

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL UNDER ARBITRATION NO. 5 OF 2009

Mr. Rajendra Bakhle, Proprietor
of R. B. Shipping, C/o BBC
Automobiles, Salkar Building,
Vasco-da-Gama, Goa. ... Appellant

Versus

Mr. Kishore Nadkarni, House No.
11, Povacao, Post Office
Benaullim, Salcette, Goa. ... Respondent

Shri V.A. Lawande with Ms. P. Kaur, Advocates for
the Appellant.

Shri S.N. Joshi with Ms. S. Shetye, Advocates for
the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 22nd SEPTEMBER, 2016

PRONOUNCED ON:- 13th OCTOBER, 2016

JUDGMENT:

This is an appeal challenging the judgment and order dated 22.10.2008 passed by the learned District Judge at Margao in Arbitration Application No. 1/2007. By the impugned judgment, the learned District Judge has dismissed the application, under

Section 34 of the Arbitration and Conciliation Act, 1996 (the Act, for short), filed by the appellant thereby confirming the award dated 31.03.2006 passed by the learned Arbitrator.

2. The brief facts are that there was an agreement between the parties dated 08.02.2003/18.02.2003, under which the respondent had undertaken the repair works of a barge owned by the appellant on "no cure, no pay basis", which is the usual practice in marine salvage operations. As per the material terms of the agreement, the contract was to be executed in two phases. The relevant clauses regarding the time period are clause nos. 7 and 10, which read thus:

"7. Time period [cl.1(a)]: The first phase of work will be in seven days after starting the work on receiving the Bank Guarantee. Should the preliminary work be completed, it will not be considered as time period till receipt of Bank Guarantee or a

letter from the underwriters of commitment of payment. Hence the time to complete the first phase for Rs.20 lakhs is deemed to have started from the date of receipt of Bank Guarantee or letter from the underwriters of commitment of payment. Work done before this will be treated a preliminary or if completed due to consideration and pressure by government or exporters to open the channel will be a gesture of good will and the owners will be committed to honour the commitment of the Bank Guarantee of Rs.20 lakhs or the underwriter's letter of guarantee of payment within seven days from that day with daily charges of Rs.25,000/- (Twenty five thousand only) till the commitment is honoured. The second phase is the delivery to an appointed repair docks within ten days in re-floating and upright condition to the satisfaction of the above mentioned surveyors. If the vessel is not taken delivery of by them, then idle charges of

Rs.1,00,000/- will be charged per day till accepting delivery by the party on honouring payment conditions.

10. Remuneration [cl.4] First phase Rs.20 lakhs, 2nd phase Rs.13 lakhs - Total Rs.33 lakhs."

3. As per clause no. 10, the remuneration for the first phase was Rs.20 lakhs and for the second phase it was Rs.13 lakhs, thus, totaling to Rs.33 lakhs. The mode of payment was immediate on completion of the job within seven days, else the Bank Guarantee was to be encashed.

4. Disputes and differences arose between the parties, as to the execution of the contract, which was referred to a sole Arbitrator. This Court had appointed a sole Arbitrator, who took up the arbitration proceedings, in which the respondent filed a claim as under:

"A.Rs.13,00,000/- towards completion of second phase of the contract alongwith interest @ 18% per annum from 05/03/2003 till the date of actual payment. This amount works out to Rs.17,87,500/- as on 31/05/2005.

B.Rs.7,74,00,000 towards holding charges @ Rs.1 lac per day from 05/03/2003 till 31/05/2005."

5. The appellant filed a reply and raised a counter claim. It was contended that the respondent had failed to adhere to the terms of the contract and deliver the barge fully salvaged in a dry dock, which has resulted into business losses being caused to the appellant. The appellant raised the following counter claim:

a) The claimant to deliver the possession of the barge M.V. Varun to the respondent by delivering the same in the Dry Docks appointed by the respondent, forthwith.

b) For compensation of Rs.1.04 crores towards business loss i.e. @ Rs.6.5 lakhs p.m. X 16 months from March 2003 to May 2005.

c) Rs.10 lakhs as compensation for mental tension and agony; towards outstanding interest amount of Rs.20 lakhs.

d) Rs.80 lakhs towards repairs of the barge as the condition of the barge is deteriorated.

6. The learned Arbitrator framed as many as eight issues, which read thus:

"i) Whether the claimant is entitled for the payment of Rs.13,00,000/- from the respondent, towards completion of the second phase of the agreement alongwith interest at 18% from 05/03/2003.

ii) Whether the claimant is entitled for payment of Rs.one

lakh per day as holding charges from 05/03/2003.

iii) Whether the respondent proves that the agreement dated 18/02/2003 is null and void.

iv) Whether the claimant prove that he has a maritime lien on the salvaged vessel.

v) Whether the respondent proves that the claimant has illegally and unauthorisedly detained the barge.

vi) Whether the respondent is entitled to a direction to the claimant to deliver the possession of the barge to the respondent in the dry dock.

vii) Whether the claimant has committed a breach of agreement dated 08/02/2003 and without prejudice to issue no. 6 of the agreement dated

18/02/2003.

viii) Whether the respondent proves that he is entitled for compensation as claimed by the respondent."

7. The learned Arbitrator passed an award on 31.03.2006, directing the appellant (respondent before the Arbitrator) to pay Rs.5,28,500/- on receiving the delivery of the vessel in a dry dock as agreed by both the parties. Feeling aggrieved, the appellant challenged the same before the learned District Judge. The learned District Judge by the impugned judgment has confirmed the award, which is subject matter of challenge in this appeal.

8. I have heard Shri Lawande, the learned Counsel for the appellant and Shri Joshi, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the impugned award, as well as the

judgment of the learned District Judge and other relevant documents.

9. It is contended on behalf of the appellant that the contract was to be executed in two phases. It is submitted that the respondent failed to adhere to the terms of the contract and failed to deliver the barge in a dry dock, as agreed. It is submitted that although, the consideration/remuneration for carrying out the salvage operations comprising of the first phase was Rs.20 lakhs, the respondent had received an amount of Rs.29,40,000/- through the Insurance Company, towards settlement of the claim. It is submitted that thus, the respondent had received Rs.9,40,000/- in excess of the amount agreed for execution of the first phase. It is submitted that inspite of attempts by the appellant, the respondent failed to deliver the barge in the dry dock, which was the second phase of the agreement and as such, the learned Arbitrator was in

error in granting consideration/remuneration towards completion of the second phase. The learned Counsel was at pains to point out that because the barge was not delivered in the dry dock at crucial time, the appellant has suffered huge business losses and the condition of the barge has also deteriorated and the same is now beyond repairs. It is submitted that in such circumstances, the learned Arbitrator ought to have granted the counter claim as raised on behalf of the appellant. The learned Counsel for the appellant has strenuously urged that the respondent has resisted the delivery of the barge, which is now beyond repairs and this aspect has not been properly considered by the learned Arbitrator. It is submitted that the learned District Judge failed to correct the impugned award for reasons which were not germane. He therefore submits that the impugned award be set aside and the counter claim be decreed as prayed.

10. On the contrary it is submitted by Shri Joshi, the learned Counsel for the respondent that the payment was made by the Insurance Company, which was an "on account payment" almost 11 months later i.e. on 13.02.2004, which was otherwise due on 06.03.2003. It is submitted that M/s Shirodkar Shipyard, which was the nominated dry dock, had written a letter dated 24.04.2006 to the respondent stating that they will not take the delivery of the barge, unless the appellant deposits a sum of Rs.5 lakhs and two trucks of 10 mm MS plates in advance. It was also informed by M/s Shirodkar Shipyard that on account of their other bookings, they will not be able to take the barge for dry docking, unless the same is delivered, within three days. It is thus submitted that the appellant had failed to make the payment of consideration for the first phase within time and secondly, failed to make a dry dock available, which would be apparent from the letter written by M/s Shirodkar Shipyard. The learned

Counsel has pointed out certain communications in which he has also referred to letter dated 15.07.2003 written by the appellant to the Manager of the National Insurance Company, in which he has acknowledged that the respondent/salvor has completed the job and the respondent being a sincere man is keeping the barge in good condition so that the repair charges do not mount. The appellant had also informed that the safe keeping charges are Rs.1 lakh per day, which are mounting, but the respondent "being a good person" can be convinced to charge Rs.12,000/- per day, which is his cost per day at minimum.

11. The learned Counsel has also referred to the application made before the Arbitrator as well as in the Execution Application No. 46/2009 (which is initiated for the execution of the impugned award), for a direction to the appellant to take the delivery of the barge. It is pointed out that the

appellant who on one pretext or the other refused to take the delivery of the barge, cannot now turn around and claim that the condition of the barge is beyond repairs and that the appellant has suffered business losses. It is pointed out that the learned Arbitrator has rightly found that the appellant, apparently did not have any funds kept ready to pay the respondent (claimant before the Arbitrator) nor has shown any attempt to raise the funds for the salvage and repairs. He submits that the learned Arbitrator has rightly passed the award in the sum of Rs.5,28,500/-. The learned Counsel submits that interference by the "Court", in Arbitration matter is minimal and the learned District Judge has rightly refused to interfere with the impugned award. He therefore submits that the appeal be dismissed.

12. I have carefully considered the rival circumstances and the submissions made and I do not

find that any case for interference is made out. In my considered view, the learned Arbitrator has passed a balanced award after considering the rival circumstances on record. The Arbitrator has found that the respondent had agreed to start the salvage operations on the basis of the first agreement dated 08.02.2003. The second agreement dated 18.02.2003 was signed for the sole purpose of indicating that the contract would be on a "no cure, no pay basis". The learned Arbitrator has found that the respondent has acted in good faith, despite of the fact that they neither got paid nor any Bank Guarantee or any guarantee from the Insurance Company was given to them, prior to the salvage operations. The learned Arbitrator has further found that initially, there was very good rapport between the parties. The learned Arbitrator found that there was a duty cast on the appellant to act as a "Insured Uninsured" or the "Prudent Insurer", which primarily means that the appellant had to do all, that which was within

his ability to save his property and not to rely on the Insurance Company for funds or any other help. The learned Arbitrator has found and to my mind rightly so, that the appellant did not have funds kept ready to pay to the respondent and they relied upon the Insurance Company, which made an "on account payment", of Rs.29,40,000/- on 13.02.2004, when the said amount was in fact payable on 06.03.2003.

13. At this stage, it would be worthwhile to reproduce the letter dated 15.07.2003 sent by the appellant to the Insurance Company, which reads as under:

Dated: 15/7/2003

*To,
The Manager,
National Insurance Company,
Margao.*

*Sub: Payment of Salvage Charges
towards "MV Varun" Salvaging by
Mr. Kishore D. Nadkarni.*

Sir,

It is past hundred days since the salvor has completed the job and he is pressuring for payment, as his safe keeping charges are mounting. He, being a sincere man is keeping the Barge in good condition, so that the repair charges don't increase.

The safe keeping charges are Rs. One Lakh per day, but being a good person and having a good relation with your company can be convinced to charge only Rs. Twelve Thousand per day, which is his cost at minimum. He may even agree for the amount, which you feel, is reasonable. We request you to pay his safe keeping charges alongwith Rs. Thirty Eight Lakhs Forty Seven Thousand, which are his salvage charges. This will enable us to start out repair work immediately, so that the Barge is ready for the season, and which will help in reducing our losses.

Kindly treat this as urgent and make his payment directly at the earliest.

Thanking you,

For R.B. Shipping

Mr. Rajendra Bakhle,

(Proprietor)

14. It would be significant to note that as per clause 7 and clause 10 of the contract as reproduced above, there were strict time lines agreed between the parties. However, the respondent notwithstanding the fact that the payment for the first phase was neither made nor any Bank Guarantee was furnished within time agreed, had proceeded with the first phase of the salvage operations. This finding of the learned Arbitrator cannot be said to be either perverse or infirm. Insofar as the second phase is concerned, the Arbitrator has found that the completion of the second phase required, dry docking facility being made available for the purpose of handing over the vessel to the respondent, which has not made available. The Arbitrator has found that the first phase of salvage operations was completed

and the vessel was re-floated on 06.03.2003 and therefore, the payment of Rs.29,40,000/- is made almost 11 months later. The learned Arbitrator has thereafter went upon considering the claims under the various heads as set forth by the parties. The Arbitrator has found that the holding charges for the vessel from the date of its re-floating until such time as the payment towards the first phase was actually made, has to be considered. However, at the same time the Arbitrator has found that the sum of Rs.25,000/- per day claimed as holding charges from the date of re-floating, until the payment is made, are on higher side. The second agreement provides that the holding charges after the first phase was Rs.25,000/- per day and after the vessel was put in the dry dock, it was Rs.1 lakh per day. The claim of Rs.1 lakh has again been found to be "questionable". The learned Arbitrator has found and to my mind rightly so, that the claim would have been maintainable, only after the respondent had put

the vessel in the dry dock. Ultimately, it has been found that the cost of taking care of the vessel, (considering its size), would not be Rs.2,000/- per day. In that view of the matter, the Arbitrator has passed the award in the following terms:

- "1. The claimants are directed to deliver the barge to the dry dock with immediate effect.*
- 2. The compensations sought by the respondents towards loss of business is dismissed as the respondents have not acted in the proper manner to pay the claimants in time and take possession of the barge as agreed upon in the two agreements. The respondents claim for mental tension is also dismissed.*
- 3. The respondents claim towards outstanding interest is also dismissed for lack of timely action on his behalf to finance the salvage operations.*

4. The respondents claim towards cost of repairs is dismissed as he has failed to provide the necessary guarantee of payment to the claimants in order to carry out the second phase of his salvage operations.
5. As far as the cost of Arbitration is concerned both parties are to bear the cost.
6. Lastly it is our opinion that the cost towards the second phase of the agreement would be payable to the claimants only upon delivery of the vessel in the dry dock. The respondents are directed to pay such costs after making the necessary calculations and deductions keeping in view that a sum of Rs.29.4 lakhs was already paid to the claimants on the 13/2/2004.

The working is as follows:

- i) Cost of Salvage Operations first phase : Rs.20,00,000.00

- ii) Cost of holding charges
from 06.03.03 to
13.02.04 @ Rs.15,000/-
per month.
(11 months 7 days)
(11 x 15,000 + 7 x 500) : Rs.01,68,500.00
Due to Claimant for 1st
Phase (A) : Rs.21,68,500.00
- iii) Total amount paid as on
13.02.04 : Rs.29,40,000.00
- iv) LESS: Cost of 1st phase
+ holding charges i.e.
(A) above : Rs.21,68,500.00
- v) Excess Received by
Claimants : Rs.07,71,500.00
- vi) Total amount to be paid
for 2nd phase : Rs.13,00,000.00
- vii) Therefore final balance
to be paid (vi-v) : Rs.05,28,500.00

(Rupees Five Lakhs Twenty Eight
Thousand and Five Hundred only)

The respondents are directed to pay this amount to the claimants immediately on receiving delivery of the vessel in a dry dock as agreed to by both the parties."

15. The contention on behalf of the appellant that on account of the respondent's lapse, the vessel could not be delivered in the dry dock as agreed, which has resulted into business losses and damage to the vessel, to my mind is not acceptable. As noticed earlier, the lapse was on the part of the appellant in not making the payment as agreed for the first phase and the said payment was realised, almost eleven months after the date agreed. Insofar as the contention that the respondent has withheld the delivery of the vessel, there is a letter dated 19.02.2004 from the appellant addressed to the respondent, in which the appellant had expressed gratitude towards the respondent for holding the vessel for so long. He has further stated that the underwriters have made an "on

account payment" of Rs.29,40,000 and requested the respondent to reduce the amount of holding charges substantially. The subsequent letter from M/s Shirodkar Shipyard dated 24.04.2006 (which is after passing of the award), would also indicate that the appellant had not made necessary arrangement, by depositing the amount with M/s Shirodkar Shipyard, so as to make the facility of the dry dock available. There was an application filed before the Arbitrator for directing the appellant to take delivery of the vessel, which was opposed. It appears that there was yet another application filed in the Execution Case No. 46/2009, in which the appellant filed a reply and claimed that M/s Shirodkar Shipyard, who are nominated in the agreement are in collusion with the respondent and the purported letter dated 24.04.2006 is managed by the respondent from M/s Shirodkar Shipyard. Assuming for a moment that the letter dated 24.04.2006 from M/s Shirodkar Shipyard is

manipulated, the appellant has not placed on record anything to show that the appellant had made available the facility of a dry dock and that it was the respondent, who had withheld the delivery of the vessel. To my mind, the award passed by the learned Arbitrator directing the payment of Rs.5,28,500/-, on receiving the delivery of the vessel in dry dock, cannot be faulted with.

16. It is well settled that the Arbitration Act envisages minimal interference by "Courts" in the Arbitration process in general. Thus, the scope of interference available under Section 34 of the Act, is limited. The scope of interference under Section 34 of the Act, is limited. The scope of interference in an appeal under Section 37 of the Act, is still limited. Having carefully gone through the award passed by the Arbitrator and the judgment delivered by the learned District Judge, I do not find that any case for interference is made

out.

In the result, the appeal is dismissed with
no order as to costs.

C. V. BHADANG, J.

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