

(2017) 07 BOM CK 0196

In the Bombay High Court

Case No : 73 of 2017 IN ARBITRATION PETITION NO 999 of 2016

M/s. Pandi Devi Oil Private Limited

APPELLANT

Vs

M/s. Shakti International Pvt. Ltd.

RESPONDENT

Date of Decision : 13-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41Rule 3](#), [Order 6Rule 17](#), [Order 6Rule 18](#), [Order 41Rule 2](#) -
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Citation : (2017) 07 BOM CK 0196

Hon'ble Judges : Naresh H. Patil, Bharati H. Dangre

Bench : DIVISON BENCH

Advocate : Pradeep Rajagopal, Drishti Shah, Rekha Rajagopal, Rohan Cama, Abhishek Adke

Final Decision : Dismissed

Judgement

1. Admit. Heard finally by consent of parties.

2. The appellant herein - M/s. Pandi Devi Oil Private Limited filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the Act of 1996), challenging an award dated 18/3/2015 passed in terms of consent terms signed between the parties to the arbitration. The consent terms were executed by and between the parties on 18/3/2015. The Board of Directors resolved on 16/3/2015 to execute, sign and file consent terms and place the same before the Arbitrator and seek an award in terms of the consent terms. The consent terms are placed before us, annexed at Annexure "A". The appellant is a private limited company incorporated under the provisions of the Companies Act, 1956 and carried on business of importing Palm Oil. The respondent - company is also incorporated under the provisions of the Companies Act, 1956, engaged in the business of importing Edible Oil and other allied business.

3. The appellant herein submitted that the appellant need not go into the facts of the case as the challenge in the appeal is confined to consent terms filed before the Arbitrator. In other words, the appellant did not raise any challenge on the merits of the case. The appellant raised questions of law as under :-

(A) Where in the facts and circumstances of the case in law, can the Appellant withdraw the Consent Terms filed before the Learned Arbitrator at any time.

(B) Whether in the facts and circumstances of the case, is it correct for the Arbitrator to terminate the Arbitral proceedings when admittedly so, the Arbitral Award was not delivered to the Appellate under Section 31(5) of the Arbitration and Conciliation Act, 1996 (herein after called the Said Act).

(C) Whether in the facts and circumstances of the case, is it correct in law for the Learned Arbitrator to declare as *Functus Officio* after terminating the Arbitral Proceedings.

4. The appellant submits that in the consent terms, the appellant gave figure of Rs.5.25 crores as payable to the respondent herein - the original claimant, as against the figure of Rs.1.75 crores, the original claim. The appellant entered into a Memorandum of Understanding (MOU) on 19/3/2015. In the Procedural Order Sheet No. 21 dated 18/3/2015, the Arbitrator recorded that in view of the consent terms, the arbitral proceedings stood terminated. The appellant sought advise of Chartered Accountant where he was advised that filing of consent terms was unwarranted. The discussion continued till the month of July, 2015, when the consent terms came to be withdrawn. The appellant took opinion of legal experts and after taking such advise / opinion, the appellant was convinced that the consent terms need to be withdrawn and accordingly the same was done on 29/7/2015, which was much before the actual delivery of the award on 3/8/2015. On 30/7/2015, the Arbitrator recorded in the Procedural Order Sheet that in the light of the consent terms, the Tribunal had become *functus officio*. The award was not communicated to the appellant.

5. By an order dated 17/2/2017, the leaned Single Judge (Coram: S. J. Kathawalla,J.) dismissed the petition filed by the appellant under Section 34 of the Act of 1996.

6. Mr. Rajagopal, learned counsel appearing for the appellant, submitted that the appeal is required to be considered by invoking powers of this court conferred under Section 34(2)(b) of the Act of 1996. The learned counsel submits that in the facts and considering the merits of the case, it would be appropriate that this court would interfere, if it finds that it is a fit case for invoking its jurisdiction under Section 34(2)(b)(i). Learned counsel sought to distinguish the principles governing the exercise of jurisdiction by the courts entertaining application under Section 34 (2) and 34(2)(b). Under Section 34(2)(b), the Court would invoke jurisdiction if it finds that interference is required under two contingencies prescribed under Section 34(2)(b)(i) and (ii). The court would be entitled to take notice *suo motu* of the facts. The learned counsel fairly made a statement that

the appellant is not pressing the ground of coercion in submitting the consent terms. The counsel referred to the Division Bench judgment of the Kerala High Court in the case of Mohammed Mamdouth Matwally Ghali vs. Kerala Automobiles Ltd. [2011 SCC OnLine Ker 4168].

7. Mr. Cama, learned counsel appearing for the respondent had raised a preliminary objection before the learned Single Judge that the grounds for challenge taken in the Arbitration Petition did not fall within the scope of Section 34 of the Act of 1996. The counsel further submitted that the court may interfere in cases falling under Section 34(2)(b)(i) in the rarest of rare cases while exercising suo motu power. It was submitted that the appellant failed to raise such a ground seeking interference of the court invoking power under Section 34(2)(b) before the learned Single Judge. Having not raised this ground either in the Arbitration Petition or during the argument, it is not open to the appellant to raise the same for the first time in the appeal before the Division Bench. In the alternative, the counsel submitted that in case Section 34(2)(b)(i) applies, this is not the case, where the dispute is not capable of settlement by arbitration. The counsel referred to judgment of the Supreme Court in the case of Booz Allen and Hamilton vs. SBI Home Finance Ltd. And ors. [AIR 2011 SC 2507], in which case six categories of cases of disputes were referred as not capable of settlement by arbitration by adding mortgage suits to these categories. The appellant itself brought issue of RBI guidelines within the ambit of arbitration and asked the Arbitrator to adjudicate thereupon. The issue of RBI guidelines is not an issue of lack of jurisdiction or one which would render the dispute incapable of settlement in arbitration. The counsel submitted that the new ground sought to be raised first time in the appeal cannot be permitted to be raised after lapse of period under Section 34(3). Even if permitted to be raised, the same ought to have been raised before the court as prescribed under Section 34 and could not be raised for the first time in appeal under Section 37. The appellant is challenging the consent award when there is no determination or adjudication of any matter. Thus, the scope of challenge is limited. As the appellant had given up the only ground that could ostensibly have been argued to consider the challenge i.e. coercion, the appeal ought to be dismissed. Learned counsel places reliance on the following judgments :

(a) State of Maharashtra vs. Hindustan Construction Company Ltd. [(2010) 4 SCC 518].

(b) Booz Allen and Hamilton vs. SBI Home Finance Ltd. And ors. [AIR 2011 SC 2507].

(b) Vastu Invest & Holdings Pvt. Ltd., Mumbai vs. Gujarat Lease Financing Ltd., Mumbai [2001 Mh.L.J. 565].

8. We have perused the record and the judgments cited (Supra). The provisions of Section 34(2)(b) reads asunder :-

"34. Application for setting aside arbitral award. - (1)

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

(a)

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian Law; or

(iii) it is in conflict with the most basic notions of morality or justice]

[Explanation 2. - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.].

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

The definition of "Court" as prescribed under Section 2(e) of the Act of 1996 reads as under :-

2. Amendment of section 2. - In the Arbitration and Conciliation Act, 1996 (26 of 1996) (hereinafter referred to as the principal Act), in section 2 -

(I) in sub-section (1),-

(A) for clause (e), the following clause shall be substituted, namely: -

(e) "Court" means -

(i) in the case of an arbitration other than international commercial arbitration, 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;

(ii) in the case of international arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

9. During the course of hearing, learned counsel Mr. Rajagopal appearing for the appellant highlighted the only ground for consideration of this court which relates to the application of the provisions of Section 34(2) (b). Much emphasis was laid by the learned counsel on the terms "the Court finds that" occurring in Section 34(2)(b).

10. In the case of Mohammed Mamdouth Matwally Ghali (Supra), the Division Bench of Kerala High Court observed in para 34 as under :-

"34. If the court finds that the award is vitiated by gross perversity and consequently patent illegality, the court should not hesitate to invoke the power under Sec. 34(2)(b)(ii). We are in agreement that such an approach is necessary to maintain the purity and credibility of the process of arbitration to which the Indian law gives great emphasis as can be seen from Sec. 89 of the amended C.P.C."

In the case of State of Maharashtra vs. Hindustan Construction Company Limited (Supra), the Apex Court considered the scope of provisions of Order 6 Rules 17 and 18, and Order 41 Rules 2 and 3 of CPC and principles allowing amendment in the context of provisions of Sections 34 and 37 of the Act of 1996. Paras 31 and 32 of the said judgment read as under :-

"31. L. J. Leach & Co. Ltd. And Pirgonda Hongonda Patil, seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment of the grounds in appeal under Section 37 of the 1996 Act.

32. It is true that, the Division Bench of the Bombay High Court in Vastu Invest & Holdings (P) Ltd. held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso to sub-section (3) of Section 34, but, in our view, by "an independent ground" the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein.

In the case of Vastu Invest & Holdings Pvt. Ltd., Mumbai vs. Gujarat Lease

Financing Ltd., Mumbai (Supra), the Division Bench of this court in paras 14 and 15 observed as under :-

"14. The law has been well settled even under the Arbitration Act, 1940, that a ground not initially raised in the petition to challenge the award could not be permitted to be subsequently raised by an amendment, if the application for amendment itself was beyond the period of limitation fixed for filing of the petition, challenging the award.

15. We may point out that under the 1940 Act, the limitation for bringing a petition to challenge an award was prescribed by the Limitation Act, subject to the provisions of the Limitation Act and the power of condonation of delay contained therein. The 1996 Act has radically altered the situation. We cannot lose sight of the fact that the 1996 Act is intended to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law, inter alia, as indicated in the preamble. Consequently, the Act has permitted very limited scope of challenge to an arbitral award. Section 34(1) provides that an arbitral award may be challenged only by an application for setting aside such award in accordance with sub-sections (2) and (3). Sub-sections (2) and (3) of section 34 provide that an arbitral award may be set aside only on the grounds narrated in sub-section (2). Finally, sub-section (3) provides that such an application for setting aside an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which the said request had been disposed of by the arbitral tribunal. Thus, there is extremely narrow power of condonation of delay vested in the Court by the proviso. The proviso empowers the Court, if satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months, to entertain the application within a further period of 30 days but not thereafter."

In the case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and ors. (Supra), in para 22, the Supreme Court observed as under :

"22. Arbitral tribunals are private for a chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may be necessary implication stand excluded from the purview of private fora . Consequently, where the cause / dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to

arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

11. Taking into consideration the principles set down in the aforesaid judgments, we will have to consider the plea raised by the learned counsel appearing for the contesting parties. The record shows that after the consent terms were filed, the Arbitrator passed the order in Procedural Order Sheet No. 20 on 18/3/2015, which reads as under :

- "1. Award has been passed in terms of Consent Terms dated 18th March, 2015.
2. In view of the Consent Terms the Arbitral proceedings stands terminated.
3. In terms of the Procedural Order Sheet No.19, each of the parties were directed to deposit an amount of Rs.2,40,000/- each and thereafter the Sitting on 5th March, 2015 which was adjourned at the request of the parties.
4. Each of the parties has to deposit their share of the costs of that date.

In the light of that each of the parties to deposit an amount of Rs.3,00,000/-."

The Procedural Order Sheet No. 22 dated 17/4/2015 reads as under :

" In the instant case, Consent Terms have been signed and submitted to me. Claimants have paid their share of costs. Respondents till date have failed to deposit their costs. Respondent to kindly deposit the costs within 7 days, failing which the matter will be placed afresh for further directions, after hearing the Claimants."

12. Thereafter it seems that the respondent sought for extensions. By an order dated 30/7/2015 in Procedural Order Sheet No. 25, the tribunal observed that as there were arrears in costs payable to the Tribunal by the parties, the Award was not communicated in terms of Section 38 of the Act of 1996. In so far as the letter received from the respondent thereafter, the Tribunal had become functus officio. The respondent was granted liberty to move an application, which would be dealt with in accordance with law.

13. The learned Single Judge, while appreciating the submissions of the learned counsel, observed in the order that the consent terms nowhere referred to any MOU. A reading of the consent terms shows that the payment terms therein were not conditional or contingent upon compliance with any terms of the MOU. The

consent terms, according to the impugned award, were not contingent upon the compliance with the MOU. The learned Single Judge further observed that even the resolution dated 16/3/2015 passed by the Board of Directors of the petitioner, authorizing filing of consent terms and passing of award in terms thereof, makes no reference to the MOU, which came to be executed subsequently.

14. The submissions of the learned counsel appearing for the appellant for invoking the power of this court under Section 34(2)(b)(i) will have to be considered in the light of the merits of the case and the plea raised by the parties before the court. In the facts, we do not find that the appellant could establish any such ground before this court causing interference by this court by invoking provisions of Section 34(2)(b) of the Act of 1996. We do not find that the award is not capable of settlement by arbitration under the law for the time being in force. We do not find any error in the orders passed by the Arbitrator in the Procedural Sheets. Belated plea raised by the appellant in respect of existence of MOU and a conditional compliance of award are not sustainable pleas. We do not notice any error or perversity in the view adopted by the learned Single Judge for dismissing the Arbitration Petition. There is no merit in this appeal.

15. The Appeal is accordingly dismissed.