
(2014) 07 BOM CK 0172
In the Bombay High Court
Case No : Arbitration Petition No. 550 of 2014

Pratibha Tushar Sanghvi

APPELLANT

Vs

Paresh Vinodlal Jhaveri

RESPONDENT

Date of Decision : 14-07-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 30, 30(2), 31, 34, 34(4)
Civil Procedure Code, 1908 (CPC) — Section 148

Citation : (2014) 07 BOM CK 0172

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Rohaan Cama, Ambreen Saheed and Chirag Bhalsara i/b. MXP and Partners, Advocate for the Appellant; Kiran Jain, Neeta Solanki and i/b. Kiran Jain and Co, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.S. Dalvi, J.—The petitioners have sought to challenge an award passed in accordance with the clauses of the settlement arrived at between the parties in an arbitration. The award came to be passed on 16th December, 2013 against the petitioners as also respondent Nos. 4, 5, 6 & 7. The petitioners have challenged the award. Respondent Nos. 4, 5, 6 & 7 have not.

2. The loan was taken by the firm of respondent No. 4 from respondent Nos. 1, 2 and 3. The two petitioners and respondent Nos. 5 & 6 were initially partners of respondent No. 4 firm. There have been certain disputes and it was contended by the petitioners that they were not partners at a certain time. Nevertheless respondent Nos. 1, 2 and 3 proceeded in arbitration against respondent No. 4 firm and all the four partners, petitioner Nos. 1 & 2 and respondent Nos. 5 & 6. The arbitration proceeded. Thereafter the parties settled their dispute under certain handwritten consent terms. The consent terms were executed on 26th November, 2012. They have been signed by respondent Nos. 1, 2 and 3 on the one hand and by petitioner Nos. 1 & 2 as also respondent Nos. 4, 5 & 6 on the

other hand.

3. Under the consent terms the claim of respondent Nos. 1, 2 and 3 was admitted. A decree on admission was agreed to be passed in favour of respondent Nos. 1, 2 & 3 as the claimants therein. This decree was specifically divided into two parts: one to be paid by petitioner Nos. 1 & 2 and the other to be paid by respondent Nos. 5 & 6 as the partners of respondent No. 4. The petitioners agreed to deposit Rs. 21 lakhs. Respondent Nos. 4, 5 & 6 agreed to deposit Rs. 32 lakhs. The petitioners further agreed that if they fail to deposit Rs. 21 lakhs the claimant would be entitled to execute the decree for the balance amount payable under clause 1 of the Consent Terms against them. Respondent Nos. 4, 5 and 6 also agreed that if they fail to deposit Rs. 32 lakhs the claimant will be entitled to execute the decree against them for the balance amount due and payable in clause 1 of the Consent Terms.

4. The material part of the settlement was, therefore, that there was a decree on admission for the entire amount payable. The petitioners were to pay a part of the amount. That payment was to be by way of deposit. If that payment by way of deposit was not made, the petitioners would be liable to a decree against them for the entire amount due. Similar was the case with the other two partners on behalf of the firm. The claimants would, therefore, allow the parties to discharge their liability in a specified ratio if they honour that commitment. If they fail to honour that commitment the claimants would be entitled to proceed against either of the groups of parties.

5. It is important to note that what was agreed by the parties was to deposit the amount and not to pay only in future.

6. The further clause stated that the amounts were to be deposited on or before 31st May, 2013.

7. Hence the two groups of partners got time from 26th November, 2012 until 31st May, 2013 to deposit the entire amount in the aforesaid ratio.

8. The parties further agreed that "award will follow in accordance with the aforesaid clauses".

9. The award, therefore, must follow only after 31st May, 2013. The award would not follow until then. The parties had agreed to settle thus. The terms of the settlement showed the settlement in futuro. The parties did not call upon the learned Arbitrator to pass the award in terms of the settlement on the date of the settlement itself.

10. The matter before the Arbitrator was kept on board on 14th June, 2013 two weeks after the last date on which the deposits had to be made. On that date the petitioner could arrange for Rs. 18 lakhs, but not Rs. 21 lakhs. The learned Arbitrator recorded that the respondent Nos. 1, 2 and 3 as the claimants therein were entitled to a decree on admission in terms of the consent terms. The other partners could not make any arrangement and that was also recorded. Though

the petitioners had made arrangements for Rs. 18 lakhs they failed to deposit even Rs. 18 lakhs. The learned Arbitrator was informed on 14th June, 2013 that all the partners had failed to deposit and had not complied with the consent terms. The learned Arbitrator observed that the claimants were, therefore, entitled to a decree on admission as per clause (a) of the consent terms and therefore, the tribunal passed the award in terms of the minutes of the consent terms. Accordingly the award was passed showing that the claimants were entitled to the decree as per the consent terms and that all debtors being respondent Nos. 1 to 5 being the partnership firm and the 4 partners i.e., the two petitioners herein and respondent Nos. 4 and 5 were jointly and severally directed to deposit with the claimants the entire sum due with the accrued amount of interest. They were also directed to pay the specified amount.

11. The award was, therefore, followed and passed in accordance with precisely the clauses of the consent terms being the settlement between the parties.

12. It is such an award which is challenged. The main ground for the challenge is that the Arbitrator could have only passed an award in terms of the settlement upon being informed by the parties to the arbitration pursuant to their settlement, but cannot wait to see that the settlement was complied and if not to give effect to the settlement.

13. In fact the agreement of the parties was precisely to record a settlement and then to have the award followed in future in terms of that settlement. The Arbitrator was, therefore, given the mandate to pass the award, but only as per the clauses of the consent terms. The award is in terms of those consent terms.

14. The only unique aspect of the consent terms was that the parties did not agree that the Arbitrator passed the award immediately upon the submission of the consent terms, but the parties deferred passing of the award to a future date. That was because under the decree on admission the parties specifically agreed to deposit and not only to pay the claimant by a given date. The parties further agreed to have the consequences that are stated in the consent terms only if the amount was not deposited. Consequently the parties did not agree to terminate the proceedings and specifically agreed to keep the proceedings alive to see the deposit. This is evidenced by the fact that the reference was kept on the board of the learned Arbitrator two weeks after the last date on which the deposits were to be made by the two sets of the parties.

15. It would have to be seen how this statement would have to be recorded in terms of Section 30 of the Arbitration and Conciliation Act, 1996 (the Act). u/s 30 the Arbitrator may encourage settlement of the dues by any modes of alternative resolution. If the parties do settle the dispute the arbitration would be terminated. If the parties request the Tribunal, the Tribunal would record the settlement in the form of an arbitral award, but on the agreed terms only in accordance with Section 31 of the Act.

16. The relevant part relating to the settlement between the parties and the

recording of the statement is u/s 30(2) which reads thus:

30. Settlement-

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and if, requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

17. It is contended on behalf of the petitioners by Mr. Cama that once the parties settled the dispute the Arbitrator would have to terminate the proceedings only and only if the parties request the Arbitrator to record that settlement, the Arbitrator would record it on the agreed terms as an arbitral award. He contends that this must take place immediately upon tendering to the Arbitrator the agreed consent terms containing the settlement.

18. The substance of the Section is in seeing that if the parties settle the dispute, the dispute cannot be agitated any more. Hence the arbitral proceedings would come to an end. If the arbitral proceedings only terminate, the settlement would remain unaccepted. If an award is passed in terms of the settlement it could be settled. Hence the parties invariably request the Arbitrator to pass an award in terms of the settlement. There is no bar to request the Arbitrator to pass the award at a later date.

19. In this case the parties settled their dispute as stated above. The parties specifically did not call upon the Arbitrator to pass the award in terms of that settlement on the date of the settlement. That was because the parties gave the debtors being the two petitioners herein and respondent Nos. 5 & 6 time to deposit specified amounts with the claimant. After they had deposited the amount they may or may not call upon the Arbitrator to record the settlement in the form of an award. Nevertheless the arbitration proceeding would not go on before the learned Arbitrator and would not be agitated. Thus the proceedings would come to an end. The expression "shall terminate" must be so construed.

20. The award when passed, whether on the date of the settlement itself, as is usually done, or on any future date, as has been done in this case, would be only upon such agreed terms. All the agreed terms must, therefore, be complied with by the parties and considered by the Arbitrator. Clause 12 of the consent terms showing that the award will follow in accordance with the aforesaid clause shows that the award will follow after 31st May, 2013 by which the amounts were to be deposited with the claimants by the respective groups of parties. Hence the parties agreed that if such deposit was made, the award would follow in terms of the settlement. Consequently even if the deposits were not made, the award would follow in terms of the settlement. Hence the parties kept the reference on board for making payment only. The payment had to be made in terms of the consent terms only. That was to be on 14th June, 2013. The award would follow on 14th June, 2013 in accordance with the consent terms. The award would, therefore, follow whether the deposits were made or not on the last date

allowed. The award would follow only as per the clauses in the consent terms. The Arbitrator would have no further jurisdiction. The Arbitrator could not grant any award in excess of or less than what the parties agreed. Such was the mandate given to the Arbitrator as requested by the parties and obviously not objected by the arbitral tribunal.

21. The petitioners further contend that the learned Arbitrator had jurisdiction to grant additional time to the petitioner on 14th June, 2013 when the reference came up for payment. It is argued that because the petitioner Nos. 1 and 2 could arrange only Rs. 18 lakhs instead of Rs. 21 lakhs the Arbitrator should have, as per the application made by petitioner Nos. 1 and 2 adjourned the proceeding and allowed an extension of time as per the provisions u/s 148 of the CPC. That was not a part of the settlement between the parties. The arbitration proceedings "will terminate" except for recording the settlement on the agreed terms. The parties had not agreed to extend time to make payment. The extension was granted from 26th November, 2012 when the consent terms were signed and filed before the Arbitrator to 31st May, 2013 which was the last date for making payment. The grant of time by the learned Arbitrator would have been an act in excess of her jurisdiction. The only jurisdiction that the Arbitrator had was to record the settlement agreed between the parties in accordance with the clause of the settlement, without more. The expression "on agreed terms" in the aforesaid sub section shows the extent of the jurisdiction of the Arbitrator. Consequently further time as prayed for by the petitioners could not be granted by the learned Arbitrator. In fact, this argument runs wholly counter to the initial argument that the arbitration proceedings would terminate forthwith.

22. It may be mentioned that the petitioners were to deposit with the claimant Rs. 21 lakhs. The petitioners had not deposited even a part thereof. Even though the petitioners could arrange for Rs. 18 lakhs the petitioners did not deposit Rs. 18 lakhs. It would have been for the claimants to grant further time and to agree in respect of the balance unpaid amount agreed if paid by the petitioners. It was not for the Arbitrator to grant any such time.

23. The learned Arbitrator had acted only as per the mandate of the parties contained in and represented by the clause in the consent terms. The learned Arbitrator has passed the award precisely as per the consent terms and has directed payment of costs as per the statutory requirement. The learned Arbitrator has not altered any part of the consent terms. That was because the arbitral proceedings terminated and could not be agitated. That was in terms of the settlement between the parties including the passing of the award after grant of the time agreed between the parties. The learned Arbitrator acted precisely as per the mandate given by the parties.

24. It is contended that this petition be adjourned and the parties be sent to the learned Arbitrator again for grant of the further time u/s 148 of the CPC, the principles of which would apply to the arbitration proceeding so that further time is granted to the petitioners to make the payment agreed upon. This contention

is taken for calling upon this Court to exercise jurisdiction u/s 34(4) of the Act which runs thus:

34. Application for setting aside arbitral award.-

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

25. Section 34(4) comes into play only when the Court sees that a large part of the award cannot be set aside except for a part of the award which would otherwise constrain the Court to set aside the entire award but for the Arbitrator taking any other action as would eliminate the ground for setting aside the award. No grant for setting aside the award upon the premise that the learned Arbitrator has not granted further time is seen to be validly taken. In fact it is seen that the Arbitrator could not have granted further time because the arbitral proceedings is otherwise terminated except for the passing of the award in terms of the consent terms which was to follow. Consequently the jurisdiction u/s 34(4) cannot be exercised.

26. Mr. Cama relied upon the case in case of Marketing and Advertising Associates Pvt. Ltd. Vs. Telerad Private Ltd., which does not apply to the arbitration proceedings and which was only with regard to the judicial adjudication.

27. For setting aside the entire award on the aforesaid main contention that the learned Arbitrator could have only immediately passed an award in terms of the consent terms upon the request of the parties and not waited until a future date and then give effect to the consent terms or the settlement, the petitioner has sought to rely upon the judgment of this Court in the case of Taherbhai Abdullabhai and Another Vs. Mohammed Hussain Abdullabhai and Others, in which Sections 30 and 34 have been considered for an arbitration, which resulted in settlement. It is not shown that in that case the parties had agreed that the award will follow in accordance with the consent terms and that a period of time was given to the parties to comply with the consent terms after which the award was to follow. The agreed terms were, therefore, different in that case. The observations of the single Judge of this Court that upon meeting the settlement the Arbitrator has to terminate the proceedings, but that he can record the settlement in terms of an award in accordance with Section 31 would, therefore, not apply to this case at all. In any event the termination contemplated in Section 30(2) would have to be read only to the above extent. It would mean that the arbitration cannot proceed to hearing after the matter is settled between the parties and hence the settlement itself must be recorded so as to terminate the proceedings. To interpret that provision to mean that the arbitration would

terminate, even if neither by settlement, nor by adjudication would be absurd. In that case the very settlement was disputed by some of the parties. The learned Arbitrator proceeded with arbitration. That was for adjudicating the dispute not in terms of the settlement, but otherwise. Hence it was held that if the arbitration was to terminate as per Section 30(2) a fresh consent would be required to continue the arbitration because it was not settled. Settlement alone can terminate the arbitration. That termination would be in terms of the settlement. The settlement in this case was to deposit on a future date. The arbitral award was to follow thereafter. The reference was adjourned to a date two weeks after the last date of the settlement. The parties, therefore, consented to the award being passed, but only in terms agreed upon by the parties on a future date. None of the parties has disputed the settlement. The arbitration proceeding did terminate as per the award which was passed only in terms of the settlement. The award is, therefore, correctly passed and does not deserve to be set aside on any ground.

28. Consequently the petition is dismissed with costs.