

(2016) 04 BOM CK 0140

In the Bombay High Court

Case No : Arbitration Appeal No. 6 of 2015

Rishabhkumar

APPELLANT

Vs

Secretary to the Government of India

RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37
Bombay Court Fees Act, 1959 — Article 3 A, 4

Citation : (2016) 5 MhLJ 745 : (2017) 2 RAJ 227

Hon'ble Judges : R.K. Deshpande, J.

Bench : Single Bench

Advocate : Shri R.P. Joshi, Advocate, for the Appellant; Shri A.M. Ghare a/w Shri A.A. Kathane, Advocates, for the Respondent No. 2; Shri M.A. Kadu, AGP, for the Respondent Nos. 3 and 4

Final Decision : Dismissed

Judgement

R.K Deshpande, J.(Oral)—Shri Ghare, the learned counsel appearing for the respondent No.2 ? National Highways Authority of India seeks permission to withdraw Civil Application (CAM) No.4 of 2016 and seeks further permission to substitute it by another application, which he has tendered. The request is accepted. The Civil Application (CAM) No.4 of 2016 is permitted to be withdrawn with liberty to file fresh application which is tendered in the Court. The application is taken on record and it be registered accordingly.

2. This appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("said Act" for short) challenging the order dated 28.08.2015 passed under Section 34 by the learned Principal District Judge setting aside the arbitral award dated 29.08.2015. The preliminary objection is with regard to payment of Court fee on the appeal. The appellant has paid Court fee of Rs. 25/- in terms of Article 13 under Schedule II of the Maharashtra Court Fees Act ("Court Fees Act" for short). According to the office and the respondent No.2, the Court fee is payable in terms of Article 4 of Schedule I under the Court Fees Act and the Court fee

payable is the same, as was paid on the application under Section 34 of the said Act, in terms of Article 3A under Schedule I of the Court Fees Act.

3. Article 3A of the Court Fees Act introduced by way of an amendment w.e.f. 01.09.2009 is therefore reproduced below:

"3A. Application or petition (including memorandum of appeal) to set aside or modify arbitral award under the Arbitration and Conciliation Act, 1996.

.....

A fee of one-half of the ad valorem fee on the amount or value of the award sought to be set aside or modified, according to the scale prescribed under Article 1."

The application under Section 34 of the said Act for setting aside arbitral award is governed by the aforesaid provision and it carries the Court fee of one-half of the ad valorem fee on the amount or value of the award sought to be set aside or modified according to the scale prescribed under Article I of the Court Fees Act.

4. The respondent No.2 had filed applications for setting aside award under Section 34 on which a Court fee of Rs.1.5 lacs on each of the application was paid. The applications have been allowed and the award has been set aside. Hence, the appellants, who are the original claimants have preferred this appeal under Section 37 of the said Act. It is not disputed that if the Court fee is payable in terms of Article 4 of Schedule I of the Court Fees Act, then the Court fee as stipulated in Article 3A and as was paid in the trial court, will have to be paid. It is also not in dispute that such Court fee has not been paid.

5. Hence, the question for determination is as under:

Whether in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 the Court fee is payable in terms of Article 13 in Schedule II or Article 4 in Schedule I of the Maharashtra Court Fees Act ?

6. Sections 35 and 36 of the Arbitration and Conciliation Act, 1996 are reproduced below :

"35. Finality of arbitral awards.- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement.- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

Section 35 under the said Act deals with the finality of the arbitral award which shall be binding on the parties and persons claiming under them respectively, subject to the other provisions in Part I of the said Act. Section 36 under the said Act deals with the enforcement and it states that where the time for making an

application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner, as if it were a decree of the Court. It is thus, apparent that Section 34 makes the order passed either refusing to set aside the award or setting aside the award enforceable, as if it is a decree of the Court.

7. The reliance is placed upon Article 13 in Schedule II under the Maharashtra Court Fees Act to justify the stand that the Court fee of Rs.25/paid on the appeal under Section 37 of the said Act is correct. Hence, the provision of Article 13 in Schedule II under the Court Fees Act is reproduced below:

"13. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree, and is presented-

(a) to any Civil Court other to any Revenue Court or Executive Officer other than High Court or Chief Controlling Revenue or Executive Authority

(Five rupees)

(b) to the Chief Controlling Executive or Revenue Authority;

(Ten rupees)

(c) to the High Court

(Twenty five rupees)".

Article 13 deals with memorandum of appeal to the High Court when the appeal is not from a decree or an order having the force of a decree. In view of Section 36 of the said Act, reproduced above, the order passed by the trial court under Section 34 of the said Act has the force of a decree and hence the provision of Article 13 in Schedule II of the Maharashtra Court Fees Act is not at all applicable. The reliance is totally misplaced.

8. Article 4 under Schedule I of the Maharashtra Court Fees Act reads as under:

"4. Plaint, application or petition (including memorandum of appeal) which is capable of being treated as a suit, to set aside a decree or order having the force of a decree.

.....

The same fee as is leviable on a plaint in a suit to obtain the relief granted in the decree or order, as the case may be."

The provision of Article 4 of Court Fees Act is clearly attracted in case of memorandum of appeal under Section 37 of the Arbitration and Conciliation Act filed to set aside order passed under Section 34 of the said Act which has a force of a decree and the Court fee is payable in the present appeal shall be in accordance with this provision. In terms of Article 4 of the Court Fees Act, the

applicant is required to pay Court Fee in appeal under Section 37 of the said Act as was paid in the trial court on the application under Section 34 of the said Act.

9. Shri Bhandarkar, the learned counsel appearing for the appellants has relied upon the following portion appearing in the paragraph 15 of the decision of the Full Bench in the case of Puneet Malhotra and another v. R.S. Gai, Sole Arbitrator and others reported in (2008)6 Mh.L.J. 867, which reads as under:

"15. Insofar as an appeal filed before this Court under section 37 of the Arbitration and Conciliation Act, 1996 against an order made in a petition filed under section 34 of the 1996 Act is concerned, it will be governed by Article 13 of Second Schedule which read as under:

13. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree, and is presented-----

(a)----

(Twenty Five Rupees)

When a petition under Section 34 is to be filed before a Principal Civil Court of original jurisdiction which is not a High Court, the question arises which Article of either First Schedule or Second Schedule would apply. Insofar as the challenge to an Award made under the 1940 Act is concerned, an application under section 13 of that Act could be made to a Civil Court and therefore, payment of court fee was governed by Article 1(a) of Schedule II which read as under:

1. Application or petition

(a)----

Five Rupees

or when presented to any Civil Court other than a principal Civil Court of original jurisdiction;

This was so because the application was to be presented to the Court or Civil Judge which was not a principal Civil Court of original jurisdiction. But now because of change of definition of term "Court" in the 1996 Act, a petition has to be presented challenging an Award made under the 1996 Act in terms of the provisions of section 34 thereof, before the Principal Civil Court of original jurisdiction. We have not been pointed out any entry either in the first Schedule or in the Second Schedule which applies to an application or petition to be made before the Principal Civil Court of original jurisdiction, and therefore, when a litigant wants to file petition before a Principal Civil Court having original jurisdiction which is not High Court, challenging an Award made under the 1996 Act, no Court fee under Bombay Court Fees Act is payable because of absence of a general or specific provision. Whereas on an appeal filed under section 37 of the 1996 Act against an order made in that petition, court fee would be payable as observed above under Article 13 of Schedule II of the Bombay Court Fees Act,

because the appeal will lie to the High Court. The question, therefore framed for our consideration is answered thus:

(i) Article 3 of Schedule I of the Bombay Court fees Act does not apply to a petition, application or memorandum of appeal filed for challenging an Award made under the 1996 Act, and Court fee on a petition filed under section 34 of the 1996 Act challenging an Award in this Court is payable according to Article 1 (f)(iii) of Schedule II.

(ii) No Court fee under the Bombay Court fees Act is payable when a petition under section 34 challenging an Award is filed before any Principal Civil Court of original jurisdiction which is not High Court.

(iii) On an appeal filed in this Court under 37 of the 1996 Act challenging an order passed in a petition filed under section 34 of the 1996 Act court fee is payable according to Article 13 of Schedule II of the Bombay Court Fees Act."

10. No doubt that the Full Bench has observed that the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 against an order made in the petition under Section 34, will be governed by Article 13 of Schedule II, which is reproduced above. According to Shri Bhandarkar, the learned counsel for the appellants, the Court fee as required in view of the aforesaid position of law, is of Rs. 25/- which has been paid and that satisfies the requirement as has been observed by the Full Bench.

11. The Full Bench was essentially dealing with the question of payment of Court fee on the application under Section 34 of the Arbitration and Conciliation Act. After the decision of the Full Bench on 23.10.2008, the provision of Article 3A under the Schedule I of the Maharashtra Court Fees Act has been introduced requiring the payment of Court fee on such application at the rate of one-half of the ad valorem fee on the amount or value of the award sought to be set aside or modified, according to the scale prescribed under Article 1. In view of this, the decision of the Full Bench is not applicable to the application under Section 34 of the said Act filed after introduction of Article 3A in Schedule I of the Court Fees Act. In the present case not only an award was passed, but an application under Section 34 of the said Act was also filed after introduction of Article 3A. Hence, there is no question of prospective or retrospective operation of Section 3A of the Court Fees Act.

12. It was not a case before the Full Bench raising the question of payment of Court fee on the appeal preferred under Section 37 of the Arbitration and Conciliation Act. The Court therefore, did not consider the impact of the provisions of Section 35 and 36 of the Arbitration and Conciliation Act, 1996 along with the provision of Article 4 under Schedule I of the Maharashtra Court Fees Act. The decision of the Full Bench is not an authority for the proposition that the Court fee payable on the appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 shall be governed by Article 13 in the Schedule II.

13. In view of above, the office to decide the Court fee payable as per Article 4 in Schedule I read with Article 3A of the Court Fees Act and upon such determination, the Court Fee so determined be paid within a period of eight days, failing which the appeal shall stand dismissed. Put up after Summer Vacation, 2016.