
(2002) 10 BOM CK 0050
In the Bombay High Court
Case No : Arbitration Petition No. 255 of 2002

Union of India (UOI)

APPELLANT

Vs

Maa Agency and Another

RESPONDENT

Date of Decision : 24-10-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(2), 4

Citation : (2003) 2 ALLMR 1003 : (2003) 2 ARBLR 402 : (2003) 4 BomCR 234 : (2003) 2 MhLj 643

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Suresh Kumar, for the Appellant; Anil Singh, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Admit. Respondents waive service. By consent taken up for hearing and final disposal forthwith.

2. In these proceedings u/s 34 of the Arbitration and Conciliation Act, 1996, an award of a sole Arbitrator, dated 18th December 2001 is called into question. The Sole Arbitrator in the present case was the Chief Commercial Manager of the Western Railway. The dispute between the parties related to a contract which had been entered into for the printing and distribution of the All India Railway Time Table - August 1998, in pursuance of a purchase order dated 13th July 1998. Disputes arose between the parties and these were referred to arbitration. On 7th July 2000 and on 9th August 2000, the first respondent sought a reference to Arbitration of two claims. The petitioners referred these two claims to Arbitration on 8th August 2001. Before the Arbitral Tribunal, the first respondent raised three claims, two of them being claims in respect of which a reference had been made and an additional claim. The petitioners filed their written statement and at this stage, it would be material to note that no objection was raised before the Arbitrator either as regards his jurisdiction to entertain the third claim or in regard to the arbitrability of the claim. By the arbitral award, an amount of

Rs. 10,21,050/- has been awarded to the first respondent under three heads of claim: (i) illegal deduction of payment as commission payable Rs. 4,06,575/-; (ii) payment against copies of vendors - Rs. 4,20,000/-; and (iii) refund of amount against unsold copies returned by Vendors - Rs. 3,14,475/-. The arbitral award notes that the first respondent was to print and distribute 6,08,000 copies of the Time Table, out of which 8000 copies were to be given free of cost to the petitioner, 4,19,300 were to be distributed to vendors, a list of which was to be provided by the petitioner and 1,80,700 copies were to be purchased by the petitioner at the rate of Rs. 15/- per copy. There was a counter claim by the petitioner to the claim in arbitration. The arbitral award notes that the petitioner had settled the entire claim by imposing a penalty on the first respondent in accordance with the penalty clause contained in the purchase order. The first respondent, it has been noted, has paid the penalty of Rs. 22,784/- on 21st January 2000. The Union of India had in fact, released the performance guarantee of the first respondent which also suggested that the inspecting authority and the consignee had accepted the quality, quantity and delivery of the said Time Table to be satisfactory and in accordance with the terms of the purchase order. In these circumstances, the three claims as aforesaid have been granted. The counter claim has also been allowed to the extent of Rs. 1,20,000/-.

3. At the outset, it has been urged on behalf of the first respondent that the Arbitration Petition is barred by limitation. Now, the admitted fact is that the arbitral award was received by the petitioner on 18th December 2001. u/s 34(3), an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award. Section 9 of the General Clauses Act provides that in any Central Act or Regulation it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to". Since the arbitral award in the present case was received on 18th December 2001, having regard to the provisions of Section 9 of the General Clauses Act, that day would have to be excluded. The period of three months would thus commence on and from 19th December 2001 and expire on 19th March 2002. The Arbitration Petition has been filed within a period of 30 days thereafter, in fact on the last of the 30 days which was 18th April 2002. A Notice of Motion for condonation of delay has been instituted by the petitioner. In my view, sufficient cause has been shown to condone the delay of 30 days. The Motion is accordingly made absolute and the delay of 30 days is condoned.

4. Counsel for the petitioner urged that while invoking the provisions for arbitration, the first respondent had made a claim only in respect of two items, namely, (i) illegal deduction of payment of Rs. 4,06,575 /- as commission and (ii) payment for vendors' copies amounting to Rs. 4,20,000/-. In response to the first respondent's letter dated 23rd February 2001, a reference to arbitration was made on 8th August 2001 of these two claims. On behalf of the petitioner, it has been submitted that it was before the sole Arbitrator that the third claim

relating to a refund of the amount against unsold copies returned by vendors was introduced. This claim, it was urged, was not referred to arbitration and was therefore, outside the jurisdiction of the Arbitrator.

5. In the present, case, the arbitration clause is to be found contained in the Indian Railway Standard Conditions of Contract. Condition 2900 is entitled "Arbitration" and Clause (a) thereof provides as follows :

"2900 Arbitration

(a) In the event of any questions, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board; and by the Head of the Organisation in respect of contracts entered into by the other organisations under the Ministry of Railways. If, however, the arbitrator is a railway servant, he will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servants have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract."

6. In considering the correctness of the challenge to the arbitral award, it would be necessary to make a reference to some of the salient provisions of the Arbitration and Conciliation Act, 1996. Section 4 of the Act provides as follows:

"4. Waiver of right to object.--A party who knows that -

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

Section 5 then provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-1, no judicial authority shall intervene except where so provided in the Part. Under Sub-section (1) of Section 16, the Arbitral Tribunal is entitled to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Under Sub-section (2) of Section 16, a plea that the arbitral Tribunal does not have jurisdiction has to be raised not later than the submission of the statement of defence. Similarly under Sub-section (3) of Section 16, it has been provided that 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. The Arbitral Tribunal is empowered to admit a later plea if it considers the delay justified under Subsection (4). Upon such plea being raised either under Subsection (2) or (3) of Section 16, the Arbitral Tribunal is to decide that plea and in the event that it rejects the plea, to continue with the arbitral proceedings and make an arbitral award. A party aggrieved by such an arbitral award, is entitled under Subsection (6) of Section 16 to make an application for setting aside the arbitral award in accordance with Section 54. Sub-section (1) of Section 34 provides that recourse to a Court against, an arbitral award may be made only by an application for setting aside such award in accordance with Sub-sections (2) and (3). Insofar as the present proceedings are concerned, it would be material to note that under Sub-clause (iv) of Clause (a) of Sub-section (2) of Section 34, an arbitral award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."

7. These provisions of the Arbitration and Conciliation Act, 1996 provide for the manner in which a challenge to the jurisdiction of the arbitral Tribunal has to be raised. The Arbitral Tribunal is empowered to rule upon its own jurisdiction. The Act provides that a plea as regards the jurisdiction of the Arbitral Tribunal must be raised no later than the submission of the statement of defence. Similarly, a plea that the Arbitral Tribunal is exceeding the scope of its authority has to be raised as soon as the matter alleged to be beyond the scope of authority of the Tribunal is raised during the arbitral proceedings. In the event that the arbitral Tribunal rejects such a plea, it has to proceed to make an arbitral award and thereupon that award can be challenged u/s 34. These provisions must be construed in the light of Sections 4 and 5 of the Act which have already been adverted to earlier. u/s 4, the Act provides that where a party knows that a requirement under the arbitration agreement is not complied with and yet proceeds with the arbitration without stating its objection without undue delay, it shall be deemed to have waived his right to so object. u/s 5, a judicial authority is not entitled to intervene except where so provided in Part-I.

8. The provisions of Section 4 came up for consideration before a Bench of three learned Judges of the Supreme Court in a recent decision in *Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others*, . In that case, there was a challenge to an arbitral award on the ground that the arbitration took place only before two Arbitrators whereas it was mandatory u/s 10 of the Act that the number of Arbitrators shall not be an even number. Before the Supreme Court it was urged that Section 10 was mandatory and that any agreement which permitted a party to appoint an even number of Arbitrators would run contrary to this mandate. The Supreme Court held, following the decision in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, , that the authority of the Arbitral Tribunal u/s 16 is not confined only to the width of its jurisdiction but

goes also to the root of its jurisdiction. The Supreme Court held that a challenge to the composition of the Arbitral Tribunal has to be taken u/s 16(2) no later than the submission of the statement of defence and the party would, therefore, be free, if it so chooses not to raise such a challenge. Consequently, it was held that an objection to the composition of the Arbitral Tribunal is a matter which is derogable and if a party chose not to so object, there would be a deemed waiver u/s 4 of the Act. The Court held that so long as the composition of the Arbitral Tribunal was in accordance with the agreement of the parties Section 34 did not permit a challenge to the award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part-I of the Act.

9. In the present case, it was open to the petitioner to challenge either the jurisdiction of the Arbitral Tribunal to adjudicate upon the third claim or to raise the plea that the Tribunal was exceeding the scope of its authority. No such objection was raised before the Arbitral Tribunal. On the contrary, the petitioner proceeded with a defence to the claim on merits. The Arbitral award was passed thereupon. That being the position, the petitioner clearly waived u/s 4 its right to object on the ground that any requirement of the arbitration agreement had not been complied with. The defence that the third claim could not have been arbitrated upon without a formal reference by the competent authority to the Arbitrator was within the knowledge of the petitioner. The defence not having been raised, before the Arbitrator, the principle of waiver embodied in Section 4 of the Act must necessarily apply.

10. The position as it obtained under the earlier Arbitration Act of 1940 was considered by a Bench earlier of two Learned Judges of the Supreme Court in Sukalu Ram Gond Vs. State of M.P. and Others, . The Supreme Court held there as follows :

"An award derives its force from the original contract. Parties to the contract, by consent, refer their dispute for settlement, to a tribunal of their choosing, instead of to a Court. Therefore, there should exist an agreement showing consent to refer a dispute for settlement by the arbitrator. In cases where the arbitrator enters into the consideration of the matters which are not referred to him or over which he has no jurisdiction to try the question is not one of waiver or estoppel but of authority."

In Tarapore and Co. Vs. State of M.P., , the Supreme Court made a distinction between a patent lack of jurisdiction and a latent lack of jurisdiction. The Supreme Court held that where there is a patent lack of jurisdiction, an acquiescence of parties would not be material inasmuch as it is settled law that by agreement, jurisdiction cannot be conferred. That would not, however, be the case where there is only a latent lack of jurisdiction.

11. The Arbitration and Conciliation Act, 1996 makes a material change from the earlier Act of 1940, in that, it requires an objection as regards the jurisdiction of the Arbitrator or on the ground that the Arbitrator is acting beyond the scope of

his authority to be raised at the earliest possible opportunity. The period by which such an objection has to be raised is specified in Section 16. Section 4 incorporates the principle of waiver where an objection that a requirement of the arbitration agreement has not been complied with is not raised by a party who knows of the objection yet proceeds with the arbitration without stating his objection. That being the position, I am of the view that it is not open to the petitioner to raise the objection which is sought to be raised in these proceedings. The petitioner chose not to raise the objection in the arbitral proceedings and chose to defend all claims on merits. Finally, it would be necessary to emphasise that this is not a case where there is a patent lack of jurisdiction within the meaning of that expression as it occurs in the judgment of the Supreme Court in the Tarapore and Company case. The third claim was not of a kind that was excepted by the arbitration clause or of a kind that was inherently incapable of being referred to arbitration. That being the position, I do not find merit in the Arbitration Petition. The Arbitration Petition is accordingly rejected.