,000 per month for a period of 20 months. The Respondent had paid a sum of Rs.3,75,000 to the Petitioner under the said chit group, the Petitioner being the successful bidder of the chit fund for the relevant month. The Respondent filed a statement of claim before the learned Arbitrator for a recovery of Rs.13,38,838 with interest. The Petitioner filed an application under Section 16 of the Arbitration and Conciliation Act 1996 on 7 November 2016 and filed the written statement on 28 November 2016. The Respondent did not file any reply to the said application filed by the Petitioner under Section 16. The Respondent filed affidavit of evidence dated 20

December 2016 before the learned Arbitrator.

5. It is the case of the Petitioner that without giving any opportunity to the Petitioner to cross examine the witness and also to lead evidence, the

learned Arbitrator made an award on 13 January 2017, directing the Petitioner to pay a sum of Rs.13,38,838 along with interest at the rate of Rs.18

per cent per annum. The Petitioner had filed the written arguments before the learned Arbitrator on 30 December 2016. The Petitioner has impugned

the said award dated 13 January 2017 in this petition.

6. Mr. Shriram Kulkarni, learned Counsel appearing for the Petitioner in both the arbitration petitions submits that the arbitration agreement recorded

in the agreement between the parties was not valid under the provisions of the Chit Funds Act 1982 and was contrary to the provisions of law. It is

submitted that the said Chit Funds Act, 1982 being a self-contained Code, the provisions of Arbitration and Conciliation Act, 1996, were not

applicable to the parties. He invited my attention to the various grounds taken in the petitions. He submits that in an identical matter, this Court in the

case of Dinesh Jaya Poojary Vs. M/s Malvika Chits India Pvt. Ltd., Arbitration Petition No.549-16, decided on 28 June 2019 has set aside the

impugned award after accepting the submissions made by the Petitioner in that arbitration petition which are similar to the submissions made by him in

these two arbitration petitions. He submits that the said judgment of this Court squarely applies to the facts of the present case.

7. Mr. Vivek Patil, learned Counsel appearing for the Respondent, on the other hand, submits that the judgment of this court in the case of Dinesh

Poojary (supra), relied upon by learned Counsel for the Petitioner is clearly distinguishable from the facts of the present case. It is submitted by

learned Counsel that the Chit Funds Act is of the year 1982, whereas the Arbitration and Conciliation Act was enacted in the year 1996. Learned

Counsel submits that in the present case, provisions of the Arbitration and Conciliation Act, 1996, would prevail and not the provisions of the Chit

Funds Act, 1982.

8. It is submitted by learned Counsel that in Section 64 of the Chit Funds Act, 1982, the expression "arbitration" referred to clearly indicates the

legislative intent that the provisions of Arbitration and Conciliation Act, 1996, would be applicable, although the transactions carried out by and

between the parties were under the provisions of the Chit Funds Act, 1982, in so far as the remedy of arbitration available to the parties for resolution of the dispute is concerned.

9. It is submitted by learned Counsel that the arbitration agreement entered into between the parties recorded in the agreement, is not in conflict with the public policy. In support of this submission, learned Counsel has placed reliance on the judgment of Supreme Court in case of Indian Financial

Association of Seventh Day Adventists Vs. M.A. Unneerikutty (2006) 6 Supreme Court Cases 35.1 Paragraphs 17 and 19 of the said judgment reads

thus :¹⁷

¹⁷17. The term 'public policy' has an entirely different and more extensive meaning from the policy of the law. Winfield defined it as a

principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and

varies from generation to generation. Judges, as trusted interpreters of the law, have to interpret it. While doing so, precedents will also guide them to

a substantial extent.¹⁹

¹⁹19. The doctrine of public policy may be summarised thus :

¹⁹Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly

horse', etc.; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which from

the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy;.... but the

doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just

like any other branch of common law, it is governed by precedents; the principles have been crystalised under different heads and though it is

permissible for the courts to expound and apply them to different situation, it should only be invoked in clear and incontestable cases of harm to the

public.²⁰

10. Learned counsel placed reliance on the judgments of the Supreme Court in the case of Ssangyong Engineering & Construction Co. Ltd. Vs.

National Highways Authority of India (NHAI) 2019 SCC OnLine SC 67 7and Gherulal Parakh Vs. Mahadeodas Maiya. AIR 1959 S.C. 781

Paragraph 23 of the judgment of Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. (supra) read thus :â

â??23. Asquith L.J. in Monkland V. Jack Barclay Ltd., 1951â?1 All ER714 restated the law crisply at p 723:

â??The Courts have again and again said, that where a contract does not fit into one or other of these pigeonâholes but lies outside this charmed

circle, the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is

incontestably and on any view inimical to the public interest.â? The Indian cases also adopt the same view. A Division Bench of the Bombay High

Court in Shrinivas Das Lakshminarayan V. Ram Chandra Ramrattandas, ILR 44 Bom 6: (AIR 1920 Bom 251) observed a p.20 (of ILR Bom): (at

pp.251â?252 of AIR):

â??It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the

Court regards as public policy. This is laid down in section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of

law as was affirmed by Lord Halsbury in 1902 AC 484 at p.491 that no Court can invent a new head of public policy, but the dictum of Lord Davey in

the same case that â??public policy is always an unsafe and treacherous ground for legal decisionâ? may be accepted as a sound cautionary maxim

in considering the reasons assigned by the learned Judge for his decision.â??

11. Learned Counsel for the Respondent does not dispute that the transactions between the parties were carried out under the provisions of the Chit

Funds Act, 1982. In my view the judgment of this Court in the case of Dinesh Poojary (supra) squarely applies to the facts of this case. In the said

judgment, this Court has not decided whether the agreement entered into between the parties was in conflict with public policy, as sought to be

canvassed by the learned Counsel for the Respondent. None of these judgments relied upon by the Respondent would assist the case of the

Respondent and the same are clearly distinguishable from the facts of the present case.

12. This court in the said judgment of Dinesh Poojary (supra) has categorically held that Section 64 of the Chit Funds Act, 1982, clearly indicates that

Subâsection (1) of Section 64 provides for a non obstante provision. The

expression "any dispute touching the management of chit business" is explained in the explanation to the said Section 64(1). The Respondent has not disputed in this case that the Petitioner was subscriber and the Respondent was a foreman, under Section 2(r) and Section 2(j), respectively. In the said judgment, it was held that the disputes between the parties related to the chit business. Statement of claim filed by the Respondent was for resolution of disputes arising out of the chit business, which was touching the management of chit business and thus provisions of the Chit Funds Act, 1982, were clearly attracted to the facts of that case. Filing of a claim for recovery of dues under the provisions of the Chit Funds Act, 1982 by a foreman amounts to dispute touching the management of chit business. This Court in the said judgment held that the provisions clearly indicates that the Chit Funds Act, 1982 being a self-contained Code, the provisions of the Arbitration and Conciliation Act, 1996, were not applicable to the disputes relating to the chit business. Under Subsection (3) of Section 64 of the Chit Funds Act, 1982, a Civil Court is barred from entertaining any suit or other proceedings in respect of any dispute referred in Subsection (1) of Section 64 of the said Chit Funds Act. This Court held that disputes could be referred only to the Registrar for arbitration as provided in Section 64 of the said Chit Funds Act.

13. This Court held that the said agreement referred to in the arbitration agreement between the parties was contrary to Section 64 read with Section 3 of the said Chit Funds Act, 1982. The exclusive remedy of the arbitration before the Registrar under Section 64 of the Chit Funds Act, 1982, being statutory arbitration in nature cannot be varied by an agreement of the parties by referring the dispute to private arbitral forum contrary to Section 3 of the Chit Funds Act, 1982. This Court in the said judgment accordingly, has set aside the order passed by the learned Arbitrator rejecting the application under Section 16 of the Arbitration and Conciliation Act, 1996 filed by the Petitioner and also set aside the impugned award. This Court declared that the learned Arbitrator had no jurisdiction to entertain, try and adjudicate the disputes filed by the Respondent. It is however, made clear that the Respondent would be at liberty to file appropriate proceedings for recovery of amount according to law. In my view, the said judgment in case of Dinesh Poojary (supra) of this Court is clearly applicable to the facts of the

present case. Mr. Patil, learned Counsel for the Respondent could not distinguish any part of the judgment.

14. Insofar as submissions of Mr. Patil, learned Counsel appearing for the Respondent that Arbitration and Conciliation Act, 1996 having been enacted in later point of time than the Chit Funds Act, 1982 and thus provisions of Arbitration and Conciliation Act, 1996 are applicable are concerned, in my view, there is no substance in this submission. This Court has already held in the judgment of Dinesh Poojary (supra) that provisions of Arbitration and Conciliation Act, 1996 are not applicable to the transactions carried out under the provisions of the Chit Funds Act, 1982.

15. Insofar as submissions of learned Counsel for the Respondent that the parties entered into an agreement recording arbitration agreement and the said agreement is not in conflict with the public policy is concerned, this Court in the said judgment of Dinesh Poojary (supra) has held that the exclusive remedy of arbitration before the Registrar under Section 64 of the Chit Funds Act, 1982 being statutory arbitration cannot be varied by an agreement of parties by referring the dispute to private arbitral forum contrary to Section 3 of the Chit Funds Act, 1982.

16. A perusal of the award indicates that the learned Arbitrator has not even dealt with the issue of jurisdiction raised by the Petitioner in the application filed under Section 16 of the Arbitration and Conciliation Act, 1996 and has taken a casual approach in passing the award.

17. A perusal of Statement of Objects and Reasons of the Chit Funds Act, 1982 indicates that the said Act has been enacted as a Central legislation,

as a step, besides ensuring uniformity in the provisions applicable to chit fund institutions throughout the country to prevent such institutions from taking

advantage either of the absence of any law governing chit funds in any State or exploit the benefit of any lacuna or relaxation in any State Law by

extending their activities in such States. The scheme of the Act and the provisions made therein largely follow the pattern of chit fund legislations in

force in some of the States and includes certain new provisions such as minimum capital requirements for companies conducting chit business,

prohibiting chit fund companies from doing any other business, placing a ceiling on the aggregate chit amounts of chits that are being conducted by chit

fund institutions, providing for a self-contained machinery for the settlement of

the disputes between a foreman and the subscribers by means of an arbitration. In my view, the legislative intent is clear that a self-contained machinery for the settlement of the disputes between a foreman and the subscribers by means of arbitration is prescribed under the provisions of the said Chit Funds Act, 1982 and thus could not be varied by a private agreement between the parties.

18. I, therefore, pass the following order.

(i) The impugned awards both dated 13 January 2017 are set aside.

(ii) Applications both dated 7 November 2016 filed by the Petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 are allowed.

(iii) It is declared that the learned Arbitrator did not have jurisdiction to entertain, try and adjudicate upon the disputes filed by the Respondent.

(iv) It is made clear that this Court has not expressed any views on merit of the claims made by the Respondent and awarded by the learned

Arbitrator.

(v) The Respondent would be at liberty to file appropriate proceedings for recovery of the amount according to law. If any such proceedings are filed

by the Respondent, such proceedings shall be decided without being influenced by the observations made and the conclusion drawn in the arbitral

awards dated 13 January 2017.

19. The arbitration petitions are made absolute on the aforesaid terms. There shall be no order as to costs.