

(2013) 01 BOM CK 0087

In the Bombay High Court

Case No : Appeal No. 72 of 2012 in Arbitration Petition No. 50 of 2008

M/s. S. Dave and Company and Others

APPELLANT

Vs

Tata Chemicals Limited

RESPONDENT

Date of Decision : 29-01-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 7 BomCR 858

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Robin Jaisinghania with Mr. Basant Trilokani instructed by Jhangiani Narula and Associates, for the Appellant; Dinyar D. Madon with Mr. Sanjay Kothari and Mr. Vipul Bilve instructed by . Mulla and Mulla and CBC, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—This appeal arises from a judgment of a Learned Single Judge dated 9 December 2011 on a Petition filed u/s 34 of the Arbitration and Conciliation Act, 1996 to challenge an award of a sole Arbitrator. By the award, the sole Arbitrator allowed the claim of the Respondent in the amount of Rs. 1.48 crores together with interest at the rate of 10% per annum from the date of the filing of the claim, till realisation. The First Appellant, which is a partnership firm, was a distributor of the Respondent admittedly for a period of nearly fifty years. The claim before the Arbitrator proceeded on the basis that the First Appellant was appointed as a distributor for several years under agreements for distribution which were renewed from time to time. The last of those agreements was for the period from 1 April 2002 to 31 March 2004. In pursuance of orders placed by the Appellants, the Respondent sold, supplied and delivered goods under the aforesaid agreements to the Appellants. Several cheques were issued by the Appellants in partial discharge of their liabilities, which were dishonoured on presentation, leading to the institution of proceedings u/s 138 of the

Negotiable Instruments Act, 1881. On 9 April 2004, the Respondent addressed a communication to the Appellants requesting them to confirm an outstanding balance of Rs. 1.48 crores as on 31 March 2004. The claim proceeded on the basis that the Appellants confirmed the amount by placing their endorsement at the foot of the said letter. By an Advocate's letter dated 14 June 2004, the Respondent called upon the Appellants to pay an amount of Rs. 1.48 crores together with interest. In reply, the Appellants by their letter dated 12 July 2004 acknowledged that the dues were indeed payable, there being no dispute in respect of the amount payable to the Respondent. The Appellants, however, stated that there were liquidity problems and sought time to pay the dues. According to the Respondent, the acknowledgement of liability by the Appellants as evidenced in the document at Exh. E to the statement of claim together with letters of acknowledgement at Exhs. G and H, reflected a jural relationship of debtor and creditor and constituted a contract and/or promise by the Appellants to pay a sum of Rs. 1.48 crores to the Respondent. It was on this basis that the claim was made in arbitration for the recovery of a principal sum of Rs. 1.48 crores together with interest at the rate of 18% per annum.

2. The Appellants examined two witnesses, namely, (i) a General Manager; and (ii) A Commercial Assistant. In the course of the Examination-in-Chief, the first witness deposed that under the practice prevailing between the First Appellant and the Respondent, on the expiration of the term of an earlier agreement, the distributorship was renewed on identical terms. The agreement for the period from 1 April 1998 to 31 March 2000 was renewed for the period between 1 April 2000 and 31 March 2002. As on 31 March 2002, a sum of Rs. 1.66 crores was payable. In accordance with the prevailing practice between the parties, the earlier agreement was renewed on identical terms for the period from 1 April 2002 to 31 March 2004. An amount of Rs. 1.48 crores was due as on 31 March 2004. The second witness, who was examined by the Claimant-Respondent, deposed to the accounting practice of the Claimant and stated inter alia that during the period of the distributorship, two reconciliation statements were signed by a partner of the Appellants and countersigned by the witness whereby accounts as of 15 December 2002 and 31 March 2003 were verified and admitted as correct. In addition, it was stated that the Appellants faxed him a reconciliation statement as of 31 March 2001. The witness stated that reconciliation statements were signed after giving effect to the opening balance as of 1 April of every financial year and as of 31 March 2004, the closing balance was Rs. 1.48 crores. Certain aspects of the cross-examination, particularly of the first witness, to which a reference has been made during the course of the submissions, would be dealt with in a subsequent part of this judgment. The sole Arbitrator held that the claim was within limitation; that the Appellants were bound by the acknowledgement of liability contained in the letter dated 9 April 2004 and that the claim was not barred by limitation. The sole Arbitrator held that an amount of Rs. 1.48 crores was due and payable by the Appellants to the Respondent for the period between 1 April 2002 and 31 March 2004 and the

claim consequently has been allowed with interest.

3. The challenge before the Learned Single Judge addressed three submissions, which have already been reiterated in appeal.

The first submission is that the claim was beyond the scope of reference to arbitration. This proceeds on the basis that the First Appellant was appointed as distributor under a distributorship agreement for the period between 1 April 2002 and 31 March 2004. In the statement of claim, the claim proceeded on the basis that goods were sold, supplied and delivered under that agreement. However, subsequently an affidavit of evidence was filed in which it was stated that there was a practice between the parties of carrying forward the balance due under an earlier agreement as the opening balance of the subsequent agreement. On this basis, it was urged that in substance, the claim was not on account of the amount due and payable under the distributorship agreement for the period 1 April 2002 to 31 March 2004, which contained an arbitration agreement, but in respect of amounts which remained outstanding under an earlier agreement or agreements. Since the arbitration clause of the agreement for the period 1 April 2002 to 31 March 2004 was invoked, it was urged that the claim was beyond the scope of reference.

The second submission is that the finding of the Learned Arbitrator is based on no evidence. No particulars of goods sold, supplied and delivered were forthcoming, nor was there any pleading in regard to the due dates of the invoices or in respect of the dates on which deliveries were effected.

The third submission is that the claim was barred by limitation. No evidence, it was urged, was adduced, when the goods were supplied and delivered: there was no evidence to indicate that the acknowledgement of liability by the Appellants was within limitation. The original invoices were not forthcoming in evidence. In the absence thereof, the Respondent, it is urged, failed to discharge the burden of establishing that the claim was within limitation. On these grounds, it was urged that the award was contrary to law and that the Learned Single Judge erred in rejecting the Arbitration Petition.

4. On the other hand, it was sought to be urged on behalf of the Respondent that (i) The statement of claim proceeded on the basis that each agreement of distributorship was renewed when the period of an earlier agreement had come to an end. The evidence of the first witness, who deposed to the practice of carrying forward the balance which was due and payable under an earlier agreement as the opening balance of the agreement for a subsequent period, was hence consistent with the basic case which was that the distributorship agreements between the Appellants and the Respondent were renewed from time to time; (ii) By a letter dated 9 April 2004, the Respondent called upon the Appellants to confirm the balance due and payable as on 31 March 2004 in the amount of Rs. 1.48 crores. The Appellants confirmed that an amount of Rs. 1.48 crores was due and payable to the Respondent in the ledger account maintained

by the Appellants. In response to an Advocate's notice dated 14 June 2004, the Appellants squarely admitted their liability in a reply dated 12 July 2004; (iii) Both the Arbitrator and the Learned Single Judge have concurrently held that the confirmation of liability was duly proved; (iv) Significantly, no evidence was adduced on behalf of the Appellants at all. Though the Appellants had a counterclaim of Rs. 2 crores, they consciously chose not to depose in support of the counterclaim. An adverse inference would have to be drawn since the Appellants failed to produce the best possible evidence which was in their possession, namely of their own books of account. In these circumstances, the Respondent discharged the burden of establishing its claim and of demonstrating that the claim was within limitation. No interference, it was urged, was warranted in appeal, having regard to the findings of the Learned Arbitrator and particularly, having regard to the fact that the Petition u/s 34 has been dismissed by the Learned Single Judge.

5. The rival submissions now fall for consideration.

6. The basis of the claim by the Respondent before the sole Arbitrator was that the Appellants were appointed as distributors of the products of the Respondent for several years under agreements for distribution entered into between them and renewed from time to time. The last of those agreements was for the period between 1 April 2002 and 31 March 2004. S.C. Kalani, the first witness of the Respondent, stated that under the practice prevailing between the Respondent and the First Appellant, on the expiration of the term of the earlier agreement, the agreement was renewed on identical terms. Thus, the agreement for 1 April 1998 to 31 March 2000 was renewed on identical terms for the period from 1 April 2000 to 31 March 2002. Once again as per the practice prevailing between the parties, the earlier agreement was renewed for the period from 1 April 2002 to 31 March 2004. The witness deposed as follows:

I say that the dues under particular Agreement, if not cleared during the period of that Agreement, was always carried forward to the subsequent Agreement and were treated as part of the outstanding under that subsequent Agreement. The First Respondent used to make payment in respect of the earlier Agreement during the period of the subsequent Agreement and the same were treated as part payments made in respect of the outstandings under the transaction of the said current Agreement.

The witness further stated that copies of the accounts were regularly sent to the First Appellant which was made aware that the liabilities under the earlier agreements were taken as a liability under the current agreement. The Appellants had raised no objection to the practice followed by the parties in respect of the suit agreements. Counsel appearing on behalf of the Appellants sought to place reliance on the admission elucidated during the course of the cross-examination to the effect that there was no document to show that the Appellants had agreed to the practice that the dues under a particular agreement if not cleared would be carried forward to the subsequent period and would be

treated as a part of the outstanding under the subsequent agreement. But, the witness also stated that while there was nothing in writing with regard to the payments to be carried forward, there was a clear understanding that the dues under the earlier agreement were carried forward under the subsequent agreement and that, therefore, there was a confirmation in writing of the balance from time to time. The second witness, who deposed on behalf of the Respondent, was S.G. Khandelwal, a Commercial Assistant. The witness explained the accounting system and stated that he had seen Exhibits B, D and E filed with the affidavit of evidence of the first witness which had been retrieved from the SAP System. The witness stated that there were two reconciliation statements which were signed by a partner of the First Appellant and countersigned by him. The witness deposed that the reconciliation statements were signed after giving effect to the opening balance at the beginning of each financial year. As on 31 March 2004, an amount of Rs. 1.48 crores was due and payable. The witness stated that he identified the signature on the reconciliation statements.

7. By a letter dated 9 April 2004, the Respondent called upon the Appellants to confirm that a balance of Rs. 1.48 crores was due from the Appellants as on 31 March 2004. The Appellants confirmed the outstanding balance. The ledger account pertaining to the Respondent in the books of the Appellants showed an outstanding. Both the Arbitrator and the Learned Single Judge have come to the conclusion that the confirmation of liability was duly proved. Though the Appellants sought to submit that the partner, who had endorsed the confirmation had no authority to do so, no evidence, oral or documentary, was produced in support of the defence. On 14 June 2004, a communication was addressed by the Respondent's Advocate to the Appellants which stated as follows:

7. As per your Ledger Account and as per the Reconciliation Statement, furnished to our clients, the balance as per your Books of Account, a sum of Rs. 1,48,32,666.37 is due and payable by you as on 31.3.2004 to our clients. As per your Ledger as on 1.3.2004, a sum of Rs. 1,48,85,601.37 Ps. was due and payable by you to our clients. However, a sum of Rs. 28,950.00 was credited to your account on 1 May 2004 being the distributor account for April 2004 (less TDS of Rs. 1485) thus leaving a balance of Rs. 1,48,05,201.37 due and payable by you to our clients.

In response to the aforesaid communication, the Appellants on 14 July 2004 squarely admitted their liability in the following terms:

There is no dispute between us and Tata Chemicals Ltd. as far as the amount payable to TATAs is concerned. It is just that we are having liquidity problems as our monies are blocked with industries which have become partially sick. Our more than Rs. 1.25 crore is blocked for more than six years.

Further we have to inform you that we have addressed a letter to the Managing Director and have informed him about the situation. We are awaiting his

response as we have clearly informed him that our intentions are not bad. Our association with Tata Chemicals Ltd. is more than 50 years and with the House of TATAs it is more than 70 years. We do not intend to spoil these relations and shall pay the company to the last rupee but we require time as at present we are not in a position to do anything.

8. We are unable to accept the submission that the claim that was made by the Respondent was beyond the scope of the reference. The foundation of the claim of the Respondent was that there was a contractual relationship between the parties by which the First Appellant was appointed as a distributor of the Respondent and that at the end of the term of a particular agreement, the relationship was renewed. This was sought to be and was proved in the evidence of the first witness, who deposed to the practice between the parties of carrying forward the balance which was due and payable under an earlier agreement to the opening balance of the subsequent agreement. When the arbitration agreement contained in the last of the distributorship agreements for the period between 1 April 2002 and 31 March 2004 was invoked, this would bring within its purview the entirety of the dues that were outstanding as on 31 March 2004. The dues that were outstanding as on the closing date of the earlier agreement, became the outstanding balance on the first day of the agreement which commenced for the period from 1 April 2002. The outstanding amount as on 31 March 2004 was Rs. 1.48 crores. The claim, therefore, pertained to the agreement for the period between 1 April 2002 and 31 March 2004 and was not beyond the scope of the reference.

9. There is no merit in the contention that the claim was barred by limitation. Undoubtedly, as a matter of first principle, it is the obligation of the Plaintiff to satisfy the Court and in an arbitration, the Arbitrator, that the action is not barred by the lapse of time. *K.S. Nanji and Company Vs. Jatashankar Dossa and Others*, On behalf of the Appellants, reliance has been placed on a judgment of a Division Bench of this Court in *Atmaram Vinayak Kirtikar Vs. Lalji Lakhamsi*, in support of the proposition that the commencement of limitation in a suit for the recovery of a claim in respect of goods sold, supplied and delivered is the date of the delivery of goods and the Court is bound to check various items which go to constitute that cause of action. In the present case, the claim proceeded on the basis that amounts were due and payable under a distributorship agreement for the period between 1 April 2002 and 31 March 2004. As we have noted, in accordance with the consistent practice between the parties, the amount which was due and payable on the closing day of the previous agreement was, at the time of renewal of the distributorship, carried forward to the agreement for the period in question, namely, 1 April 2002 to 31 March 2004. The claim of the Respondent was in respect of the amount due and payable as on 31 March 2004. This claim was within limitation. The invocation was within a period of three years. The acknowledgement of liability on 12 July 2004 was within limitation.

10. Significantly, in the present case, the Appellants chose not to adduce any

evidence at all. They did not produce their books of account and on the hypothesis that the burden rested on the Plaintiff to prove its case and to establish that its claim was within limitation. The Plaintiff discharged its burden of establishing that the claim was within limitation and of proving that an amount of Rs. 1.48 crores was due under the last of the distributorship agreements, as on 31 March 2004. In this background, it would be necessary at this stage to advert to the judgment of the Supreme Court in *Hiralal and Others Vs. Badkulal and Others*, which in turn, cited with approval, the dictum of the Privy Council in AIR 1917 6 (Privy Council) as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

This principle was reiterated by a Bench of three learned judges of the Supreme Court in *Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others*,

It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

The same position in law was reiterated by the Supreme Court in *Vidhyadhar Vs. Manikrao and Another*,

Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in AIR 1927 230 (Privy Council) .

An adverse inference would justifiably be drawn against the Appellants for choosing to remain silent and refusing to produce the best possible evidence consisting, inter alia, of their books of account which were in their possession. In view of the acknowledgment of liability by the Appellants, the claim could not have been dismissed only because the invoices were not produced. Such a defence is unacceptable, coming from a distributor who acknowledged liability, sought time to pay the outstandings and had even issued some cheques that were dishonoured.

For all these reasons, we have come to the conclusion that there is no merit in the challenge to the arbitral award and that the judgment of the Learned Single Judge in appeal does not suffer from any error. In a challenge u/s 34 of the

Arbitration and Conciliation Act, 1996, this Court would not be, in any event, justified in reappreciating the evidentiary material and substituting a finding which has been arrived at by the arbitral Tribunal, for the opinion of the Court. No case for interference is, therefore, made out. The appeal shall stand dismissed.