

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.891 OF 2016

M/s Acropetal Technologies Ltd. Petitioners
& Ors.

Vs.

SBI Global Factors Ltd. Respondent

Mr. Vaibhav Bajpai a/w Mr. Gaurav Jangle and Digant Bhatt i/by
I.V. Merchant & Co. for the Petitioners.

Ms. Sushmita Gandhi a/w Ms. Anisha Zachariah i/by HSA
Advocates for the Respondent.

Coram : **Smt. R.P. SondurBaldota, J.**

Date : 6th October, 2016

P.C. :

1 This petition filed under Section 34 of the Arbitration and Conciliation Act challenges the award dtd. 26th October, 2015 passed by the Sole Arbitrator directing the petitioners jointly and severally to pay a sum of Rs.12,11,64,086.18 ps. with interest @12% per annum from the date of filing of the Claim Application i.e. 19th January, 2015 till the realisation. The petition is opposed by the respondent.

2 Petitioner no.1-Company had taken certain finance facilities from the respondent. The initial sanction of the facility

for Rs.2,50,00,000/- was enhanced from time to time to Rs.12,00,00,000/-. Petitioner no.1 entered into a Global Accounts Receivable Management Agreement dtd. 13th December, 2011 with the respondent. Petitioners no. 2 and 3 are the guarantors for repayment of money lent under the finance facilities. The petitioners had also created an equitable mortgage in respect of certain immovable properties by deposit of Title Deeds. When the petitioners loan account went in default, the respondent by it's Advocate's letter dtd. 21st February, 2014 made a demand for the outstanding amount within a period of 21 days. When there was no response to the notice, another notice of demand dtd. 24th July, 2014 was issued by the respondent to petitioners no. 2 and 3 demanding payment of the amount within a period of 7 days from the date of receipt of the notice. Petitioners no. 2 and 3 also did not respond to the notice. Then the respondent issued letter dtd. 23rd August, 2014 to the petitioners invoking arbitration agreement appointing the learned Arbitrator as sole Arbitrator. The petitioners did not respond to that letter also. Then the respondent, by it's letter dtd. 4th November, 2014 requested the learned Arbitrator to adjudicate the dispute between the parties.

3 Upon receiving the request, the learned Arbitrator issued notice dtd. 17th November, 2014 to the Advocate for the respondent as well as to the petitioners fixing up the first date of hearing of arbitral proceedings on 17th December, 2014 for the purpose of issuing preliminary directions in the matter. The

notices were duly received by the parties. The petitioners do not dispute that the notices were received by them though they claim not to remember the date of the receipt of the notice. On the first date of hearing, the advocate for the claimants appeared before the learned Arbitrator. None of the petitioners were present. Then preliminary directions as regards filing of statement of claim by the respondent, its service upon petitioners and filing of the written statement by the petitioners alongwith counter-claim, if any, came to be given. On that very day, the petitioners merely sent letter to the learned Arbitrator raising an objection to his appointment. They did not appear in the proceedings. Thereafter several opportunities were given to the petitioners by fixing up meetings of the arbitral proceedings on 28th April, 2015, 17th June, 2015 and lastly on 20th July, 2015. When the petitioners did not appear, the learned Arbitrator passed his award dtd. 26th October, 2015.

4 The petitioners have not stated any reason for not appearing before the learned Arbitrator. They have, however objected to the award by challenging the jurisdiction of the learned Arbitrator. According to them, firstly the arbitration clause in the agreement between the parties was unilateral and such clause could not have been resorted to by the respondent. Secondly, the procedure under the agreement for adopting arbitral proceedings was not followed. Thirdly, the petitioners' application made under Section 16 of the Arbitration and Conciliation Act challenging the

jurisdiction of the learned Arbitrator has not been decided and therefore the award is bad in law.

5 It is not even the case of the petitioners that any application under Section 16 of the Arbitration Act was filed by them before the learned Arbitrator. All that the petitioners had done was to send letter dtd. 17th December, 2014 to the Arbitrator stating therein that they deny and dispute the claim made by the respondent and baldly alleges that the learned Arbitrator had no jurisdiction to decide the dispute as his appointment was not in accordance with the Arbitration and Conciliation Act and they had not given any concurrence for the appointment. According to the petitioners, this letter to the Arbitrator ought to have considered as an application under Section 16 of the Arbitration Act. Mr. Bajpai, appearing for the petitioner submits that since the respondent had by it's advocate's letter dtd. 8th January, 2015 sent a reply to that letter, there could have been no difficulty for the arbitrator to treat the letter as an application. Section 16 which falls under Chapter IV of the Arbitration Act provides for competence of arbitral Tribunal to rule on its jurisdiction. It requires that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence by the respondent. This would clearly mean that the party has to first appear in the arbitral proceedings. Unless the party appears before in the proceedings, there can be no question of resort to Section 16 by it.

6 Mr. Bajpai, then refers to the decision of the Apex Court in Dharma Prathishthanam vs. Madhok Construction (P) Ltd, reported in (2005) 9 Supreme Court Cases, page 686 to submit that a unilateral appointment or a reference to the Arbitrator has been disproved by the Apex Court. In the facts of the decision cited, the Apex Court considering the challenge to arbitral award made under the Arbitration and Conciliation Act, 1940 since reference had been made under that Act. The petitioners had not appeared before the learned Arbitrator and an award came to be passed. The award creditor had been made an application to the Court under Sections 14 and 17 of the 1940 Act for making the award a rule of the Court. The notice of filing of the award in the court was served upon the petitioners and the petitioners appeared before the court and filed objections to the award. The objections were dismissed by the court on the ground that the objection application had been filed beyond prescribed period. Thus, in the circumstances of the case before the Apex Court, there was appearance at the appropriate place i.e. before the Court on receiving notice from the court before making the award a rule of the court for the purpose of it's execution. Hence, the decision cited cannot be applicable to the facts of the present case. The scope of scrutiny of the award under the earlier Act was under Sections 14 and 17 thereof before making the award a rule of the Court. The new Act i.e. the Arbitration and Conciliation Act, 1996, this stage of filing award in the court for the purpose of

decree in terms thereof has been eliminated and an arbitral award has been made directly executable with challenge to the arbitral award within the limits of Section 34 thereof.

7 The other decision cited by Mr. Bajpai is of the Apex Court, in International Amusement Limited vs. India Trade Promotion Organisation, reported in (2015) 12 Supreme Court Cases, page 677. This decision can also be distinguished on facts where after receiving the notice, the petitioners had appeared before the learned Arbitrator but there was no application filed challenging the jurisdiction of the learned Arbitrator.

8 In the above circumstances, the petitioners have failed to make out any ground within the ambit of Section 34 of the Arbitration and Conciliation Act to challenge the award. Hence, the petition is dismissed.

(Smt. R.P. SondurBaldota, J.)