

(1992) 09 BOM CK 0018

In the Bombay High Court

Case No : Arbitration Petition No. 32 of 1992

Star Industrial and Textile Enterprises Ltd.

APPELLANT

Vs

Som Datt Builders P. Ltd. and Others

RESPONDENT

Date of Decision : 22-09-1992

Acts Referred:

Arbitration Act, 1940 — Section 2, 28

Citation : (1993) 1 BomCR 173 : (1993) 95 BOMLR 941

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : D.J. Khambatta, Mulla and instructed by Mulla and Craigie Blunt and Caroe, for the Appellant; K.C. Nichani, for the Respondent

Judgement

S.M. Jhunjhunwala, J.—By this petition, the petitioners seek extension of time for the learned Arbitrators to make their Award.

2. On 3rd February, 1983, the petitioners had entered into a contract with one M/s. Sonitex of Algiers for erection of a plant for manufacture of woven blankets and coarse yarn on a turnkey basis. On 8th October, 1982, the petitioners had entered into an agreement with the 1st respondents whereby the 1st respondents were appointed as sub-contractors of the petitioners for the said project on the terms and conditions mentioned therein (for short, hereinafter referred to as 'the said agreement'). Clause 11 of the said agreement incorporates an arbitration agreement entered into by and between the petitioners and the 1st respondents. The said Clause 11 reads as under :

"Any dispute arising out of or in connection with this agreement during its execution or after the completion or abandonment thereof and which cannot be settled amicably shall be finally referred to and decided in accordance with the Indian Arbitration Act, 1940 or any other law in force at the time of arbitration. Each party will appoint one arbitrator for this purpose. In the event of disagreement between the arbitrators, the matter shall be referred to the common Umpire to be nominated by both the arbitrators. The decision of the

Umpire shall be deemed to be final and binding on both the parties."

Disputes and differences having arisen by and between the petitioners and the 1st respondents out of or in connection with the said agreement, and according to the 1st respondents over a sum of Rs. 25 crores having become due and payable by the petitioners, by their letter dated 21st April, 1989 addressed to the petitioners, the 1st respondents invoked arbitration as per the said arbitration agreement and appointed one Mr. Gurucharan Singh, former member, Central Water Commission, Government of India, New Delhi as their arbitrator. The petitioners were called upon to appoint their arbitrator within the time specified in the said letter. By their letter dated 6th May, 1989 addressed to the 1st respondents, while denying their liability to pay a sum of Rs. 25 crores to the 1st respondents, the petitioners appointed one Mr. C.P. Shah, former Chairman of Bank of India, Bombay, as their arbitrator in the matter and reserved their right to put their all claims against the 1st respondents in the arbitration. In this connection, the petitioners had earlier forwarded to the 1st respondents their telefax dated 6th May, 1989.

3. By his letter dated 31st May, 1989, addressed to the petitioners and the 1st respondents, the said Gurucharan Singh expressed his inability to act as an arbitrator. The 1st respondents appointed one Mr. R.S. Aggarwal, a retired Chief Commissioner of Income Tax, New Delhi, to act as an arbitrator on their behalf in place and stead of the said Gurucharan Singh. By their letter dated 6th June, 1989 addressed to the petitioners, the 1st respondents communicated to the petitioners about appointment of the said R.S. Aggarwal as arbitrator on behalf of the 1st respondents. The said C.P. Shah and the said R.S. Aggarwal, the learned arbitrators appointed Mr. Justice Y.V. Chandrachud (Retired) as an Umpire.

On 14th June, 1989, the petitioners addressed a letter to the learned arbitrators and pointed out that -

i) Petitioners' Company was a sick Undertaking within the meaning of The Sick Industrial Companies (Special Provisions) Act, 1985, and was covered under the BIFR Scheme; and

ii) the petitioners' Company was declared as a Relief Undertaking under The Bombay Relief Undertaking (Special Provisions) Act, 1958 by the Maharashtra Government vide a Notification dated 22nd December, 1988 which was extended from time to time. By the said letter, the petitioners contended that by reason of an Agreement entered on 25th January, 1988, with the 1st respondents and the Protocol dated 15th March, 1989 entered with one M/s. Enedim to which the 1st respondents were also signatories, and pending disputes, differences and claims were fully settled and as such, the claim put forward by the 1st respondents could not be entertained. Without prejudice to their said contention, the petitioners also contended that the claim of the 1st respondents was barred by limitation. The petitioners further contended that since the Notification declaring

the Petitioners" Company as a Relief Undertaking was in force, the alleged liability of the petitioners having been suspended thereunder, the arbitration could not be proceeded with and requested the learned arbitrators to decide the said issue first. By the said letter, the petitioners further contended that the petitioners had a claim against the 1st respondents arising out of or in connection with the said agreement as mentioned in Annexure II forwarded alongwith and requested the learned Arbitrators for adjudication thereof in case the learned Arbitrators came to the conclusion that the arbitration proceedings could legally be proceeded with and the parties could make their claims outside the scope and ambit of the Agreement dated 25th January, 1988 and Protocol dated 15th February, 1989.

4. The first meeting before the learned Arbitrators was held on 20th June, 1989 in Bombay. Preliminary matters pertaining to subject matters of the arbitration reference were discussed. In view of the petitioners being then declared as a Relief Undertaking under the Bombay Relief Undertakings (Special Provisions) Act, 1958 till 21st December, 1989, the learned Arbitrators directed both the parties to obtain written legal opinions as to operation, scope and extent of the effect of BRU on the arbitration proceedings, whereupon the learned Arbitrators would decide further course of action. Accordingly, both the parties obtained written legal opinions and filed before the learned Arbitrators. The learned Arbitrators also obtained opinion of Mr. Justice A.N. Grover (Retired). At the meeting held on 19th August, 1989, the learned Arbitrators considered the opinions filed with them as also the opinion obtained from Mr. Justice Grover (Retired) and other relevant facts and circumstances and decided to proceed with the arbitration and to ascertain the rights liabilities of the parties in dispute. The 1st respondents were directed to file their claim with all supporting documents by 4th September, 1989 and the petitioners were directed to file their reply to the claim of the 1st respondents and their counterclaims with all supporting documents before the learned Arbitrators by 18th September, 1989. Claims by the 1st respondents, reply to the claims as well as counterclaims by the petitioners were filed before the learned Arbitrators. The hearings of the arbitration reference were held by the learned Arbitrators from time to time. The 1st respondents declined to lead any oral evidence before the learned Arbitrators.

5. Since the petitioners had sought to invoke the bank guarantee furnished by the 1st respondents, the 1st respondents had on or about 21st April, 1989 filed a suit bearing No. 1092 of 1989 in the High Court at Delhi for declaration that the bank guarantee was discharged and that the petitioners were not entitled to invoke the same. The 1st respondent also sought injunction against the petitioners to restrain the petitioners from invoking the bank guarantee. In view thereof, the petitioners had addressed a letter dated 13th September, 1990 to the learned Arbitrators and gave notice to them about the said suit having been filed u/s 35 of the Arbitration Act, 1940 (for short, "the said Act"). In view of the said suit filed by the 1st respondents being not upon whole of the subject matter of the reference, the learned Arbitrators decided to continue with the hearing of

the reference pending before them.

6. The petitioners have also led oral evidence before the learned Arbitrators. one Mr. P.M. Gurumurthy was examined on behalf of the petitioners before the learned Arbitrators on 16th February, 1990 and he was cross-examined by the learned advocate appearing for the 1st respondents on 17th February, 1990. One Dr. P.V. Seshadri was examined before the learned Arbitrators on behalf of the petitioners. His oral examination-in-chief commenced on 21st March, 1991 and was concluded on 23rd November, 1991. On 23rd November, 1991, the learned advocate for the 1st respondents commenced cross-examination of the said Dr. Seshadri. As the cross-examination could not be concluded on 23rd November, 1991, the dates of next meetings to continue the cross-examination were fixed for 3rd and 4th days of January, 1992. Both the parties had from time to time granted their consent to extend time for making the Award and accordingly, time to make the Award was extended till 31st December, 1991. The petitioners gave their consent for extension of time for making the Award till 29th February, 1992. However, the 1st respondents did not agree to extend the time for the learned Arbitrators to make the Award beyond 31st December, 1991 and addressed a letter dated 31st December, 1991 to the learned Arbitrators to refer the matter to the Umpire. A copy of the said letter was forwarded by the 1st respondents to the learned Umpire with a request to him to enter upon the reference.

7. With the consent of the learned Counsel appearing before me, I have heard the petition at the stage of its admission on the footing of final hearing thereof.

8. Ms. Nichani, the learned Counsel appearing for the 1st respondents, has submitted that the petitioners by their conduct being negligent in proceeding with the reference for about one and half years, are not entitled to have time extended by this Court for the learned Arbitrators to make their Award. She has further submitted that the petitioners are interested in avoidance of arbitration proceedings under one pretext or the other and in causing delay in completion thereof. The petitioners obstructed the proceedings firstly, alleging that since the petitioners were declared as a Relief Undertaking under BRU, the arbitration proceedings could not be proceeded with and secondly, by serving notice upon the learned Arbitrators u/s 35 of the said Act after the 1st respondents had filed the aforesaid suit in the Delhi High Court and as such, the petitioners are not entitled to discretionary relief of having the time for the learned Arbitrators to make the Award extended. Ms. Nichani has further submitted that the time for the learned Arbitrators to make the Award having expired, the 1st respondents justly and properly requested the learned Umpire to enter upon the reference since, in the circumstances of the case, the 1st respondents were entitled to have the reference made to the learned Umpire. In view of reference to the learned Umpire already made by the 1st respondents, the question of extension of time for the learned Arbitrators to make the Award now does not arise. Ms. Nichani has lastly submitted that this Court has no jurisdiction to entertain and try this petition, as no part of the cause of action has arisen within the

jurisdiction of this Court. In her submission, in view of the 1st respondents having filed the said suit in the High Court at Delhi, the High Court at Delhi is the proper forum to entertain and try this petition.

9. Section 28 of the said Act reads as under :

"28.(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

The Court has under this section power to enlarge the period of making the award from time to time and this power can be exercised before or after the time originally fixed has expired and before or after the award has been made, though beyond time. The courts have always favoured enlargement of time for making the award even when one of the parties to the arbitration expressed disinclination or even opposition to such extension, where the party seeking such an extension had not been guilty of a condemnable delay or contumacious conduct. In the instant case, 22 meetings have been held before the learned Arbitrators since 20th June, 1987. The issues pertaining to the effect of petitioners being declared a Relief Undertaking under BRU and the said suit filed by the 1st respondents in the High Court at Delhi have already been considered by the learned Arbitrators and the learned Arbitrators decided to proceed with the hearing of the reference pending before them and did proceed to hear the same whereat both the parties have participated. The petitioners have led the evidence of the said Gurucharan Singh. Cross-examination of Dr. Seshadri, a witness on behalf of the petitioners is not yet concluded. Several meetings of the arbitration such as fixed on 30th August, 1990 to 10th September, 1990 and for 28th and 29th days of October, 1990 could not be proceeded with as scheduled as the 1st respondents had asked for postponement thereof. In the last meeting held before the learned Arbitrators on 23rd November, 1991 both the petitioners and the 1st respondents were present alongwith their legal advisers. The learned Arbitrators had fixed the next meetings for proceeding with hearings of the said reference on 3rd and 4th day of January 1992. From the minutes of the meeting held before the learned Arbitrators on 23rd November, 1991, it is not borne out that the 1st respondents were not consenting party to the meetings fixed on 3rd and 4th days of January 1992. The petitioners have already given consent to extend the time for the learned Arbitration to make the Award till 29th February 1992. However, the 1st respondents have by their letter dated 31st December, 1991 declined to extend the time for the learned Arbitrators to make the Award beyond 31st December, 1991. There is a possibility of the valuable rights accrued to the petitioners due to conduct of the 1st respondents during the arbitration proceedings being lost if the time to make the Award is not extended at this stage. It appears that the 1st respondents are now attempting to avoid the

evidence already recorded as also consequences of the hearing already completed before the learned Arbitrators, by intending to have de novo hearing of the reference before the learned Umpire. In the facts of the case, it can not be said that the petitioners are guilty of negligence or causing delay in completion of the proceedings before the learned Arbitrators. On the contrary, if the time for the learned Arbitrators to make the Award is not extended, it will cause injustice to the petitioners.

10. The arbitration agreement entered by and between the petitioners and the 1st respondents permits reference to the Umpire in the event of disagreement between the arbitrators. In the present case, there has been no disagreement between the learned Arbitrators. However, section 3 of the said Act provides that arbitration agreements must be deemed to include the provisions set out in the First Schedule to the said Act, "unless a different intention is expressed therein". Para 4 of the said Schedule provides that the Umpire is to enter on the reference in lieu of the arbitrators in two contingencies.

- i) if the arbitrators have allowed their time to expire without making an award; or
- ii) if the arbitrators have delivered to any party to the arbitration agreement or to the Umpire a notice in writing stating that they can not agree.

The said arbitration agreement entered by and between the petitioners and the 1st respondents does not exclude the operation of para 4 of the First Schedule to the said Act. However, in the facts of the case, it is not correct to say that the learned Arbitrators allowed the time to expire without making the Award. On the time for the learned Arbitrators to make the Award being extended by this Court, the learned Umpire to whom the reference has been unilaterally made by the 1st respondents shall cease to have jurisdiction in the matter. Merely because the reference to the learned Umpire has been made by the 1st respondents by their said letter dated 31st December, 1991, the Court does not cause to have jurisdiction to enlarge the time for the learned Arbitrators to make the Award.

11. Section 2(c) of the said Act defines 'Court' as under :

"2(c) 'Court' means a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit, but does not, except for the purpose of arbitration proceedings u/s 21, include a Small Cause Court;"

Therefore, Court means a Civil Court which would be competent to decide a suit in respect of the matter which is the subject of the reference. The Civil Court need not necessarily have jurisdiction over the whole of the cause of action or subject matter of reference; it is sufficient if it has jurisdiction over part of it. The said agreement incorporating the arbitration agreement between the petitioners and the 1st respondents was executed in Bombay. The amount due by the 1st respondents to the petitioner in connection with the said agreement is payable to the petitioners in Bombay. The petitioners carry on business in Bombay. Even

some of the arbitration meetings have been held in Bombay. In the said suit filed in the High Court at Delhi, the 1st respondents have prayed for declaration that the bank guarantee furnished in favour of the petitioners stands discharged and that the petitioners are not entitled to invoke the same. In the said suit, the 1st respondents have sought permanent injunction to restrain the petitioners from encashing the said bank guarantee. The said suit is not an application under the said Act to a Court competent to entertain it as contemplated by section 31(4) of the said Act and as such, does not oust the jurisdiction of this Court otherwise possessed to entertain and try the petition.

12. Taking all the circumstances into consideration, I am satisfied that it is a fit case to exercise the discretion in favour of the enlargement of time for the learned Arbitrators to make the Award. Hence, the petition is made absolute in terms of prayer (a). Time to make and publish the Award by the Arbitrators extended till 31st January 1993. No order as to costs.

13. Ms. Nichani, the learned advocate appearing for the 1st respondents, applies for stay of the operation of this Order. Mr. Khambatta, learned Counsel appearing for the petitioners, opposes the application.

14. In view of the fact that I have taken the view that the arbitration proceedings before the learned Arbitrators be expeditiously disposed off, the application for stay of the operation of the