

(2010) 10 BOM CK 0102

In the Bombay High Court

Case No : Appeal (L) No. 714 of 2010 in Arbitration Petition No. 1072 of 2010

Paras Collins Distilleries Pvt. Ltd. and Others

APPELLANT

Vs

United Spirits Limited

RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 21, 99
Suits Valuation Act, 1887 — Section 11

Citation : AIR 2011 Bom 255 : (2011) 113 BOMLR 718 : (2011) 2 MhLj 328

Hon'ble Judges : Mohit S. Shah, C.J.; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Rajni Iyer, V.S. Khanavkar, K.B. Dighe, instructed by Shailesh S. Redekar, for the Appellant; N.G. Thakkar instructed by Bharat Shah and Co., for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J.—This appeal is directed against the order dated 14th September 2010 of the learned Single Judge in Arbitration Petition No. 1072 of 2010 filed u/s 9 of the Arbitration and Conciliation Act, 1996 and order dated 6th October 2010 clarifying the order dated 14th September 2010.

2. The dispute between the appellants and respondent was referred to the Sole Arbitrator Justice S.P. Bharucha, Former Chief Justice of India. The sole arbitrator made a consent award against the appellants herein. Under the award, the appellants are liable and bound to pay the respondent a sum of Rs. 8.80 crores. In the arbitration petition the respondent herein (original petitioner) sought an order of attachment of Rs. 2.65 crores payable by the Andhra Pradesh Beverage Corporation Ltd. (respondent No. 2 herein). The respondent further sought appointment of Court Receiver and an injunction restraining the appellants from creating third party rights in respect of the properties of the appellants, as provided in the consent award.

3. The appellant No. 1 and the respondent herein (original petitioner) had entered into an agreement of tie-up for manufacture of IMFL products on 1st July 2005. Clause-35 of the agreement contained an arbitration clause. As the appellant No. 1 failed to make payment as required by the said agreement, present respondent by letter dated 12th July 2006 invoked the arbitration clause and nominated one learned Judge of this Court as an arbitrator and called upon appellant No. 1 to nominate another arbitrator. The present respondent filed Arbitration Petition No. 307 of 2006 in this Court seeking various interim reliefs. By order dated 2nd August 2006 certain interim reliefs were granted. Thereafter, by order dated 28th August 2006 the arbitration petition was disposed of by consent of the parties and the Sole Arbitrator Mr. Justice S.P. Bharucha came to be appointed as stated above. Pleadings were filed before the learned Arbitrator and the learned Arbitrator appointed one Chartered Accountant.

4. It appears that appellant No. 3 (the Managing Director of appellant No. 1 herein) at the time of his cross examination, offered to settle the claim of present respondent. Two orders were passed by the learned Arbitrator on 15th June 2010. By first order, the appellant No. 3 agreed to become a party to the arbitration proceedings and to submit to the jurisdiction of the arbitral tribunal and agreed to secure the payment by the appellant No. 1 of the claim of respondent herein as per the agreed settlement. By the second order, the learned Arbitrator made an award in terms of the consent terms signed by the parties and their advocates on the appellants agreeing to pay a sum of Rs. 5.50 crores. By the consent award, present appellants were directed to jointly and severally pay to the present respondent a sum of Rs. 5.50 crores with interest thereon @ 15% p.a. from 14th October 2006 till payment/realization. It was further provided in the award that in the event of appellants paying Rs. 4.50 crores in the manner provided in the award without committing any default, the decree shall stand satisfied.

5. Pursuant to Clause 5 of the consent award, the present respondent filed Arbitration Petition No. 979 of 2010 and by order dated 25th June 2010 the learned Single Judge recorded a statement made on behalf of appellants that they have no objection for an order being passed in terms of prayer Clauses (a) and (b) of the arbitration petition.

6. In the course of execution proceedings, however, the present appellants raised objections mainly on the ground that this Court had no jurisdiction to entertain and try the Arbitration Petition No. 307 of 2006 as no part of the cause of action had arisen in Mumbai and that in any event even if a part of the cause of action had arisen out of Mumbai, leave under Clause-XII of the Letters Patent was not taken and, therefore, this Court had no jurisdiction to try and entertain Arbitration Petition No. 307 of 2006 which was disposed of by consent of the parties. Hence, the order disposing of the said arbitration petition and the subsequent award are void, ab-initio.

7. After hearing the learned Counsel for the parties, the learned Single Judge

overruled the objections and gave necessary directions while allowing the Arbitration Petition No. 1072 of 2010.

8. Ms. Rajni Iyer, learned Counsel for the appellants has challenged the above order reiterating the contentions raised before the learned Single Judge that this Court did not have territorial jurisdiction while passing the order dated 28th August 2006 in Arbitration Petition No. 307 of 2006 under which the learned Arbitrator was appointed and the dispute was referred to the arbitration.

9. It is contended that all the parties were out of the territorial jurisdiction of this Court and that the agreement was signed and executed at Hyderabad, though it was mentioned in the agreement that it was signed at Mumbai. Strong reliance is placed on decision of Apex Court in case of Kiran Singh and Others Vs. Chaman Paswan and Others, in support of the contention that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. A decree passed by the Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.

10. On the other hand, the learned Counsel for the respondent-petitioner has opposed the appeal and submitted that clause-35 of the agreement not only provided for a reference of the disputes between the parties to arbitration but also provided that the arbitration shall take place at Mumbai and shall be subject to the jurisdiction of the Courts at Mumbai. The learned Counsel further contended that in paragraph 15 of the Arbitration Petition No. 307 of 2006, present respondent i.e. the petitioner in the arbitration petition had stated that the arbitration proceedings shall take place in Mumbai and subject to the jurisdiction of the Courts at Mumbai and that the agreement was made at Mumbai. Agreement dated 1st July 2005 was made at Mumbai and that the aforesaid averments made in the arbitration petition were not denied by appellant No. 3 herein, who is Managing Director of appellant No. 1. Now, in the reply to the relevant paragraphs of the arbitration petition, the deponent in the reply had stated "I have nothing to say". It is, therefore, submitted that it is not open to the appellants to raise the dispute about territorial jurisdiction of this Court after more than four years and that too after having appeared before the learned Arbitrator and having sought the consent award passed by the learned Arbitrator.

11. We have heard learned Counsel for the parties. Clause-35 of the agreement for tie-up for manufacture of IMFL products dated 1st July 2005 reads as under:

35. Any dispute or difference between the parties hereto concerning anything contained in or arising out of this Agreement or as to the rights, duties or liabilities hereunder of the parties hereto shall be referred to the arbitration of two arbitrators one to be appointed by each party in accordance with and subject

to the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modifications or re-enactment thereof for the time being in force and such arbitration proceedings shall take place at Mumbai and subject to the jurisdiction of the courts at Mumbai.

It is, thus, clear that the parties had agreed in terms that the arbitration proceedings shall take place at Mumbai and subject to the jurisdiction of the Courts at Mumbai. In view of this clear agreement between the parties, there is no substance in the objection which for the first time has been raised by the appellants in the execution proceedings. The agreement also specifically stated as under:

This Agreement entered into at Mumbai this the 1st day of July, 2005

between

Shaw Wallace Distilleries Limited, a Company ... at Mumbai....

and

Paras Collins Distilleries Pvt. Ltd. having its ... at Hyderabad....

12. We also find substance in the submission of learned Counsel for the respondent that when the respondent herein (petitioner in Arbitration Petition No. 307 of 2006) had specifically stated that the agreement dated 1st July 2005 was made at Mumbai and that clause-35 of the said agreement clearly mentioned that the arbitration proceedings would take place in Mumbai and it would be subject to the jurisdiction of the Courts at Mumbai, Appellant No. 3 herein who is Managing Director of appellant No. 1, has clearly stated that "I have nothing to say". Even so, since the appellant raised the question of law and the learned Single Judge has answered the same against the appellants, the learned Counsel for the appellants has argued at length on the correct legal principle.

13. In *Kiran Singh v. Chaman Paswan* (supra) it is true that a Bench of four learned Judges of the Apex Court made following observations in paragraph 6 of the judgment:

6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relief upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles

governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position.

(emphasis supplied)

The underlying sentence strongly relied upon by the learned Counsel for the appellants may give an impression that a decree passed by a Court without territorial jurisdiction would be a nullity and that such an objection can be raised at any stage. However, the observations made by the Apex Court in the above paragraph are required to be read in light of the discussion in the subsequent paragraph of the judgment and particularly the following principle enunciated by the Apex Court:

7.... The policy underlying Sections 21 and of the CPC and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained u/s 11 of the Suits Valuation Act.

(emphasis supplied)

14. The same principle was reiterated by a Bench of four learned Judges Bench of the Apex Court in Seth Hiralal Patni Vs. Sri Kali Nath, in following terms:

(4). ...The objection to its territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to

arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award.

(emphasis supplied)

15. Apart from the principle enunciated by the Apex Court in the above decision, even on facts of present case, which are similar to the one decided in *Hiralal Patni v. Sri Kali Nath* (supra), once the appellant agreed in Arbitration Petition No. 307 of 2006 to have the dispute referred to arbitration, the appellants deprived themselves of the right to question the authority of the Court to refer the matter to arbitration or of the arbitrator to render the award. The appellants are estopped from challenging the jurisdiction of this Court to entertain and try the Arbitration Petition No. 307 of 2006 and to refer the matter to the learned Arbitrator. Similarly, the appellants are estopped from challenging the authority of the learned Arbitrator to make the award which even otherwise was a consent award.

16. In view of the above discussion, we find no merit in the appeal and the same is summarily dismissed.

17. The learned Counsel for the appellants at this stage prays for stay of this judgment. In the facts and circumstances of the case, we see no justification to stay the judgment. We reject the said request.