

(1998) 10 BOM CK 0062
In the Bombay High Court
Case No : Arbitration Petition No. 341 of 1998

Nirfabrics Limited

APPELLANT

Vs

Nirlon Limited

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Bombay General Clauses Act, 1904 — Section 21
Bombay Relief Undertakings (Special Provisions) Act, 1958 — Section 3, 4
Constitution of India, 1950 — Article 14, 19(1), 226, 245, 246
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (1999) 1 ALLMR 50 : (1999) 1 BomCR 362 : (1999) 1 MhLj 512

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Janak Dwarkadas and D.D. Madan, instructed by Kanga and Co, for the Appellant; N.G. Thakker and K.D. Parikh, for the Respondent

Judgement

F.I. Rebello, J.—Admit. Respondents waive service. By consent heard forthwith.

2. The short, but interesting question that arises in this petition is whether the Notification issued u/s 4 of the Bombay Relief Undertakings (Special Provisions) Act, 1958, has the effect of suspending proceedings pending before any Court, or Tribunal, Officer or Authority or the remedy for enforcement by the undertaking in respect of any right, privilege, obligation or liability accrued or incurred.

3. The question arises thus :- The respondents are admittedly a relief undertaking having been so notified by the State of Maharashtra u/s 3 of the Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as the Relief Act). The respondents had a claim against the petitioners. There being a provision for arbitration, the Arbitration Clause was invoked and reference was made to an Arbitrator. The reference was made in March, 1996. During the course of the proceedings the Notification issued under the Relief Act came to an end by efflux of time. The award was declared and notified on 6th July, 1998. A fresh notification under the Relief Act was published on 11th

August, 1998. On merits the Arbitrator found in favour of the respondents. The Arbitrator rejected the counterclaim raised by the petitioners. On the interpretation of law, however, the Arbitrator held that the Relief Act not only applies against rights and privileges against the undertaking, but also claims by undertaking against 3rd parties like the petitioners herein. The petitioners in the present petition have impugned the said award. It is their contention that the fresh notification having been issued the Award cannot be enforced. It is their contention that on account of the subsequent event namely the fresh notification under the Relief Act, the Award cannot be given effect to. Though in the prayer Clause the relief prayed is to set aside the impugned award dated 6th July, 1998 it is pointed out that in terms of section 36 of the Arbitration & Conciliation Act, 1996 the respondents would be entitled to execute the award as if it was a decree in the event the Award was not challenged within the period prescribed or if the challenge is rejected. It is further contended that it is not open to the respondents to contend in the petition filed by the petitioners that the Award in so far as a application of law is concerned, proceeded on a wrong proposition. Petitioners have relied on a judgment of the Division Bench of the Gujarat High Court in the case of D.S. Patel and Co. v. Gujarat State Textile Corporation Ltd. and others, 41 Company Cases 1098 to contend that on issuance of notification the remedy of the undertaking to proceed before a Court or Tribunal, etc., it also suspended.

4. On behalf of the respondents it is contended that the objection to the Award in fact is an objection that the Award is against the public policy of India. It is contended that the said Award otherwise is not subject to any other challenge u/s 34 of the Arbitration and Conciliation Act, 1996. It is further contended that as the Award is in their favour they could not have challenged the findings against them. It is, however, contended that once the award is before this Court the Court is entitled to set right the wrong proposition of law, if in fact it is so.

5. The Relief Act as this preamble shows was enacted as a temporary measure to provide for industrial relations and other matters to enable the State Government to conduct or to provide loan guarantee or financial assistance for the conduct, of certain Industrial Undertakings as a measure of preventing unemployment or of unemployment relief. In other words the object behind the Act seems to be to prevent unemployment or providing unemployment relief. The Act, however, can be made applicable only in the event the State Government, by Notification in the Official Gazette, declares that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government and carried on or proposed to be carried on by itself or under its authority, or to which any loan, guarantee or other financial assistance has been provided by the State Government to be a relief undertaking. Once it is so declared, the undertaking is deemed to be a relief undertaking and its business is to be conducted to serve as a measure of preventing unemployment or of unemployment relief. There is no challenge to the declaration of the respondents as a relief undertaking. There is also no challenge to the notification issued. It is

in these circumstances that the question as raised now needs to be decided. For that purpose it is essential to reproduce Section 4, which reads as under :-

"4(1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provision whatsoever, the State Government may, by notification in the Official Gazette, direct that-

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-section (2) of section 3---

(i) all or any of the laws in the schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be exempt therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do not however, affect the policy of the said laws) as may be specified in the notification;

(ii) all or any of the agreement, settlements, awards or standing orders made under any of the laws in the schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of, the State Government, for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification.

(iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with Clauses (i) and (ii) and the notification;

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any Court, tribunal, officer or authority shall be stayed;

(b) the right, privilege, obligation or liability referred to in Clause (a)(iv) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued;

Provided that in computing the period of limitation for the enforcement of such right, privilege, obligation or liability, the period during which it was suspended under Clause (a)(iv) shall be excluded notwithstanding, anything contained in any law for the time being in force.

(2) A notification under sub-section (1) shall have effect from such date not being earlier than the date referred to in sub-section (1) of section 3, as may be specified therein, and the provisions of section 21 of the Bombay General Clauses Act, 1904, shall apply to the power to issue such notification."

6. A bare reading of the sub-section (a)(iv) of section 4 refers to two categories of rights and privileges. In so far as sub-section (a)(i) and (a)(ii) are concerned,

it is referable to the Schedule to the Act. The schedule to the Relief Act refers to the various Central and State Acts. These are Acts in respect of which the workmen of the Relief Undertakings have certain rights. In respect of these Acts the State Government could make those Acts inapplicable, to or suspend the application of those Acts or apply them with such modification and in a like manner any settlement, agreement, award, etc. In other words rights, etc. of workers of the Relief Undertaking namely the rights, privileges, obligations and liabilities can only be determined and made enforceable in accordance with Clauses (i) and (ii) and the Notification. The object behind the said Clause seems to be that an undertaking which has become unviable is allowed to operate and in such situation the workers must also contribute and/or share in rehabilitation of the unit. The idea behind it is to reduce the liabilities of the company in respect of the workers rights and privileges so that the undertaking can be made economically viable. In so far as Clause (iv) is concerned it is of a wider import include rights, privileges, obligations, liabilities in relation to any relief undertaking. Sub-clause (4)(1)(b) however, makes it clear that the rights, privileges, obligations or liabilities referred to in Clause (a)(iv) on the Notification ceasing to have force, revive and/or become enforceable and the proceedings referred to therein shall be continued. In other words, it is a temporary moratorium and on realisation of dues against the undertaking in respect of what is covered by the said Clause. Another striking aspect is that these are all rights, privileges, etc., previous to the issuance of the Notification. Acts subsequent to the issuance of the Notification are not covered by the said sub-clause. It is, therefore, clear that the State Government when it declares the unit as a Relief Undertaking u/s 3 has to consider the material as available and then issue the Notification. It is one time measure to enable the undertaking not to be bounded with part liabilities, in the running of the industry but help to make it economically viable.

With this background can it be now said that if the undertaking itself is entitled to receive monies from others which if recovered would bring it out of financial difficulties or help the process of rehabilitation these remedies stand suspend as contended by the petitioners. If the argument is accepted the very purpose and object of the Act will be defeated. How will it be possible in such a situation where the company has been carrying on trade and business and has claims against persons, which because of the Notification cannot be immediately secured to overcome its financial difficulties. Such an interpretation in my view would be self defeating. Apart from the clear language of the section it would also defeat the very object of the Act itself. Even the language of section 4(1)(a) (iv) makes it clear that there are rights, privileges, etc. against the undertaking. Section 4(1)(a) makes it clear that it is in relation to the relief undertaking that the remedy for enforcement or proceedings stand suspended. The section does not include proceedings by the relief undertaking against others.

7. On behalf of the petitioners, however, it is contended that the very same issue was in issue before the Division Bench of the Gujarat High Court in B.S. Patel &

Co. (supra). It is contended that the Division Bench of the Gujarat High Court has taken a view that the Notification issued u/s 4 would suspend the remedy of the relief Undertaking itself. It is no doubt true that there is an observation in the judgment of the Division Bench which takes the view as urged on behalf of the petitioners herein. The observation is as under :-

"It is evident from the wording of this sub-clause that it contemplates the suspension of "any" right, privileges, obligation or liability accrued or incurred in the past. The sub-Clause, therefore, covers within its wide compass even the rights accrued in favour of the relief undertaking itself."

It is, therefore, essential to examine as to what is the ratio of the judgment of the Division Bench of the Gujarat High Court in B.S. Patel & Co. (supra). A perusal of the facts in that case would show that the issues for consideration were (i) that the Act dealt with industry which was within the legislative competence of Parliament and hence contravened Articles 245 and 246 of the Constitution; (ii) The Act was in conflict with the Industries (Development and Regulation) Act; (iii) Under the Act there was excessive delegation of power in favour of the State Government and discrimination between the persons falling in the same classification infringing Article 14 of the Constitution. (iv) The Act also infringed the right of properly guaranteed under Article 19(1)(f); and (v) the Notification issued under sections 3 and 4 were vitiated as they have been issued by the Government without applying its mind.

In other words the issue which has arisen before this Court was not directly in issue before the Division Bench of the Gujarat High Court. The said observations in the said judgment cannot be said to be the ratio of the said judgment. At the highest it can be contended that those are observations which are persuasive in nature and/or obiter dicta. Even otherwise it is contended if the section is considered this Court also must come to the same conclusion. Even to that extent I respectfully disagree with the observations of the learned Division Bench of the Gujarat High Court. The observations were made in the course of considering one of the issues namely that the Notifications issued u/s 3 was beyond the scope of that section and Notification issued u/s 4 by the Government was without applying its mind. After considering the provisions of sections 3 and 4 the learned Division Bench observed that from the perusal of the provisions contained in section 4 of the State Act it was clear that these provisions are enacted with a view to give a sort of moratorium to the undertaking in respect of which is declared a Relief Undertaking u/s 3. This moratorium would be applicable to the undertaking in respect of which the State Government has issued notification u/s 4. In other words the learned Division Bench itself considered that the effect of the Notifications are with a view to give moratorium to the undertakings of enforcing claims against it. Thereafter the learned Division Bench observed that on the other hand section 3 contemplates positive assistance in the form of loans and finance. On the other hand section 4 provides for a temporary relief. So the undertaking in question would be free

from worries of certain liabilities. All these are temporary provisions, but during this temporary period, the concern in question would be able to stand on its legs. If this happens it would necessarily result in the prevention of unemployment. Thereafter considering the scope of sub-section (iv) of section 1(a) the Division Bench has noted that sub-section (4) contemplates relief from the past liabilities incurred by the past management because it contemplates the suspension of the rights, privileges, obligations or liabilities accrued or incurred before the undertaking was declared as a relief undertaking. Thereafter the Division Bench has further noted that whatever action the Government proposes to take u/s 4 would obviously be guided by one supreme consideration, namely, of putting the industry on a second footing so that the apprehended unemployment resulting from the closure of the industry can be avoided. From all these observations what is clear is that the Division Bench itself understood that the entire purpose in suspending recovery of claims against the Relief Undertaking was to help the undertaking to stand on its own legs and by so allowing it the object of the Act would be fulfilled namely prevention of unemployment. If these observations are considered a stray observation that the notification would apply to the Relief Undertaking itself cannot be said to the law decided by the Division Bench. It is true that the petitioners before the Division Bench had a claim against the Relief Undertaking. The matter proceeded on the footing that the Notification applied to the undertaking. The question whether the Notification would apply to the undertaking itself was not in issue.

8. In the instant case even considering the notification the language used is "directs that in relation to the undertaking and in respect of the said period." In other words, in relation to that undertaking, except the parties exempted therein, the remedy of enforcement of others is suspended and the proceedings pending before any Court or Tribunal or Authority stand stayed. Nowhere in the notification itself is it capable of reading the words in relation to undertaking to mean that the undertaking itself is prevented from seeking its remedies or enforcing its claims before any Court, Tribunal, Officer or Authority. It leaves, therefore, no manner of doubt that the notification u/s 4 will not cover the undertaking itself.

9. Reference was made to section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 to contend that in so far as section 22 of the said Act is concerned, the language is clear that there cannot be proceedings initiated or liabilities or claims or privileges, etc., enforced against the Company covered u/s 22. In the first instance it is a settled law of interpretation that in interpreting one law even in respect of a cognate legislation the language of another enactment cannot be considered. The section must be further read as it stands. Interpretation of section must be in consonance with the object of the Act. In the first instance what has to be considered is the literal meaning of the section itself and the words used therein. The language of the section cannot be rendered infructuous. It is only in the event the Courts find it difficult to give effect to the intent and object of the legislation then the other means of interpretation are to

be given effect to give effect to the true meaning which was the legislative intent. In the instant case there can be no manner of doubt that the Legislative intent was to help the Relief Undertaking to come out of its financial difficulties. For this purpose not only the claims against it can be suspended but even various legislations can be suspended or applied with modification. Awards can also be suspended or applied with modification. Considering all these factors I am of the view that it is not possible to accept the contention advanced on behalf of the petitioners that the remedies and/or rights of the relief undertaking themselves stand suspended and/or the proceedings stand stayed.

10. It was sought to be contended as to what will happen in case the party against whom the proceedings for recovery or suits are stayed has suits or proceedings against it filed by the relief undertaking. It is contended that in these circumstances it will be arbitrary to permit recoveries against such persons when their rights for recovery are suspended. There may be some substance in the said contention. However, it is clear that the Notification is issued for one year. The Government can exclude certain claims from the notification. On representation made to the Government, the Government can always consider such claim and modify the notification and exclude such specific Clauses without issuing a fresh notification. This argument, therefore, by itself cannot detract from construing the section in its correct perspective. Even otherwise if the act is arbitrary a Court can always look into the legality of the Notification itself.

11. That brings us to the question as to whether this Court in a petition filed by the petitioners can go into the said issue. It is now settled law that a person aggrieved against an Award can prefer petition. Secondly, in a suit a person aggrieved by a decree can prefer an appeal. A person however, cannot prefer an appeal or file a petition aggrieved by findings. It is also settled law that such findings would not be binding on the party in subsequent proceedings and/or constitute res judicata. The purpose behind it is, that the party who had no opportunity of contesting the said findings cannot be precluded from contesting the legality of the said findings, if such findings are sought to be used in collateral proceedings. It is always open to the Court in such an event to consider the said findings. In the instant case these are not mere findings. It is a proposition of law namely interpretation of section. It is not merely a conclusion of law. A mere conclusion of law could not have been interfered with by this Court in a challenge to the award, but if it is proposition of law based on the interpretation of the Act the Court can interfere with the same. Also the proposition of law was not referred to the learned Arbitrator for decision. It arose incidentally. In the instant case, however, what is sought to be contended is that on account of the subsequent notification the Award should not be enforced. What this Court is therefore, called upon is to give an interpretation to the law subsequent to the Notification dated 30th September, 1998. It is always open to the Court, therefore, in considering the contention as raised by the petitioners to decide the said proposition of law. In the instant case it is so done. It was contended at one stage that these are contentions which can be raised at the

stage of execution. The challenges to an award are as contained in section 34 of the Arbitration Act, 1996. If a challenge is not available u/s 34 it cannot be available to an executing Court. On the contrary, the challenges before the executing Court are further limited to jurisdictional issues only.

12. In so far as the merits are concerned, there is no other challenge as contemplated in section 34 of the Arbitration & Conciliation Act, 1996 except the one advanced and which has been decided.

12-A. On behalf of the respondent it is contended that in para. 17 there is a typographical error in so far as the rate of interest is concerned, whereas the learned Arbitrator has earlier held that 12% p.a. would be the proper rate. While fixing the rate thereafter it is mentioned as 10% p.a. u/s 33 of the Arbitration & Conciliation Act, 1996 it is open to the parties to move the learned Arbitrator for correction of the said mistake.

13. In the light of that I find no substance in this petition, which is accordingly dismissed. In the circumstances of the case there shall be no order as to costs.

14. Counsel for the petitioners seeks stay of the operation of the order. This is opposed by the respondents. Respondents, however, have made a statement that they will not execute the decree till 23rd November, 1998. The statement made on behalf of the respondents is accepted. No further orders are, therefore, necessary.

Certified copy expedited.

15. Petition dismissed.