

(2002) 06 BOM CK 0011
In the Bombay High Court
Case No : Arbitration Petition No. 179 of 2002

Pharmaceutical Products of India Ltd.	Vs	APPELLANT
Tata Finance Ltd.		RESPONDENT

Date of Decision : 10-06-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 31, 31(6), 34
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22(1)

Citation : (2002) 4 ALLMR 412 : (2002) 6 BomCR 168 : (2002) 4 BOMLR 344 :
(2003) 41 SCL 259

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : H.J. Thakkar and R.C. Dhuru, for the Appellant; Pooniwala and Y.R. Shah, for the Respondent

Judgement

S.A. Bobde, J.—This petition is filed u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "Act", The respondent Tata Finance Limited has initiated arbitration proceedings. During the course of the arbitration proceedings, the Pharmaceutical Products of India Ltd. questioned the jurisdiction of the Arbitrator to proceed. It was the petitioner's contention that the Arbitrator had no jurisdiction to proceed with the arbitration in view of the fact that the reference before the BIFR regarding the petitioner-company was pending. It is contended that in view of the provisions of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, the Arbitrator must stay the arbitration proceedings as he has no jurisdiction to proceed in the matter. The Arbitrator, therefore, framed the following questions :--

"Whether the Respondents prove that the Learned Arbitrator has no jurisdiction to decide this Arbitration in view of the fact that BIFR reference of the Respondent Company is presently pending ?"

Mr. Pooniwala, learned counsel for the respondent No. 1, has raised a preliminary objection to the maintainability of this petition. According to the learned counsel,

the arbitral Tribunal is conferred with a power to rule on its own jurisdiction. Where, therefore, the arbitral Tribunal rejects the plea of jurisdiction, it is entitled to continue with the proceeding and make an arbitral award which can only be challenged in accordance with Section 34.

2. Mr. Pooniwala, learned counsel for the respondent No. 1, is right in his preliminary objection. Section 16 reads as follows :--

"16. Competence of arbitral Tribunal to rule on its jurisdiction.--(1) The arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in Subsection (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

The section clearly empowers an arbitral Tribunal to rule on its own jurisdiction vide Sub-section (1). Where the arbitral Tribunal decides to reject the plea regarding its jurisdiction, Sub-section (5) clearly empowers the Tribunal to continue with the arbitral proceedings and make an arbitral award. Sub-section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with Section 34. On the other hand, if the arbitral Tribunal decides to accept the plea that it has no jurisdiction, then such an order is appealable u/s 37(2) of the Act which reads as follows :--

"37. Appealable orders.--(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original

decrees of the court passing the order, namely :--

(a) and (b) **

(2) An appeal shall also lie to a court from an order of the arbitral Tribunal-

(a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17."

3. Mr. Thakkar, learned counsel for the petitioner, submitted that the order rejecting the plea that the arbitral Tribunal has no jurisdiction is an award, in particular an interim award within the meaning of Section 2(1)(c). Section 2(1)(c) reads as follows :--

"2. Definitions.--(1) In this Part, unless the context otherwise requires,--

(a) and (b)**

(c) "arbitral award" includes an interim award."

According to the learned counsel, the decision of the Arbitrator on the issue of jurisdiction is an interim arbitral award as contemplated by Section 31(6), Section 31(6) reads as follows :--

"31. Form and contents of arbitral award.--An arbitral award shall be made in writing and shall be signed by the members of the arbitral Tribunal.

(2) to (5)** ** **

(6) The arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award."

4. I am unable to accept the contention of the learned counsel for the petitioner that the decision whether arbitration proceedings should be stayed or not can be a matter with respect to which the arbitral Tribunal may make a final arbitral award and, therefore, when such a decision is made at an interim stage, it may be treated as an interim award. By the very nature of the plea, whether the proceedings before the Arbitrator should be stayed or not cannot be the subject-matter of a final arbitral award. Therefore, having regard to Section 31(6), a decision on such a question cannot be an interim award either. It must be simply a decision u/s 16 of the Act which empowers to rule on its own jurisdiction specifically u/s 16 of the Act and that section clearly contemplates such a ruling at an interim stage of the arbitration also. Only a challenge to it is postponed to a stage after the award is made.

5. Mr. Thakkar further submitted that there is no question of jurisdiction raised by the petitioner since the only right asserted by the petitioner was to have the proceedings before the Arbitrator stayed. In my view, for all practical purposes,

what was being questioned was the power of the Arbitrator to proceed with and adjudicate the controversy before it and for all practical purposes what was raised was the issue of jurisdiction. Indeed, the issue framed by the learned Arbitrator was also one of jurisdiction.

6. Mr. Thakkar lastly submitted that the Arbitrator cannot be said to have ruled on his jurisdiction since it was only considering the question of stay. Though the word "jurisdiction" is a verbal cast of many colours as observed by the Supreme Court in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, it is clear that one of the meanings of the word "jurisdiction" is the power to adjudicate on the subject-matter. I am, therefore, of the view that the petitioner, who was the respondent in the arbitration, had questioned the jurisdiction of the Arbitrator to proceed to adjudicate the subject-matter of the claim and a decision on the Arbitrator whether to proceed with it or not amounts to a ruling on its own jurisdiction.

7. In this view of the matter, I am of the view that since admittedly no award is passed till date, the present petition u/s 34 of the Act is not tenable and must be dismissed. Mr. Pooniwala, learned counsel for the respondent No. 1, referred to a decision of *Rebello, J.* dated 3-5-2002 in Writ Petition No. 2801 of 2002 rejecting the Writ Petition filed by the petitioner under Article 227 of the Constitution of India. The learned Single Judge was considering a challenge to the same order challenged in the present petition. That Writ Petition was rejected with the following observations :--

"Under the Arbitration Act, as it now stands once the finding is given the only remedy to the party is to challenge the said decision or order while challenging the Award u/s 34."

8. I am in agreement with the observations of the learned Single Judge.

9. However, the issue whether a decision of an arbitral Tribunal that it has jurisdiction, can be challenged before the arbitral award is made is no more *res Integra*. It is squarely decided by a Division Bench headed by the Hon'ble the Chief Justice in *BASF Styrenics Pvt. Ltd. Vs. Offshore Industrial Construction Pvt. Ltd.*, of the report, the Division Bench has observed :--

"10. In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in Sub-sections (5) and (6) of Section 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under Sub-section (2) of Section 37 of the Act."

10. The present petition is, therefore, dismissed. It is made clear that dismissal of this petition shall not disentitle the petitioner from raising all grounds as may

be available to it in law while challenging the arbitral award when made.

11. Mr. Thakkar further submitted that there is no question of jurisdiction raised by the petitioner since the only right asserted by the petitioner was to have the proceedings before the Arbitrator stayed. In my view, for all practical purposes, what was being questioned was the power of the Arbitrator to proceed with and adjudicate the controversy before it and for all practical purposes what was raised was the issue of jurisdiction. Indeed, the issue framed by the learned Arbitrator was also one of jurisdiction.