

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.914 OF 2011

Jayantilal Khandwala & Sons Pvt. Ltd.)
201, Stock Exchange Tower, Dalal Street,)
Fort, Mumbai – 400 001) **..... Petitioner**

VERSUS

1. Iffat Ahmedi)
8-2-608/1, Road No.10, Banjara Hills,)
Hyderabad – 500034)

2. Bombay Stock Exchange Ltd.,)
a company incorporated under the)
provisions of the Companies Act, 1956)
and having its Registered Office at)
25th Floor, P.J. Towers, Dalal Street,)
Mumbai – 400 001) **..... Respondents**

Mr.Simil Purohit, i/b. Purohit & Co. for the Petitioner.

None for the Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 24th MARCH, 2015

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 18th May, 2011 and supplementary award dated 15th May, 2011 passed by the arbitral tribunal allowing the claims made by the respondent no.1.

2. Some of the relevant facts for the purpose of deciding this petition are as under :-

3. The petitioner was the original respondent in the arbitration proceedings whereas the respondent no.1 was the original claimant.

4. The petitioner is share and stock broker and a member of the Bombay Stock Exchange Ltd. Respondent no.1 was the constituent and had carried out various transactions in shares and securities through the petitioner. During the period between 2002 – 2003, the petitioner had sold and disposed off the shares and securities of the respondent no.1 for approximately Rs.71,70,112/-. The dispute arose between the parties. The respondent no.1 filed a complaint against the petitioner before the Bombay Stock Exchange Ltd. The respondent no.1 was directed to initiate arbitral proceedings against the petitioner on 6th June, 2006.

5. On 14th July, 2006 the petitioner and respondent no.1 entered into a Memorandum of Understanding. Under the said Memorandum of Understanding, the petitioner agreed to compensate the respondent no.1 by paying an amount of Rs.1,86,50,000/- in full and final settlement of all dues including those of Mr.M.H.Latif and Mrs.Nasreen Latif. The said payment was to be made by the petitioner in installments. Clause 4 of the said MOU provided that the petitioner had promised to ensure that all the obligations contained in the MOU shall be fulfilled with not more than two defaults as per clause 3 of the said MOU. It was provided that in case of any such default, it would render the said agreement void and respondent no.1 shall be entitled to pursue all the legal remedies available to her both civil or criminal to recover the entire amount due with interest and payable to her.

6. It was the case of the respondent no.1 that under the said MOU the petitioner committed default in making payment of the installments. The

respondent no.1 filed statement of claim on 28th December, 2010 before the learned arbitrators appointed by the Stock Exchange. The respondent no.1 invoked alleged arbitration agreement forming part of the bye-laws and regulations of the Bombay Stock Exchange. The petitioner resisted the said claim by filing a detailed written statement and also filed written arguments before the arbitral tribunal. Amongst several objections raised in the written statement and written arguments, the petitioner objected to the jurisdiction of the arbitral tribunal on the ground that in view of the parties having entered into a Memorandum of Understanding, the earlier agreement entered into between the parties was substituted by the said MOU which did not contain any arbitration agreement and thus the arbitral tribunal had no jurisdiction to entertain, try and dispose off the arbitral proceedings filed by the respondent no.1.

7. The arbitral tribunal rendered an award on 18th May, 2011 directing the petitioner to pay a sum of Rs.1,12,50,000/- with further interest at the rate of 9% per annum compounded annually from 5th January, 2008 till the date of payment. This arbitral award has been impugned by the petitioner under section 34 of the Arbitration and Conciliation Act,1996 on various grounds.

8. Pursuant to the order passed by this court, the office has issued a notice upon all the respondents. A perusal of the report submitted by the office of the Prothonotary and Senior Master clearly indicates that all the respondents have been served. None appeared for the respondents though served.

9. Mr.Purohit, learned counsel appearing for the petitioner invited my attention to the Memorandum of Understanding entered into between the parties and also the objections raised by the petitioner of jurisdiction in the written statement as

well as in the written arguments filed before the arbitral tribunal. He submits that in view of the parties having entered into Memorandum of Understanding dated 14th July, 2006, all the rights and obligations of the parties under the earlier transactions entered into between the parties under the provisions of bye-law and regulations of Bombay Stock Exchange Ltd. were substituted by the rights and obligations agreed upon under Memorandum of Understanding dated 14th July, 2006. He submits that there was a complete novation under section 62 of the Contract Act.

10. Learned counsel submits that the entire statement of claim filed by the respondent no.1 before the arbitral tribunal was for enforcement of the rights and obligations of the parties under the said MOU which admittedly did not contain any arbitration agreement. He submits that the rights and obligations of the parties under the earlier transactions entered into between the parties were substituted by the provisions of MOU. The parties could not enforce their alleged rights under the alleged transactions which were substituted by the MOU.

11. Learned counsel invited my attention to the impugned award and more particularly on the issue of jurisdiction raised by the petitioner and submits that though this issue of jurisdiction was specifically raised by the petitioner and referred by the arbitral tribunal in the impugned award, in paragraph (9) of the impugned award, the arbitral tribunal has merely observed that sale transaction of the original shares was consolidated in the form of MOU dated 14th July, 2006, the arbitration was only on completion of the sale transaction and not on the MOU and hence it was arbitrable. He submits that the arbitral tribunal has not considered the objections of the jurisdiction raised by the petitioner in right direction and has rendered irrelevant reasons while rejecting the said plea.

12. Learned counsel invited my attention to the application made by the petitioner under section 33 of the Arbitration and Conciliation Act, 1996 dated 17th June, 2011 and in particular paragraph (1) (c) thereof and pointing out that though the petitioner had raised defence of novation and had relied upon various judgments, the arbitral tribunal had not given any findings in that regard. Learned counsel also invited my attention to the order dated 15th July, 2011 passed by the arbitral tribunal under section 33 of the Arbitration and Conciliation Act, 1996 and would submit that in the said order the arbitral tribunal did not issue any clarification in so far as the issue of jurisdiction not having been considered by the arbitral tribunal raised in the application filed under section 33 of the Act is concerned.

13. Learned counsel placed reliance on the judgment of this court in case of ***Lloyds Steel Industries Limited vs. Oil & Natural Gas Corporation Ltd. AIR 1997 Bombay 337*** and in particular paragraph (16) and would submit that the arbitration clause which was provided in the bye-laws and regulation of the Bombay Stock Exchange Ltd. perished in view of the parties having entered into Memorandum of Understanding which admittedly did not contain any arbitration agreement. Relying upon the said judgment, he submits that since the old contract is substituted by new contract, old contract does not subsist. Rights and obligations of the parties under old contract stood substituted or abrogated. Paragraph (16) of the judgment of this court in case of ***Lloyds Steel Industries Limited (supra)*** reads thus:-

16. From the aforesaid discussion it is clear that the parties can put an end to a contract as if it had never subsisted and can substitute it with a new contract governing their rights and obligations. In such a case, the arbitration clause in the original contract perishes. In such a case, the arbitration clause in the substituted or abrogated contract cannot be invoked for

the determination of the questions under the new agreement for a claim to set aside a contract on the grounds such as fraud, duress or coercion. Once the contract is substituted by a new contract, the old contract does not subsist. In a contract which is substituted or abrogated, the parties have no right to invoke the clause which has perished with the contract. In such a case, there is no question of appointing arbitrator as the very jurisdiction of the Arbitrator is dependent upon the existence of the arbitration clause. Facts of the present case clearly reveal that parties to the contract, which was executed in 1987, have subsequently agreed to bring it to an end to all intents and purposes and to treat it as if it had never existed by substituting a fresh MoU. Fresh contract does not provide for arbitration and it has been specifically stated in the MoU that both the parties have discharged their respective obligations in respect of the contract. In full and final settlement the Applicant had received the amount stated in the MoU for the work done. Hence for that purpose there existed no arbitrable dispute for reference.

14. Though the petitioner has raised several grounds in the arbitration petition for impugning the arbitral award, since I am of the view that the petition can be disposed of on the ground of jurisdiction, I have not heard the learned counsel for the petitioner on the other issues raised in the petition.

15. A perusal of the Memorandum of Understanding entered into between the parties clearly indicates that the rights and obligations of parties in respect of the transactions effected by the petitioner on behalf of the respondent no.1, if any, under the provisions of bye-laws and the regulations of Bombay Stock Exchange Ltd., have been substituted by a monetary claims quantified at Rs.1,86,50,000/-. Clause 4 of the said MOU clearly indicates that in case of any breach of the obligations or default if any committed by the petitioner as setout in the said clause, the respondent no.1 herein shall be entitled to pursue all the legal remedies

available to her both civil or criminal to recover the entire amount due with interest and payable to her.

16. A perusal of the said MOU clearly indicates that the parties have not recorded any fresh arbitration agreement under the said MOU. A perusal of the statement of claim filed by the respondent no.1 and in particular paragraphs 5, 7, 8, 10 and 11 clearly indicates that the respondent no.1 has filed statement of claim for enforcement of her rights and obligations against the petitioner under the said MOU and not under bye-laws and regulation of Bombay Stock Exchange Ltd. The petitioner thus had rightly raised an objection of jurisdiction in the written statement as well as in the written arguments filed before the arbitral tribunal.

17. In my view the parties having substituted their obligations under the earlier transactions by recording a fresh agreement by entering into a Memorandum of Understanding, all the rights and obligations of the parties under the earlier transactions are substituted by the rights and obligations under the MOU specifically. In my view none of the parties could apply for enforcement of their rights under the earlier transactions in view of the complete novation under section 62 of the Contract Act.

18. This court in case of *Lloyds Steel Industries Limited (supra)* has considered similar facts and has held that if the parties have put an end to a contract, as if it had never subsisted and have substituted it with a new contract governing their rights and obligations, in such a case, the arbitration clause in the original contract perishes. It is held that in such a case, the arbitration clause in the substituted or abrogated contract cannot be invoked for the determination of the questions under the new agreement for a claim to set aside a contract on the ground such as fraud,

duress or coercion. It is held that once the contract is substituted by a new contract, the old contract does not subsist. This court accordingly refused to appoint any arbitrator after considering similar facts in hand. In my view the said judgment clearly applies to the facts of this case. I am in respectful agreement with the views expressed in the said judgment.

19. In my view the arbitration agreement recorded in the bye-laws and regulations of the Bombay Stock Exchange Ltd. has perished in view of the parties having entered into Memorandum of Understanding which admittedly does not record any fresh arbitration agreement. I am therefore of the view that there was no arbitration agreement between the parties. The respondent no.1 therefore could not have invoked the arbitration agreement recorded in the bye-laws and regulation of the Bombay Stock Exchange Ltd. which were no longer applicable to the parties in view of the execution of the Memorandum of Understanding. The proceedings before the arbitral tribunal appointed by the Bombay Stock Exchange Ltd. under the bye-laws and regulations of the Bombay Stock Exchange Ltd. were thus without jurisdiction. The entire award rendered by the arbitral tribunal is thus without jurisdiction and nullity and deserves to be set aside.

20. Since I am of the view that there existed no arbitration agreement between the parties, I do not propose to go into the other issues raised by the petitioner in this arbitration petition.

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

- (a) Arbitration petition is made absolute in terms of prayer
- (a).

(b) Impugned award dated 18th May, 2011 and supplementary award dated 15th July, 2011 are set aside. It is made clear that whether respondent no.1 will have any other remedy to recover the amount or not is kept open.

(c) No order as to costs.

[R.D. DHANUKA, J.]