

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.3374 OF 2014

...

Sadanand Gangaram Kadam

...Petitioner

v/s.

Xavier Kallupurkkal Josepeh
and ors.

...Respondents

...

Mr.V.P.Sawant with Mr.Prabhakar Jadhav for the Petitioner.

Mr.Simil Purohit with Goghari, Mr.Pramod Kothare i/b Pramod Kothare for
Respondent No.1.

Mr.Kirti Munshi with Mr.Sachin Hande i/b Raju Yamgar for Respondent
No.3.

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CORAM : A.A. SAYED, J.

RESERVED ON : 13 MARCH 2015

PRONOUNCED ON : 15 JUNE 2015

ORAL ORDER:

This Petition is filed under Article 226 of the Constitution impugning the order dated 14 November 2014 passed by the learned sole Arbitrator on an Application filed by the Petitioner under section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act'). The Respondent No.1 herein is the Claimant and the Petitioner alongwith Respondents Nos. 2 to 4 herein are the Respondents in the arbitration proceedings.

2. The Petitioner and the Respondents carried on business of providing cable television network services to various customers under the name and style of M/s.Sai Star Distributors. The business was carried on in partnership on the terms and conditions contained in the Deed of Partnership dated 12 April 2000.

3. On 13 March 2013, the Respondent No.1 on behalf of himself and the Respondents Nos. 2 to 4 addressed a notice to the Petitioner setting out the disputes and invoking the arbitration clause under the Partnership Deed dated 12 April 2000.

4. The Notice dated 13 March 2013 was replied to by the Advocate of the Petitioner, interalia, declining to appoint Arbitrator. The Respondents, therefore, filed an Arbitration Application under section 11 of the 1996 Act. An Affidavit-in-Reply dated 12 July 2013 was filed by the Petitioner to the said Application. On 26 July 2013, an order was passed by this Court under section 11 of the 1996 Act appointing Justice V.C. Daga, a former Judge of this Court as an Arbitrator to adjudicate upon the disputes and differences between the parties in respect of the partnership firm M/s.Sai Star Distributors and pertaining/in relation to the terms and conditions of the Partnership Deed dated 12 April 2000.

5. The Respondent No.1-Claimant filed a Statement of Claim in the Arbitration Proceedings. Initially the Statement of Claim was purportedly filed on behalf of the Respondents Nos. 1 to 4. Subsequently however, the Respondents Nos. 2 to 4 have been transposed as Respondents in the Arbitration Proceedings. Thus, the Statement of Claim is filed by Respondent No.1 as a Claimant and the Petitioner alongwith the Respondent Nos. 2 to 4 herein are Respondents in the Arbitration Proceedings.

6. According to the Petitioner, the Respondent No.1 has filed the Statement of Claim, which is beyond the scope of reference to Arbitration and which ex-facie seeks diverse reliefs against the entities such as other partnership business and companies, which can never be the subject matter of the Arbitration Proceedings. It is contended on behalf of the Petitioner that the reliefs claimed in the Statement of Claim are patently beyond the order of reference of disputes and differences between the parties as regards the business of the partnership firm of M/s. Sai Star Distributors and pertaining to the terms and conditions of the Partnership Deed dated 12 April 2000. According to the Petitioner, since the Statement of Claim travels beyond the scope of arbitration reference, he was constrained to file an Application under section 16 of

the 1996 Act before the learned Arbitrator, inter alia, praying that the Arbitral Tribunal rule on its jurisdiction and hold that it has no jurisdiction to decide the disputes and differences in respect of firms and entities other than M/s.Sai Star Distributors. No Reply was filed to the Application. The said Application under section 16 of the 1996 Act of the Petitioner is decided by the learned Arbitrator vide order dated 14 November 2014, which is the subject matter of challenge in the present Petition.

7. By the impugned order the learned Arbitral Tribunal has interalia observed: that prima facie it appears that disputes in relation to all partnership firms, companies and other establishments have been referred to the Arbitral Tribunal for adjudication, however, it is not possible to record positive finding at this juncture and it is only a prima facie observation; that the scope of reference itself is debatable and disputed question; that the possibility of these disputes having been referred to the Tribunal by this Court cannot be ruled out; that the burden lies on the person who is seeking to exclude jurisdiction; that the Petitioner could have produced Books of Accounts of other firms to establish absence of link between M/s.Sai Star Distributors and other establishments which the Petitioner failed to produce and he did not

produce adequate material before the Tribunal to come to a positive conclusion to exclude the jurisdiction of the Tribunal vis-a-vis other business establishments; that for want of adequate material it is not possible for the Tribunal to record the conclusive finding on the issue.

8. The learned Arbitrator disposed of the Application of the Petitioner under section 16 of the 1996 Act without recording a finding on the issue of jurisdiction raised in the Application of the Petitioner under section 16 of the 1996 Act and has observed that after recording evidence, if it is conclusively proved that the other establishments were established independent of the funds of M/s. Sai Star Distributors and that there was absolutely no nexus between the other business establishments and M/s. Sai Star Distributors, then in that event, appropriate orders can be passed by the Tribunal while proceeding to finally pronounce the Award. The issue was left open for being considered on merits after recording evidence of the parties. The learned Arbitrator left it open for the parties to raise relevant contention in this behalf in their Written Statement so as to enable the Tribunal to strike appropriate issues and give opportunity to the parties on this count. The learned Arbitrator observed that 'at this stage the Application under consideration is disposed of'.

9. Learned Counsel for the Petitioner made the following submissions:

(i) The Court can entertain this Petition under Articles 226/227 of the Constitution, there being no efficacious remedy available to the Petitioner to impugn the order of the Arbitral Tribunal;

(ii) There is an error apparent on the face of the record and the learned Arbitrator has erred in expanding the scope of arbitration proceedings, and that no evidence is required when *ex facie on a* bare reading of the Statement of Claim it is apparent that it attempts to seek reliefs in relation to firms, business and entities including companies which can never be a part of the arbitration proceedings before the learned Arbitrator;

(iii) The Arbitral Tribunal ought not have cast any burden on the Petitioner to establish exclusion of jurisdiction, when on the face of it the Statement of Claim filed by the Respondent No.1 seeks reliefs which cannot be granted in the arbitration proceedings;

(iv) The arbitration reference pertains solely to the partnership firm viz. M/s.Sai Star Distributors and the compliance of the terms and conditions of the said partnership deed dated 12 April 2000 and the Arbitral Tribunal had erred in widening the scope of the arbitration;

(v) The Arbitrator Tribunal is a creature of an agreement and is not Court having inherent powers and could not have left the issue under consideration open for being considered on merits after the recording evidence. The learned Arbitrator cannot permit the Respondent No.1- Claimant to produce documents pertaining to other parties such as firms, business and companies which are not parties to the arbitration proceedings and permit a roving inquiry into business, documents and accounts etc. of third parties;

(vi) The Arbitral Tribunal ought not to have deferred the decision on the Application which goes to very root of the jurisdiction and in doing so has refused to exercise the jurisdiction vested in him by section 16 of the 1996 Act and declined to decide the objection as a preliminary objection. Under section 16 of 1996 Act, the Arbitral Tribunal is under a duty to decide the Application raising the objection to the jurisdiction of the Arbitrator at the earliest. Sub-section 5 of section 16 contemplates that once an objection is raised to the jurisdiction it has to be decided by the Arbitrator and it is only after deciding it and in the event it is rejected that the Arbitral Tribunal can proceed and make an Award, and that in the event the Arbitral Tribunal rules in favour of the objection and holds that it has no jurisdiction, the proceedings come to

an end. The impugned order is thus contrary to the provisions of section 16;

(vii) The Application of the Petitioner ought to have been decided on the basis of the material on record and the decision ought not to have been deferred.

In support of his submissions, the learned Counsel has placed reliance on the following judgments:

- i) Bharat Sanchar Nigam Limited vs. BMW Industries Ltd., AIR 2007 (NOC) 1715 (CAL.) (DB);
- ii) M/s. Archcon vs. Sewda Construction Co., 2005 (1) R.A.J. 676 (Gau);
- iii) Unic Accurates Pvt. Ltd. vs. Sumedha Fiscal Services Ltd., 2003 (4) R.A.J. 571 (Cal);
- iv) M/s. Anuptech Equipments Private Ltd. vs. M/s. Ganpati Co- op. Housing Society Ltd. Mumbai, AIR 1999 Bom. 219;
- v) Union of India vs. Tania Construction Private Limited, (2011) 5 SCC 697;
- vi) Rohtas Industries Ltd. vs. Rohtas Industries Staff Union, AIR 1976 SC 425;
- vii) Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha, AIR 1980 SC 1896;
- viii) M.D. Army Welfare Housing Organisation vs. Sumangal Services Pvt. Ltd., 2003(3) R.A.J. 447 (SC);
- ix) Maharshi Dayanand University vs. Anand Co-op. L/C Society Ltd., (2007) 5 SCC 295;

- x) National Thermal Power Corporation Ltd. vs. Siemens Atkeingesellschaft, (2007) 4 SCC 451;
- xi) M/s. Sanwal Coal Carriers vs. Western Coalfields Ltd., 2011 (3) ALLMR 716;
- xii) Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd., (2006) 11 SCC 245;
- xiii) Arati Dhar vs. S.K. Dutta, 2003 (4) R.A.J. 98 (Cal.);
- xiv) McDermott International Inc. vs. Burns Standard Co. Ltd., (2006) 11 SCC 181;

10. Learned Counsel for the Respondents Nos. 2 to 4 has supported the submissions made on behalf of the Petitioner. He submitted that by the impugned order the Arbitral Tribunal has sought to act as an investigator and this Court is not precluded from interfering with the impugned order. It is submitted that the Arbitral Tribunal cannot enter upon a roving inquiry. The learned Counsel has placed reliance upon the judgment of Division Bench of this Court in **Patel Engineering Company Ltd. v/s. Konkan Railway Corporation Ltd.** (Appeal No.799 of 2004 in Arbitration Petition No.493 of 2003).

11. Learned Counsel for the Respondent No.1, on the other hand, supported the impugned order and made following submissions:

- (i) the Arbitral Tribunal in the present case is a private Tribunal and not a statutory Arbitral Tribunal and a writ under Articles 226/227 would not be maintainable;
- (ii) Section 5 of the 1996 Act provides that except as provided in Part I of the 1996 Act, the extent of judicial intervention by Courts is minimal;
- (iii) Under sub-section 6 of section 16 a remedy has been provided, but the time to exercise that remedy is at the time of filing a Petition under section 34 of the 1996 Act challenging the final Award. Thus, the Petitioner cannot be said to be remediless;
- (iv) Sub-sections 2 & 3 of section 16 of the 1996 Act only provide that a plea that the Arbitral Tribunal does not have jurisdiction is required to be 'raised' before the submission of the Written Statement and it does not contemplate that the Arbitral Tribunal has to 'decide' the issue which is 'raised' as a preliminary issue. This is so in view of the fact that under section 4 unless an issue of jurisdiction is 'raised' and not waived, the parties are precluded from raising this issue under section 34. Section 16 is not qua Arbitral Tribunal but only the party which is required to 'raise' this objection and the Arbitral Tribunal is not bound to 'decide' the issue as a preliminary issue. Section 16 does not use the word

'preliminary';

- (v) It was purely within the Arbitral Tribunal's domain to hold that there was not enough evidence to decide the Application and this Court cannot reappreciate and hold that there was sufficient evidence and substitute this finding of the Arbitrator. If the Petitioner is correct in his contention that the Arbitral Tribunal does not have jurisdiction, the Arbitral Tribunal after the evidence is recorded can always hold so;
- vi) This is not a case of inherent lack of jurisdiction like there being no arbitration agreement or arbitration clause.

In support of his submissions, the learned Counsel for Respondent No.1 has relied upon the following judgments:

- i) SBP & Co. vs. Patel Engineering Ltd., (2005) 8 SCC 618;
- ii) Steel Authority of India Ltd. v/s. Indian council of Arbitration and Ors. , 2013(4) Arb.LR.526 (Delhi);
- iii) NRP Projects Pvt. Ltd. & Anr. v/s. Hirak Mukhopadhyay & Anr. MANU/WB/1331/2012.
- iv) Scan Organics Limited & ors. v/s. Mukesh Babu Financial Services Ltd. In Arbitration Petition (L) No.16 of 1998;
- v) N. Jayalaxmi v/s. R.Veeraswamy and Anr, MANU/AP/0585/2003;
- vi) Dr.(Mrs.) Vimal Madhukar Wasnik vs. The Sole Arbitrator & Ors., 2006 (1) All MR 254;

12. In Rejoinder, learned Counsel for the Petitioner has submitted as follows:

(i) The notice invoking arbitration is only in relation to the partnership firm of M/s.Sai Star Distributors and the Court has appointed the Arbitrator only in relation to this partnership firm. Arguments were made in section 11 Application on behalf of Respondent No.1 as regards other entities, but the Court has rejected the arguments as the third party cannot be subjected to arbitration, but the Statement of Claim covers all other parties nevertheless. There is no decision taken by the learned Arbitrator on the Application under section 16 and it was mandatory for the learned Arbitrator to decide the Application. The impugned order is against public policy as parties who are not party to the arbitration agreement have been roped in the arbitration proceedings;

(ii) The Arbitral Tribunal is not a Court of inquiry and by the impugned order the Arbitral Tribunal has by expanding the scope of arbitration and allowing unnecessary evidence to be led would only mean that the arbitration proceedings shall be prolonged and the arbitration could turn out to be a rather expensive affair, which the Petitioner can ill-afford;

(iii) This Court has supervisory jurisdiction even over the private arbitral tribunal. The expression "shall" used in section 16(2) shows that it is mandatorily required by the Petitioner to raise an issue of jurisdiction

prior to filing of the written statement. This would mean that the issue of jurisdiction has to be decided upon the Statement of Claim being filed and objection being taken before the Written Statement is filed. In other words, no evidence is permissible before the decision in respect of jurisdiction is arrived at. Unless the decision is taken rejecting the plea of jurisdiction, the Arbitrator cannot proceed with the arbitration proceedings;

(iv) The Arbitral Tribunal has incorrectly sought to shift the burden on the Petitioner;

(v) There can be no embargo to exercise the constitutional power of the Writ Court under Articles 226/227 of the Constitution and there are no fetters on the Writ Court to entertain the Petition. The Writ Court cannot shut its eye when it is patently clear that the proceedings may ultimately turn out to be nullity;

(vi) The mandate of section 16 is that the Application has to be decided at the preliminary stage. However, by the impugned order the Application under section 16 is disposed of without any decision on the issue of jurisdiction;

(vii) The other parties who are roped in the arbitration are governed by different arbitration clauses and different agreements, which cannot be looked into by the Arbitral Tribunal in the present arbitration proceedings;

(viii) A bare reading of the prayers of the Statement of Claim would show that they are beyond the scope of present arbitration proceedings and therefore there is no necessity or requirement to lead any evidence to arrive at this conclusion. The procedure adopted by the Arbitral Tribunal is not proper and/or legal and the learned Arbitrator has to mandatorily decide the Application and cannot keep the issue in abeyance.

13. I have considered the rival contentions of the learned Counsel for parties.

14 Though elaborate submissions have been made by the learned Counsel for the parties and the relevant sections viz. 4, 5, 16, 34 and 37 of the 1996 Act have also been pointed out during the course of arguments, in light of the judgment of the Supreme Court by a Bench of seven Hon'ble Judges in **SBP & Co. v/s. Patel Engineering Ltd. and Anr., (2005) 8 SCC 618**, the present Writ Petition would not be maintainable. In para 45, 46 & 47 of the judgment, the Supreme Court has held as follows:

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no

warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal, therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course,

a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

47. We therefore, sum up our conclusions as follows:

... ..

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

... ..”

(emphasis supplied)

15. In the circumstances, the Writ Petition is dismissed as not maintainable. No order as to costs.

16. Learned Counsel for Respondent No.1 and learned Counsel for Respondent Nos.2 to 4 concede to the position that the learned Arbitrator has not recorded any conclusive finding on the Application filed by the Petitioner under section 16 of the Arbitration & Conciliation Act, 1996 and the issue has been left open for consideration and the Application could be revived at any later stage (since the learned Arbitrator for want of adequate material has observed that 'at this stage the Application is disposed of') if adequate material is placed on record. In the circumstances, in the event the Written Statement is filed by the

Petitioner annexing therewith adequate material to the satisfaction of the learned Arbitrator, it would be expected of the learned Arbitrator to decide the Application even prior to the recording of evidence.

(A.A. SAYED, J.)

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