

(2018) 09 BOM CK 0012
In the Bombay High Court
Case No : Arbitration Appeal No.3 Of 2017

Shri. Chandrashekhar S/O Daulatram Bisen	APPELLANT
Vs	
M/S Yogi Construction, Thr. Proprietor, Shri. Shivkumar Jogendraprasad Sinha And Another	RESPONDENT

Date of Decision : 07-09-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 28(1)(a), 34, 34(2), 34(2)(a) (iii), 34(2)(b)(ii), 34(4), 37(1)(c)
Specific Relief Act, 1963 — Section 16, 16(c)

Citation : (2018) 09 BOM CK 0012

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

Bench : Single Bench

Advocate : A. A. Ninawe

Final Decision : Partly Allowed

Judgement

1. This appeal filed under Section 37(1) (c) of the Arbitration and Conciliation Act, 1996 (for short, the said Act) takes exception to the order passed by the learned Principal District and Sessions Judge, Nagpur in Misc. Civil Application No.1118/2015 whereby that application filed under Section 34 of the said Act by the respondent No.1 herein has been allowed and the award passed by the Sole Arbitrator on 30.09.2015 has been set aside.

2. The facts in brief are that on 30.04.2012, the appellant and the respondent No.1 entered into an agreement of sale of a flat. That agreement contained an arbitration clause. Pursuant to orders passed in proceedings under Section 11(6) of the said Act, this Court appointed a Sole Arbitrator to adjudicate the disputes between the parties. Pursuant to such reference being made, the appellant filed his statement of claim before the sole Arbitrator. Despite grant of opportunities to the respondent No.1 herein, the

proceedings were not contested and on 3rd 2015, the Sole Arbitrator passed his award by accepting the claim made by the appellant. The appellant was held entitled to possession of the flat in question on the payment of balance consideration within a period of two months and the respondent No.1 was directed to deliver possession of that flat to the appellant within a period of three months. Being aggrieved the respondent No.1 filed proceedings under Section 34 of the said Act for challenging the award. By the impugned judgment dated 6th 2017 that application was allowed and after setting aside the award the matter was remanded for fresh adjudication either by the same Arbitrator or by any other Arbitrator as would be agreed by the parties. Being aggrieved the appellant has filed the present appeal.

3. Shri A. A. Ninawe, learned Counsel for the appellant submitted that the Court erred in setting aside the award that was passed in favour of the appellant. The respondent No.1 despite grant of sufficient opportunity failed to appear before the Arbitrator and contest the proceedings. By raising false grounds in the proceedings under Section 34 of the said Act, the respondent No.1 sought to invoke the jurisdiction of the Court. It was submitted that under provisions of Section 34(2) of the said Act the scope for interference was limited and in absence of participation by the respondent No.1 before the Arbitrator, the contentions as urged were not liable to be accepted. It was submitted that pursuant to the award as passed, necessary payments were remitted to the respondent No.1 and the balance consideration was duly paid. It was further submitted that the Court committed an error in holding that the readiness and willingness on the part of the appellant had not been considered by the Arbitrator or that reasonable opportunity was not given to the respondent No.1. Further the Court was not justified in observing that the Arbitrator could not have directed sale of the suit property without cancelling the sale deed that was executed by the respondent No.1 in favour of a third party. It was then submitted that there was no power with the Court to remand the proceedings to the Arbitrator as held in *Kinnari Mullick & another vs Ghanshyam Das Damani* (2018) 11 SCC 328. The learned Counsel also placed reliance on the decisions in *Satya Pal Anand v. State of M. P.* (2016) 10 SCC 767, *State of West Bengal v. Shivananda Pathak* (1998) 5 SCC 513 and *Food Corporation of India and Ors. vs. Yadav Engineer and Contractor* 1982 Mh.L.J. 803 in

support of his contentions.

4. The respondent No.1 has been duly served but it has not chosen to contest the appeal. With the assistance of the learned Counsel for the appellant,

I have perused the records of the case and I have given due consideration to his submissions.

5. Perusal of the impugned order indicates that in proceedings under Section 34 of the said Act, the Court has set aside the award principally on the

ground that reasonable opportunity was not given to the respondent No.1 for putting forth its case before the Arbitrator. It has also been observed

that the dispute has not been adjudicated in the light of the provisions of the Specific Relief Act, 1963 (for short, the Act of 1963). Further

observation has been made that the Arbitrator could not have directed the sale of the suit property without first cancelling the sale deed which had in

the meanwhile been executed by the respondent No.1.

6. Considering the first ground as regards grant of sufficient opportunity to the respondent No.1 by the Arbitrator, perusal of the record of the

arbitration proceedings indicates that on 20/3/2015 a notice was issued by the Arbitrator to both parties to remain present on 20/4/2015. On that

day both parties were present. The appellant filed his statement of claim while the respondent No.1 sought time to engage a Counsel. The Arbitrator

granted time of more two months and fixed the proceedings on 27/6/2015. The appellant was present on that day with his counsel, while the

respondent No.1 again sought time to engage Counsel. The parties were directed to deposit Rs.2500/- each for effective hearing and Rs.25,000/- as

advance. The appellant deposited amount of Rs.25,000/- by cheque. The proceedings were then adjourned and kept on 23/7/2015. On that day,

the appellant was present and the respondent No.1 remained absent but sent an application for adjournment. Time was again granted and the

proceedings were kept on 2/8/2015. On that day, the appellant was present but the respondent No.1 remained absent and he did not give any

intimation about his absence. Hence, the matter proceeded further and the appellant was directed to file claim statement with documents. On 18/8/

2015, the appellant was again present and the respondent No.1 was absent. To enable the appellant to file additional claim statement, the matter

was kept on 19/8/2015 on which day the appellant filed his statement of claim

along with affidavit of his evidence. The respondent No.1 again remained absent. The affidavit filed by the appellant was verified and the appellant's statement was recorded. The matter was kept on 28.8.2015. On that day it was again adjourned with a view to enable the appellant to give correct calculations. Ultimately, the award was passed on 3.9.2015.

From the aforesaid it is clear that sufficient opportunity was given by the Arbitrator to the respondent No.1 to contest the arbitration proceedings.

Though the respondent No.1 appeared before the Arbitrator on two occasions and sought time, he did not take any further steps in the matter. The

Arbitrator was not expected to grant any further opportunity when even after grant of time of more three months, the respondent No.1 did not choose

to participate in the said proceedings. As per provisions of Section 34(2)(a)(iii) of the said Act, the award can be set aside only if the party making the

application under Section 34 is not given proper notice of the appointment of an Arbitrator or was otherwise unable to present his case. The

observations in para 10 of the impugned judgment that the arbitration proceedings were wound up within a period of ten days after filing of the claim

statement is contrary to the record of the arbitration proceedings. Initial affidavit was filed on 20.4.2015 with copy to the respondent No.1.

Thereafter statement of claim was filed on 19.8.2015. However, from 23.7.2015, the respondent No.1 remained absent. The Arbitrator was not

expected to wait indefinitely for the respondent No.1. Despite grant of time, the respondent No.1 did not choose to utilize that opportunity. The

finding recorded by the Court in that regard is therefore contrary to the record and is thus liable to be set aside. It is held that the Arbitrator had

granted sufficient opportunity to the respondent No.1 and the award was not liable to be set aside under provisions of Section 34(2)(a)(iii) of the said

Act.

7. Coming to the other ground that has found favour with the Court is that the aspect of readiness and willingness in terms of provisions of Section 16

(c) of the Act of 1963 has not been considered by the Arbitrator. As per provisions of Section 28(1)(a) of the said Act, an arbitration other than an

international commercial arbitration has to be conducted and decided by the Arbitral Tribunal in accordance with the substantive law for the time being

in force in India.Â In other words, the parties to the arbitration agreement are required to make out their respective cases and the Arbitral Tribunal

has to decide the same in accordance with the substantive law for the time being in force in India.Â In *Bharat Aluminium Co. v. Kaiser Aluminium*

Technical Services Inc. (2012) 9 SCC 552 it has been observed by the Constitution Bench of the Hon'ble Supreme Court that said provision ensures

that two or more Indian parties do not circumvent substantive Indian law by resorting to arbitration. Thus, it is clear that the Arbitral Tribunal has to

decide the dispute in accordance with the substantive law as prevailing. That a claim for specific performance can be adjudicated through arbitration

has been held by the Hon'ble Supreme Court in *Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others* (1999) 5 SCC 651.

In the present case, considering the nature of relief being sought by the appellant before the Arbitral Tribunal, the Act of 1963 would be the

substantive law applicable to the parties. It was therefore incumbent upon the Arbitrator to have applied the provisions of the Act of 1963 while

passing the award. However, in the said award, the requirements of Section 16 of the Act of 1963 have not been taken into consideration. The aspect

of readiness and willingness on the part of the appellant as well as the manner in which discretion was required to be exercised in favour of the

appellant has not been adverted to.Â The learned Principal District Judge to that extent was justified in observing that the statutory mandate in the

form of complianceÂ with the provisions of the Act of 1963 was absent in the award as passed.Â That finding recorded by the learned Principal

District Judge does not deserve to be interfered with. The award has been rightly set aside under provisions of Section 34(2)(b) (ii) of the Act.

8. On the aspect of remand of the proceedings as ordered by the learned Principal District Judge, it is found that said direction isÂ contrary to the

provisions of Section 34(4) of the said Act as well as the law as laid down in *Kinnari Mullik* and another (*supra*). It has been held in the aforesaid

decision that the limited discretion available to the Court under Section 34(4) of the said Act can be exercised only if a written application is made by a

party to the arbitration proceedings before passing of the award. Said power cannot be exercised suoÂ?motu by the Court after the award has been set

aside. By the impugned order, the award has been set aside and the proceedings have been remanded to the Arbitrator for fresh adjudication. Such

course is not permissible in view of the aforesaid law as laid down. That direction issued by the learned Principal District Judge to that effect is thus

liable to be set aside.

9. According to the appellant, the Court was not justified in observing that the Arbitrator could not have directed sale of the property which was

already sold without first cancelling the said sale deed.Â Reliance in that regard has been placed on the decision in Satya Pal Anand (supra). It is

found that in the light of present adjudication those observations are not relevant especially when in proceedings under Section 34 of the said Act, the

award itself was set aside.Â Needless to state that if the appellant would have been found entitled to the relief as claimed in the arbitration

proceedings, consequential orders could have been passed in that regard by the Arbitrator.

10. In view of aforesaid discussion, it is found that the Arbitrator decided the proceedings without applying the substantive law of the land namely the

Act of 1963. However, the Court in proceedings under Section 34 of the said Act was not justified in remanding the proceedings after having set aside

the award.Â In that view of the matter, the following order is passed:

(1) The judgment dated 6Â1Â2017 in Misc. Civil Application No.1118/2015 to the extent it has remanded the proceedings to the Arbitrator is quashed

and set aside. Setting aside of the award under Section 34(2)(b)(ii) of the Act is maintained. Similarly, observations made in the impugned order with

regard to cancellation of the sale deed would not operate. As the award now stands set aside, the parties are at liberty to take such other steps and

pursue their remedies in accordance with law as observed in Kinnari Mullik and another (supra).

(2) The Arbitration Appeal is partly allowed in aforesaid terms and disposed of.Â There would be no order as to costs.