

(2002) 03 BOM CK 0091

In the Bombay High Court

Case No : Chamber Summons No. 836 of 2001 in Execu. Application No. 21 of 2001 in Arbitration Case No. A/152 of 1998-99

R.K. Textiles

APPELLANT

Vs

Sulabh Textiles Pvt. Ltd.

RESPONDENT

Date of Decision : 16-03-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 35, 7
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (2002) 2 ALLMR 897 : (2003) 1 ARBLR 303 : (2002) 5 BomCR 267 : (2002) 4 MhLj 678 : (2003) 44 SCL 228

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : S.K. Jain, for the Appellant; H.V. Gala and Co., for the Respondent

Judgement

J.A. Patil, J.—The respondents Sulabh Textiles Pvt. Ltd. have taken out this Chamber Summons and prayed for a declaration that the Arbitral Award dated 6-9-2000 passed in Arbitration Case No. A/152/1998-99 on the file of Hindustan Chamber of Commerce ("HCC" for short) is without jurisdiction, illegal, null and void and not enforceable against the respondents. They have further prayed for quashing and setting aside the Execution Application taken out by the applicants R. K. Textiles and for raising attachment issued by this Court under the two warrants of attachment dated 21-4-2001 on the respondents properties. A few relevant facts are necessary for proper appreciation of the prayers made by the respondents.

2. The respondents carry on business of manufacturing of blended fabrics and they are not the members of HCC. The applicants are cloth merchants and they are the members of HCC. It appears that sometime in July or August, 1997 the respondents had placed an oral order for purchase of certain cloth. It further appears that at the time of taking delivery of cloth, the respondents found the same defective and less in quantity and hence there arose disputes between the parties. The applicants referred the matter to the HCC with a request to enforce

their claim for damages. The HCC referred the letter of the applicants to the respondents and asked them to settle the claim. The respondents disputed the claim made by the applicants and refused to pay any amount claimed by the applicants. Consequently, on 2-2-1999, the respondents lodged their claim with the HCC with a request for referring the matter to the Arbitrator as per the Arbitration Rules of the HCC. According to the respondents they pointed out that they were not the members of the HCC and that there was no arbitration agreement with the applicants and that, therefore, the arbitration rules of the HCC were not applicable. However, the HCC persisted and appointed Arbitrator on behalf of the respondents without their consent. The respondents, therefore appeared before the Arbitrators under protest and submitted that they had no jurisdiction to arbitrate. The respondents also filed a written statement and counter claim. According to the respondents the arbitrators wrongly assumed jurisdiction and purported to make an Award which was not served upon the respondents either by the Arbitrators or by the HCC. Thereafter, on 14-5-2000, the respondents filed Arbitration Petition No. 349/2001 u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, "Act 1996").

3. In the meantime, the applicants had taken out Execution proceedings and attached the Office, factory premises, stock, machinery etc. belonging to the respondents. The respondents claim that on 9-5-2001, they discovered the said Award passed in favour of the applicants as well as the Execution Application taken out by the applicants to execute the said Award which was for a sum of Rs. 1,28,345.10 ps. with interest thereon @ Rs. 1.75% p.m. The respondents filed an application u/s 34 of the Act, 1996 for setting aside the said Award. It appears that there was a delay in filing the application and, therefore, an application was filed by the respondents for condonation of delay but the same came to be rejected as according to the learned Single Judge, there was no compliance of Section 34. While dismissing the application for condonation of delay, the learned Judge proceeded to observe, "However, it is made clear that if in law the petitioner is entitled to contend that the Award is nullity it is always open to the petitioner in proceedings in execution to raise the said contention and it is for the executing Court to decide whether the petitioner could be allowed to raise the said objections at the stage of execution of the Award as a decree". It is on the basis of these observations that the respondents have taken out this Chamber Summons and prayed for the abovementioned reliefs.

4. In support of the Chamber Summons, Sanjay Natvarlal Patel, one of the Directors of the respondents company has filed his affidavit raising the contention that the Award in question is illegal and void on the grounds stated in the affidavit. It is stated that there was no arbitration agreement between the parties and that the composition of the arbitral tribunal and the arbitral procedure was not in accordance with the provisions of the Act, 1996. He has further contended that the respondents were not given proper notice of appointment of Arbitrator. He has further contended that the arbitration rules of the HCC are not followed and enforceable as they are not in accordance with the

provisions of Sections 10 and 11 of the Act, 1996. Sanjay Patel has further stated that the appointment of the Arbitrator by the HCC on behalf of the respondents was illegal and invalid as the HCC had not authority to do so. He has further alleged that the Arbitrators misconducted themselves. On behalf of the applicants there constituted attorney Anand Ridhkaran Goenka has filed his affidavit in reply, wherein, he has contended that the Award in question was legally and validly made and published which, in law it has become an executable decree. He has further pointed out that the decree has already been executed and properties of the respondents have been attached. Therefore, according to him, there is no scope left in law to dislodge the execution of the Award/Decree. It is also contended that this Court being an executing Court cannot go beyond the Award/Decree. Anand Goenka has further pointed out that the petition filed by the respondents for setting aside the Award has been dismissed and, therefore, the respondents having lost their right to challenge the said Award, have now no legal right to re-agitate the same cause in this Chamber Summons.

5. I have heard Shri Gala, the learned advocate for the respondents and Shri Jain, the learned advocate for the applicants. Shri Gala took me through the several documents in the arbitral proceedings and submitted that the Award in question is without jurisdiction. He has further submitted that the executing Court has jurisdiction to go into the legality and validity of the Award on the ground of jurisdiction. Shri Gala also made submissions that the arbitration rules framed by the HCC are contrary to the provisions of the Act, 1996 and that the Arbitrators failed to follow certain procedure. He pointed out that the composition of the arbitral tribunal was not proper since the respondents did not nominate their Arbitrator. He has further submitted that it was not for the HCC to foist its own Arbitrator as being the Arbitrator on behalf of the respondents. Shri Jain, on the other hand, pointed out that no submission was made by the respondents before the arbitral tribunal to decide the question of jurisdiction as a preliminary issue. He pointed out that the bills issued to the respondents include an arbitration clause and that the same constitutes valid arbitration agreement between the parties. Shri Jain, further submitted that an opportunity was given to the respondents to appoint their nominee to the arbitral tribunal and that due procedure for appointing the Arbitrators was followed. Shri Jain further contended that all the grounds which were available to the respondents u/s 34 of the Act, 1996 were not availed of by them in time. Therefore, according to him, the Award has now become decree of the Court and it is not open to the executing Court to go behind the decree.

6. u/s 35 of the Act, 1996, arbitral award is final and binding on the parties. This general rule is however, subject to the provisions of Section 34 which contemplates an application for setting aside the award on certain specified grounds. In the instant case, the respondents tried to avail of this remedy but failed to obtain any relief as their application was barred by time. Therefore, in view of the general rule stated above, the impugned award has become final and binding on the parties. The applicants in whose favour the said award is made;

are therefore, trying to enforce it u/s 35 of the Act, 1996 which provides for the enforcement of arbitral award under the CPC as if it is a decree of the Court. It is well settled law that the executing Court cannot go behind the decree and has to execute it as it is unless it can be shown that the Court which passed it had inherent lack of jurisdiction. (Vide Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, and Sunder Dass Vs. Ram Prakash,). In that case, the decree is null and void ab initio and it is non est. The present Chamber Summons by the respondents is an attempt to challenge the validity of the award, which has now become decree of the Court, on the several grounds including the ground of jurisdiction. It is not open to the respondents to press into service other grounds of challenge in execution proceedings. Therefore, their challenge can be entertained and considered so far as it relates to the ground of jurisdiction only. The respondents Director Sanjay Patel has in paragraph 3 of his affidavit raised several grounds; viz. (a) to (p) but only following two can be considered as they relate to the question of jurisdiction. They are :

(a) There is no Arbitration agreement between the parties.

(b) The Award was made without jurisdiction.

7. Sanjay Patel has made the following affirmations in paragraph 4.12 of his affidavit.

"..... .The Hindustan Chamber of Commerce informed the respondents about the same whereupon the Respondents by their letter dated 23-2-1999 pointed out that they were not the members of the Hindustan Chamber of Commerce, that there was no Arbitration Agreement between the Respondents and the Applicants and that therefore, the Arbitration Rules of the Hindustan Chamber of Commerce did not apply. The Hindustan Chamber of Commerce however persisted and purported to appoint an Arbitrator on behalf of the Respondents without their consent or authority. By their letter dated 23-4-1999, sent to the respondents, the said Hindustan Chamber of Commerce intimated them that they had appointed Shri Laxmichandji Ariyab as an Arbitrator on behalf of the respondents and that the Arbitration Meeting was fixed on 15-5-1999. Hereto annexed and marked Exhibit "B" is office translation of the said letter which is in Hindi language. Three members Arbitration, one appointed by the Applicants, the other appointed by the Hindustan Chamber of Commerce ostensibly on behalf of the respondents and the two Arbitrators having appointed an umpire was thus illegally constituted. The respondents appeared before the said Arbitrators under protest and submitted that they had no jurisdiction to Arbitrate as they sought to do."

In paragraph 6 of the affidavit he has further stated :

"The Arbitrators overruled the Respondents objection as to Jurisdiction, wrongly assumed jurisdiction and purported to make an Award, allegedly on 6-9-1999. Neither the Arbitrators nor the said Hindustan Chamber of Commerce served the said Award on the Respondents. The Respondents discovered the said Award only

on 9th May, 2001, when they took search of proceeding in execution Application filed by the Applicants in the High Court to execute the said Award, as stated hereinafter."

8. Chapter IV of the Act 1996 relates to the jurisdiction of the arbitral tribunal and Section 16 therein deals with the competence of the arbitral tribunal to rule on its jurisdiction. It reads as under :--

"(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 Sub-section (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."

In the instant case, the respondents did raise the issue of jurisdiction before the arbitral tribunal but the same was overruled. Such rejection affords a ground to the respondents under Sub-section (6) of Section 16 to get the Award set aside u/s 34. But as pointed out above the respondent could not avail of the remedy u/s 34 as their application for condonation of delay in filing their application was beyond time. Shri Gala however, submitted that the respondents can agitate that ground in execution proceeding also since the executing Court is competent to consider the ground of lack of jurisdiction of the Court passing the decree. In this respect, Shri Gala placed reliance on the Division Bench decision of this Court in *Union of India v. Ajit Mehta and Associates Co.*, AIR 1990 Bombay 457, in which the validity of awards by persons who could not under the arbitration agreement, have ever been appointed as arbitrators, was in question. The Division Bench after taking conspectus of various decisions laid down the following three

propositions in paragraph 25 of its judgment.

"The conspectus of the decisions cited above, therefore, lays down a proposition that if under a clause of arbitration such as ours where the arbitrator is to be appointed by a named authority and not by consent of the parties, the provisions of Section 8 cannot be invoked for appointment of an arbitrator. It is only the provision of Section 20(4) that can be availed of in such circumstances, and even in that case the only direction that the Court can give, in the first instance, is to the appointing authority to name the arbitrator. The second proposition which emerges from this decision is that when there is an express term in the contract that the dispute will be arbitrated only by an arbitrator appointed by the named authority and when an arbitrator is appointed u/s 8 to arbitrate such a dispute, the very appointment of the arbitrator is void being without jurisdiction, the arbitrator so appointed lacks jurisdiction inherently and hence the award made by such arbitrator is non-est. The third proposition is that when the award suffers from such inherent defect it can be set aside or ignored at any stage of the proceedings."

In the facts of the case before it, the Division Bench proceeded to observe as under:--

"The present is not a case of a mere invalidity of the award either on account of an error apparent on the face of the award or on account of its being outside the scope of the reference or being made pursuant to an invalid reference. In the present case, the award is a nullity from its inception since the very appointment of the arbitrator was without jurisdiction. The Court which made the appointment had no power u/s 8 to appoint the arbitrator and hence no arbitrator could have been appointed under the said section at all. This is not a matter of mere illegality in the appointment of the arbitrator but a lack of power to appoint the arbitrators in question. Since the arbitrator/s in question could not have acted in law, they had no legal existence. The arbitrators so appointed were prohibited by law to proceed with the arbitration. Hence the proceedings conducted and the award/s made by him/them are non-est from the beginning and will have always to be regarded as such. The award is thus patently illegal and void. This illegality which goes to the very root of the award is not necessarily covered only by Section 30. It can be raised as a ground to set aside the award even independently of the said section. Hence the Court not only has the power but also a duty to quash the award or to ignore it. The nullity in such cases further runs with the award and the objection with regard to it can be raised at any stage including the stage of its execution or enforcement." (Emphasis provided)

In paragraph 35 of the judgment it is again observed : "At the cost of repetition we may state that it is held there that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the Court passing it, its invalidity can be set up in an execution proceeding. The executing Court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the executing Court would not incur the reproach that it is

going behind the decree because the decree being null and void, there would really be no decree at all."

It is therefore clear that the validity of a decree can be questioned before the executing Court only on the ground of lack of jurisdiction and not on any other ground. Even as regards the ground of lack of jurisdiction, the Supreme Court has in Vasudev Dhanjibhai's case (supra) laid down a crucial test to the effect that the executing Court should not be required to investigate the facts in order to determine whether the Court which passed the decree had jurisdiction to pass it. It was observed:

"Again when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record; where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

9. The respondent's contention that the arbitral tribunal has no jurisdiction to arbitrate and make an award is based on the alleged fact that there is absence of arbitration agreement within the meaning of Section 7 of the Act, 1996. Shri Jain the learned Counsel for the applicants, while refuting this contention, pointed out that the bills issued to the respondents contain an endorsement : "Subject to the sale dispute and arbitration Rules of Hindustan Chamber of Commerce, Mumbai". He further relied upon the decision in Krishan Chander Ramesh Chander and Brothers Vs. Sohan Lal, wherein incorporation of such a term in the bill was held to constitute a valid arbitration agreement. The Delhi High Court was dealing with an application u/s 20 of the Arbitration Act, 1940. In our case, however, the question arises in the execution proceeding. In my opinion, the executing Court is not expected nor warranted to enter into an investigation of the facts whether there is absence of arbitration agreement or not; if not, whether the alleged incorporation of the term in the bills amounts to a valid arbitration agreement or not etc. These questions clearly fall outside the jurisdiction of the executing Court which need not and can't record its finding on these factual aspects. Bearing in mind the ratio and test laid down by the Apex Court in Vasudev Dhanjibhai's case (supra), the lack of jurisdiction must be patent and should not require investigation or examination of certain facts. In other words, the alleged lack of jurisdiction must be obvious and ex facie clear. I may illustrate this by giving following examples. A decree passed by a Small Cause Court granting relief of specific performance of contract, a money decree passed by a Court for an amount above its pecuniary jurisdiction, a decree of matrimonial relief passed by a Civil Court where there is a family Court established for the same area, are some of the instances which illustrate what a patent or obvious lack of jurisdiction means. The want of jurisdiction may be territorial, pecuniary or with

respect to the subject matter of the dispute. Refusal in such cases by the executing Court to execute the decree on the ground that the Court which passed it had no jurisdiction is perfectly right and justified. But if the executing Court goes beyond its limits and takes upon itself to examine the validity of the decree on any other ground or enters into examination of factual details on which the plea of lack of jurisdiction is based then it ceases to be the executing Court and usurps the jurisdiction or assumes the role of an appellate Court. The plea that there, was no arbitration agreement at all or if there be any, it was not within the ambit of Section 7 cannot be entertained in the execution proceeding. The executing Court cannot decide the same as it is not a question "relating to execution, discharge or satisfaction" within the scope of Section 47 of the Civil Procedure Code. It is true that in the case of *Union of India v. Ajit Mehta and Associates* (supra) the Division Bench did undertake the exercise of examining the question whether the Court had any power, under the arbitration agreement, to appoint arbitrators. But it cannot be ignored that it was not in the exercise of powers of executing Court but an appellate Court.

10. Shri Jain drew my attention to the decision in *I.T.C. Ltd. v. Hanuman Vitamin Food Ltd.*, 1999 (2) LJ 345 wherein a learned Single Judge of this Court (Rebello, J.) in the exercise of the jurisdiction of executing Court decided a similar question about the existence or otherwise of an arbitration agreement and held :--

"In the instant case, it is no doubt true that there was no contract in writing between the parties. Nevertheless by accepting the membership of the Association and agreeing to abide by the Rules, Bye-laws, etc., as framed by the Association the said Bye-laws and Rules become a contract by incorporation between the parties and to that extent it can be said that there is an agreement in writing by virtue of incorporation. In that light of the matter I have no hesitation in holding that even under the Arbitration and Conciliation Act, 1996 pursuant to the Rules of the Association both the applicants and the respondents, by virtue of incorporation, entered into an agreement for Arbitration in writing. Once having so held, the main contention as to jurisdiction or nullity must be rejected."

With great respect, in my opinion, such an exercise is not necessary nor warranted by the executing Court in view of the clear ratio laid down by the Apex Court in *Vasudev Dhanajibhai*'s case (supra).

11. Shri Gala made reference to the decision of another learned Single Judge of this Court (Kochar, J.) in *Jaimal Shah Vs. ILA Pandya*, wherein the learned Judge proceeded "in the interest of justice" to examine whether the award in terms of which a decree was passed suffered from the vice of perversity and misconduct on the part of the Arbitrator and finally dismissed the execution application observing :

"According to me such a grant of decree does not debar or estop an Executing

Court from testing the validity and legality of the award. Even a decree which is confirmed upto the Supreme Court can be questioned when it is to be in execution and the Executing Court can go into the contentions which are open to it under law."

With great respect, I do not agree with my learned brother for the view which I have taken. Normally in such a case, the proper course would be to make a reference to a larger bench. However, in the instant case such a course is not necessary as both the learned counsel state before me that the operation of the judgment of Kochar, J. has been stayed by the appellate bench.

12. In the result, the chamber summons is dismissed with costs of Rs. 2,000/- to be paid by the respondents to the applicants.

C. C. expedited. Parties to act on ordinary copy duly authenticated by the Associate.