
(2016) 02 BOM CK 0055

In the Bombay High Court

Case No : Review Petition (L) No. 32 of 2015 in Arbitration Application No. 166 of 2013

Soham Shah

APPELLANT

Vs

Indian Film Company Limited and another

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 11(9), 2(1)(f)

Citation : (2016) 5 ALLMR 555 : (2016) 5 BCR 182 : (2016) 3 MhLJ 476 : (2016) 5 RAJ 748

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Ashish Kamat, a/w. Madhu Gadodia, Ms.Megha Chandra, i/b. Naik Naik & Co, for the Respondent

Final Decision : Allowed

Judgement

R.D. Dhanuka, J. - By this review petition, the applicant seeks recall of the order dated 27th June, 2014 passed by the then designate of the Hon''ble Chief Justice thereby appointing a counsel of this court as the sole arbitrator. By an order dated 17th November, 2014, S.J. Kathawala, J., the then learned designate of the Hon''ble Chief Justice by consent of parties substituted the earlier arbitrator appointed by an order dated 27th June, 2014. It is not in dispute that the review petitioner has filed written statement before the learned arbitrator.

2. Ms.Panda, learned counsel for the review petitioner invited my attention to the arbitration application filed by the original applicant and would submit that admittedly, the applicant no.1 was a company incorporated in Cyprus and admittedly was a body incorporated in the country other than India. She submits that since one of the party to the arbitration agreement was a corporate incorporated in the country other than India, the arbitration would be an international commercial arbitration within meaning of section 2(1)(f) of the Arbitration and Conciliation Act, 1996. She submits that under section 11(9) of

the Arbitration and Conciliation Act, 1996, in view of the arbitration being an international commercial arbitration, the Chief Justice of India or his designate alone can appoint an arbitrator. She submits that the provisions of section 11(6) of the Arbitration and Conciliation Act, 1996 were thus not applicable and thus the designate of the Hon''ble Chief Justice of this court had no jurisdiction to appoint an arbitrator. She submits that since the order passed by the learned designate of the Chief Justice was without jurisdiction, the subsequent order passed by S.J. Kathawala, J. substituting the arbitrator appointed by the earlier order was also without jurisdiction.

3. It is submitted by the learned counsel that since the order passed by the learned designate of the Hon''ble Chief Justice was without jurisdiction, the present review application being in the nature of the procedural review would be maintainable. In support of this submission, learned counsel placed reliance on the judgment of this court delivered on 4th April, 2013 in Review Petition No.2 of 2013 in case of Hindustan Construction Co. Ltd. v. State of Maharashtra.

4. Mr. Kamat, learned counsel appearing for the original applicant on the other hand submits that though the original applicant had filed an application under section 11(6) of the Act, no objection about jurisdiction of the learned designate of the Hon''ble Chief Justice was raised. He submits that in any event, since the earlier arbitrator appointed by the learned designate refused to act as an arbitrator, the parties had by consent substituted the said arbitrator by appointing a senior advocate of this court and an order to that effect was passed by the then learned designate of the Hon''ble Chief Justice on 17th November, 2014. He submits that even in the written statement filed before the learned arbitrator, the review petitioner has not issued any issue of jurisdiction. It is submitted that in any event in view of the subsequent order passed by the learned designate of the Hon''ble Chief Justice on 17th November, 2014, the review petitioner not having sought review of the said order, the order passed by the learned designate of the Hon''ble Chief Justice on 27th June, 2014 cannot be reviewed. He submits that the grounds on which the review petition is filed by the review petitioner are not in the nature of the procedural review.

5. My attention is also invited to the statement of claim filed by the original applicant before the learned arbitrator and more particularly paragraph (9) and the prayers in the statement of claim. It is submitted that the applicant no.1 is impleaded as a party applicant before the arbitral tribunal only with a view to obviate the objection if any to the review petition that the applicant no.2 was not legally liable to enforce the present claim against the respondent. He submits that the statement of claim is basically filed by the claimant no.2 who is an Indian party.

6. In rejoinder, Ms.Panda, learned counsel appearing for the review petitioner submits that even if the earlier arbitrator appointed by the learned designate was substituted by consent, the said consent almost could be the consent for substitution of the name and it would not confer the jurisdiction on the then

designate of the learned Chief Justice.

7. A perusal of the application filed under section 11 by the original applicant clearly indicates that the original applicant no.1 was a company incorporated in Cyprus i.e. in a country other than India. A perusal of the statement of claim filed by the applicant before the learned arbitrator also indicates that even today it is the claim of the applicant no.1 that the applicant no.1 company was incorporated in Cyprus i.e. country other than India. It is not in dispute that the review petitioner however did not raise any objection before the learned designate while opposing the Arbitration Application No.166 of 2013.

8. Under section 11(9) of the Arbitration and Conciliation Act, 1996, if any application for appointment of a sole or third arbitrator is required to be made in any international commercial arbitration, the Chief Justice of India or the person or institution designated by him only is empowered to appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The power of the Chief Justice of High Court under section 11(6) of the Arbitration and Conciliation Act, 1996 can be exercised only in case of a domestic arbitration. Admittedly, one of the parties to the arbitration agreement was a body incorporated in the country other than India. The arbitration relating to disputes between such two parties would fall within the definition of the international commercial arbitration defined under section 2(1) (f) of the Arbitration and Conciliation Act, 1996. In my view the learned designate of the Hon''ble Chief Justice of this court thus has no jurisdiction to appoint an arbitrator in the facts of this case.

9. In my view even if the party did not bring these facts to the notice of the learned designate of the Hon''ble Chief Justice when application under section 11 of the Arbitration Act was heard, even by consent of parties, the learned designate of the Chief Justice of this court could not have appointed an arbitrator in case of international commercial arbitration. The question of waiver will thus not apply to the facts of this case in view of there being inherent lack of jurisdiction.

10. Insofar as appointment of the substitute arbitrator by the then designate judge of the Hon''ble Chief Justice is concerned, in my view since the first order passed by the learned designate of this court on 27th June, 2014 was without jurisdiction, the subsequent order passed by the designate of the Hon''ble Chief Justice in furtherance of the earlier order also would be without jurisdiction.

11. Merely because review petitioner has not raised any objection before the learned arbitrator in the written statement, the order passed by the learned designate which itself was without jurisdiction which objection can not be derogable, there would be no waiver under section 4 of the Arbitration and Conciliation Act, 1996.

12. Insofar as submission of the learned counsel for the original applicant that the review sought by the review petitioner is not in the nature of the procedural

review is concerned, in my view since the learned designate of this court had passed the said order under section 11(6) of the Arbitration and Conciliation Act, which order was without jurisdiction on the application filed by the original applicant which itself was not maintainable, even by consent of parties, the learned designate could not have exercised jurisdiction which jurisdiction he did not have in entertaining the application under section 11(6) of the Arbitration and Conciliation Act, 1996. This court in Review Petition No.2 of 2013 in case of Hindustan Construction Co. Ltd.(supra) while dealing with similar situation has taken a view that the procedural review is permissible under Article 215 of the Constitution of India. In my view, judgment this court in case of Hindustan Construction Co. Ltd.(supra) in Review Petition No.2 of 2013 would apply to the facts of this case. There is thus no merit in this objection of the learned counsel for the original applicant.

13. A perusal of the statement of claim filed before the learned arbitrator by the original applicants clearly indicates that the claim is filed by both the applicants including the applicant no.1 which company is incorporated in country other than India.

14. I, therefore, pass the following order :-

Order dated 27th June, 2014 passed by the learned designate of this court in Arbitration Application No.166 of 2013 is recalled. Arbitration Application No.166 of 2013 is dismissed being without jurisdiction.

15. Review petition is allowed in the aforesaid terms. No order as to costs.