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

ARBITRATION PETITION NO.686 OF 2012

1. Metal Tube And Rolling Mills,)
A Partnership Firm registered under)
the Partnership Act, having its)
Office at : Marol Maroshi Road,)
Marol Village Naka, P.O.J.B. Nagar)
Andheri (East), Mumbai – 400 059.)
 2. Kantilal Manilal Morakhia)
 3. Kantaben Rasiklal Morakhia)
 4. Rasilaben Ashokkumar Morakhia)
 5. Bharati Manilal Morakhia)
 6. Prakash Sevantilal Morakhia,)

They all residing at 289, S.V.P. Road,)
Shree Bhavan, 5th Floor, Khetwadi)
4th Lane, Mumbai – 400 004.)
- ...Petitioners

....Versus....

- Maharashtra Small Scale Industries)
Development Corporation Limited,)
a Company registered under the)
Company's Act, 1956 having their)
Registered Office at Kripaniddhi,)
9, Walchand Hirachand Marg,)
Ballard Estate, Mumbai – 400 038.)
- ...Respondent

Mr.Ravi Kadam, Senior Counsel with Mr.Hrishikesh Soni and Ms.Aditi Naikare i/b Mr.Prabhakar Jadhav for the Petitioners.

Mr.A.S. Daver with Mr.Nirav Shah and Mr.Anuj Jaiswal i/b Little & Co.
for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 8TH JUNE, 2016.

ORAL JUDGMENT :-

1. By this petition filed under section 30 of the Arbitration Act, 1940, the petitioners have impugned the award dated 14th June, 2011 made by the learned arbitrator thereby allowing the claims made by the respondent and dismissing the counter claims made by the petitioners. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioners and the respondent had entered into an agreement on 23rd October, 1990 on various terms and conditions. It is the case of the petitioners that under the said agreement dated 23rd October, 1990, the respondent had agreed to import the raw material for and on behalf of the petitioners. The respondent agreed to act as an agent of the petitioners for the sourcing of electrolytic copper wire bars, copper scrap and brass scrap of various qualities as per the indent and/or orders that may be placed by the petitioners upon the respondent from time to time.

3. A dispute arose between the parties under the said agreement dated 23rd October, 1990 and was referred to arbitration. The respondent filed statement of claim *inter-alia* praying for recovery of various amounts. The said statement was resisted by the petitioners by filing a written statement. The petitioners also made counter claims against the respondent before the learned arbitrator. The learned arbitrator made an award on 14th June, 2011 directing

the petitioners to pay jointly and severally to the respondent a sum of Rs.16,99,56,060.26 ps. with further interest on the principal sum of Rs.9,83,96,965/- to be calculated at the rate of 18% p.a. from 1st July, 1997 till the date of award and also till realization whichever was earlier. The learned arbitrator dismissed the counter claims made by the petitioners and directed the petitioners to pay costs of Rs.6,25,000/- to the respondent. The petitioners have impugned the said arbitral award by filing the petition under section 30 read with section 33 of the Arbitration Act, 1940.

4. Mr.Kadam, learned senior counsel appearing for the petitioners submits that the agreement entered into between the parties on 23rd October, 1990 was in respect of import of raw material. He submits that though under the arbitration agreement recorded in clause 19 of the said agreement, the dispute, if any, between the parties could be referred to arbitration only in respect of import transactions, the respondent in the statement of claim filed before the learned arbitrator had made the claim not only in respect of the import transactions but also arising out of local transactions. He submits that the claims thus made by the respondent in respect of local transactions / goods was outside the jurisdiction of the learned arbitrator and beyond the scope of arbitration agreement recorded in clause 19 of the agreement dated 23rd October, 1990. He submits that the substantial part of the claim awarded by the learned arbitrator is in respect of local goods which was beyond the scope of reference. He submits that the learned arbitrator having exceeded his jurisdiction in respect of the claim arising out of the local goods, the entire award deserves to be set aside on that ground.

5. In support of the aforesaid submission, the learned senior counsel for the petitioners invited my attention to the recitals and various clauses of the said agreement dated 23rd October, 1990 and would submit that the disputes which could be referred to arbitration were only in respect of import transactions and not in respect of local goods. He submits that though the agreement was made effective with effect from 26th February, 1990, the fact remains that the dispute only in respect of the transactions entered into from the date of execution of the said agreement i.e. 23rd October, 1990 could be referred to arbitration. He submits that the entire agreement was only in respect of import transactions.

6. It is submitted by the learned senior counsel that even in the evidence led by the respondent before the learned arbitrator, it was admitted by the witness examined by the respondent that only few provisions of the said agreement were extended to local transactions. He submits that though it was averred by the respondent in the pleadings as well as deposed in the affidavit in lieu of examination in chief that the said agreement dated 23rd October, 1990 included all the transactions including the transactions prior to execution of the said agreement, contrary to such plea raised by the respondent, the learned arbitrator took a view that by conduct of the parties, the terms and conditions of the said agreement dated 23rd October, 1990 stood extended to the local transactions also. He submits that in view of this finding of the learned arbitrator which was in variance with the pleadings and evidence of the respondent, it is sufficient to set aside the entire award.

7. Learned senior counsel invited my attention to the

definition of arbitration agreement under section 2(a) of the Arbitration Act, 1940 which provides that the “arbitration agreement” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. He submits that admittedly there was no arbitration agreement recorded in respect of the local transactions between the parties and thus even if the petitioners have not raised any specific plea in the written statement filed before the learned arbitrator, the learned arbitrator could not have adjudicated upon those claims in respect of local transactions by relying upon the agreement which was meant only for adjudication upon the dispute arising out of import transactions.

8. Learned senior counsel also placed reliance on section 7(4) of the Arbitration & Conciliation Act, 1996 to buttress his submission that it is only under the provisions of 1996 Act provided that if the arbitration agreement is pleaded in the statement of claim and is not denied in the written statement, it would amount to arbitration agreement and more particularly section 7(4) of the Arbitration & Conciliation Act, 1996. He submits that there was no such corresponding provision in the Arbitration Act, 1940.

9. It is submitted by the learned senior counsel that in any event the learned arbitrator has recorded a finding that the provisions of the agreement dated 23rd October, 1990 stood extended to the local transactions also. He submits that since the learned arbitrator has dealt with the applicability of the agreement dated 23rd October, 1990 to the local transactions also, the petitioners are entitled to adjudicate upon the issue of jurisdiction in this proceedings filed under section 30.

10. Mr.Daver, learned counsel appearing for the respondent on the other hand invited my attention to the various provisions of the agreement dated 23rd October, 1990, pleadings filed by both the parties before the learned arbitrator and also the findings recorded by the learned arbitrator. He submits that there is no dispute that prior to the date of execution of the agreement dated 23rd October, 1990, there were various transactions between the parties, including local transactions in respect of which various amounts were due and payable by the petitioners to the respondent. It is submitted that thus the parties while entering into the agreement dated 23rd October, 1990 had made the said agreement effective from 26th February, 1990. It is submitted that even in the said agreement and more particularly in the 3rd recital, there was a reference to the earlier transactions. It is submitted that clause 19 of the said agreement which recorded the arbitration agreement is very wide and does not state that the disputes and differences between the parties only in respect of import transactions could be referred to arbitration.

11. It is submitted by the learned counsel for the respondent that though a detailed written statement was filed by the petitioners, no issue of jurisdiction raised by the petitioners contending that the dispute arising out of the local transactions was not arbitrable or that the learned arbitrator had no jurisdiction to entertain, try and dispose of the claims arising out of local transactions. He submits that the learned arbitrator therefore, rightly not framed the issue of jurisdiction during the course of hearing before the learned arbitrator.

12. It is submitted by the learned counsel for the respondent

that the learned arbitrator has thus dealt with the issue of limitation which was raised in the impugned award and on merits. He submits that the learned arbitrator has held that the terms and conditions of the agreement dated 23rd October, 1990 also stood extended to local transactions entered into between the parties. He submits that this Court thus cannot interfere with the reasons recorded by the learned arbitrator on the interpretation of the terms of the contract. He submits that under section 30 of the Arbitration Act, 1940, this Court cannot go into the reasonableness of the reasons recorded by the learned arbitrator. He submits that the petitioners cannot be allowed to raise the issue of jurisdiction for the first time in this petition filed under section 30 of the Arbitration Act, 1940.

13. It is submitted that since the petitioners have not made any submission on the other grounds before this Court on merits though raised in the arbitration petition, the respondent need not deal with the other grounds though raised in the petition but not pressed.

14. Mr.Kadam, learned senior counsel for the petitioners in rejoinder submits that since the learned arbitrator has dealt with the issue as to whether the provisions of the agreement dated 23rd October, 1990 stood extended to the local transactions or not, the petitioners are entitled to raise such issue of jurisdiction in this petition filed under section 30 of the Arbitration Act, 1940 though not raised in the written statement.

15. A perusal of the agreement dated 23rd October, 1990 clearly indicates that there was no dispute that the petitioners used to purchase indigenous dress and copper scrap from the respondent

which the respondent was procuring from the Ordinance Depots / Ammunitions on Depot. There is no dispute that even prior to the date of execution of the said agreement dated 23rd October, 1990 between the parties, the parties were already having transactions in respect of import of materials and had transactions in respect of local goods. A perusal of the said agreement clearly indicates that though the said agreement was executed on 23rd October, 1990, it was agreed by and between the parties and more particularly in clause 18 thereof that the agreement shall be deemed to come into force from 26th February, 1990 and was to remain in force unless terminated by either party by giving three months notice in writing. It was also recorded that the contract which was already entered into before such date will not cease and the firm would be continued to liable for cost of material and other charges in respect of the said transactions. Clause 19 of the said agreement provided for mechanism of arbitration.

16. A perusal of the said agreement recorded in clause 19 of the said agreement clearly indicates that the said clause is very wide which provided that in case of any dispute or difference between the parties to the said agreement as to the interpretation of the said agreement and/or otherwise, the same may be referred to the sole arbitration of the Managing Director of the Corporation.

17. A perusal of the statement of claim filed by the respondent before the learned arbitrator and the correspondence annexed to the statement of claim clearly indicates that there was a dispute between the parties also in respect of the transactions in respect of local goods and also in respect of import transactions. The

respondent had made the claims in respect of both the transactions in the statement of claim and had claimed a separate amount. A perusal of the written statement filed before the learned arbitrator by the petitioners clearly indicates that though the petitioners had raised a plea of limitation in respect of the claims made by the respondent, no issue of jurisdiction before the learned arbitrator was raised by the petitioners in the written statement contending that the claims in respect of the local goods / transactions was beyond the scope of arbitration agreement or beyond the jurisdiction of the learned arbitrator. The petitioners opposed both the claims made by the respondent by filing a written statement on merits. In my view, the learned arbitrator thus rightly did not frame any issue in respect of jurisdiction of the learned arbitrator to entertain the claim arising out of local goods / transactions.

18. A perusal of the award clearly indicates that the learned arbitrator has specifically referred to the issue of limitation raised by the petitioners and has dealt with the same in the impugned award. Mr.Kadam, learned senior counsel for the petitioners fairly conceded that no issue of jurisdiction was specifically raised by the petitioner in the written statement before the learned arbitrator and more particularly contending that the claim arising out of local goods / transactions was beyond the scope of jurisdiction of the learned arbitrator or that the arbitration agreement recorded in clause 19 of the agreement dated 23rd October, 1990 was not extended to the claims arising out of local goods / transactions. On the contrary the case of the petitioners before the learned arbitrator was that all the terms and conditions of the agreement dated 23rd October, 1990 were not applicable. The petitioners had admitted that some of the

provisions of the agreement dated 23rd October, 1990 were applicable even in respect of local goods / transactions.

19. Insofar as the evidence led by the petitioners on the issue as to whether all the conditions of the agreement dated 23rd October, 1990 were also applicable to local goods / transactions or not is concerned, in my view since the petitioners had not raised any issue of jurisdiction before the learned arbitrator in the written statement or even across the bar, the said evidence was of no relevance. No evidence could be led by the petitioners which was beyond the pleadings filed by the petitioners. A perusal of the award rendered by the learned arbitrator indicates that the learned arbitrator has rightly not given any finding on the issue of jurisdiction since the same was not raised by the petitioners in the written statement filed before the learned arbitrator.

20. In my view since the issue of jurisdiction was not raised before the learned arbitrator, the said issue cannot be allowed to be raised for the first time in this petition filed under section 30 read with 33 of the Arbitration Act, 1940. Be that as it may, since the learned arbitrator has also not dealt with the issue of jurisdiction in the impugned award since the same was not raised by the petitioner in the written statement or was not urged in the arbitral proceedings, the petitioners cannot be permitted to urge that issue for the first time in this petition. The petitioners thus has acquiesced in the arbitral proceedings also in respect of the claim arising out of local goods / transactions on merits and thus cannot be allowed to raise this plea for the first time in this petition.

21. Insofar as the submission of the learned senior counsel for the petitioners that since the finding of the learned arbitrator on the issue whether the terms and conditions of the agreement dated 23rd October, 1990 stood applied to the transactions arising out of local goods was in variance with the pleadings filed by the respondent and thus award shall be set aside on that ground is concerned, in my view the findings recorded by the learned arbitrator does not indicate that there is any variance in the case of the respondent and the finding rendered by the learned arbitrator. A perusal of the agreement dated 23rd October, 1990 clearly indicates that the said agreement was not only in respect of the transactions arising out of import but was also in respect of local goods / transactions. Learned senior counsel for the petitioners could not dispute that there were transactions between the parties even prior to the execution of the said agreement in respect of not only import transactions but also in respect of local goods / transactions. The parties had intentionally and with open eyes had made the said agreement effective from 26th February, 1990 though the same was executed on 23rd October, 1990.

22. A perusal of the impugned award rendered by the learned arbitrator clearly indicates that the finding is rendered that the respondent herein had also made import on the basis of cash against the documents and also made purchases of the goods locally from Hindustan Copper Ltd. and Hindustan Zinc Limited by opening local letters of credit for and on behalf of the petitioner no.1 herein which transaction took place in the month of February, 1990 and 31st December, 1992. The respondent had already furnished the details of such local transactions in the annexures to the statement of claim. The petitioners have not disputed that the transactions in respect of

local goods also had taken place prior to the date of execution of the said agreement dated 23rd October, 1990. In my view, the arbitration clause recorded in clause 19 of the said agreement dated 23rd October, 1990 being very wide in its nature, all the disputes having arisen between the parties since 26th February, 1990 under the said agreement inclusive of dispute arising out of local goods / transactions could be referred to arbitration under the said clause.

23. Since the learned senior counsel for the petitioners did not advance any other submissions though urged in the arbitration petition for impugning the arbitral award, the learned counsel appearing for the respondent has not dealt with those grounds. This Court is also thus not required to deal with other grounds not urged before this Court by the learned senior counsel for the petitioner at the time of argument though raised in the petition.

24. In my view, there is thus no substance in the submission made by the learned senior counsel for the petitioners that though the issue of jurisdiction was not raised in the written statement, the petitioners can agitate this issue for the first time in the arbitration petition filed under section 30 of the Arbitration Act, 1940. Reliance placed on the provisions of the Arbitration & Conciliation Act, 1996 is misplaced. The principles of waiver would apply to the petitioners.

25. Be that as it may, on perusal of the agreement dated 23rd October, 1990, I am of the view that the arbitration agreement recorded in clause 19 being very wide, all the disputes arising between the parties from 26th February, 1990 under the said agreement as claimed could be referred to arbitration. In my view the

learned arbitrator has given reasons in the impugned award. This Court cannot go into the reasonableness of the reasons recorded by the learned arbitrator. The learned arbitrator has not committed any misconduct of any nature whatsoever set out in section 33 of the Arbitration Act, 1940.

26. In my view, the petition is devoid of merits. I therefore, pass the following order :-

- i). Arbitration Petition No.686 of 2012 is dismissed.
- ii). No order as to costs.
- iii). Mr.Daver, learned counsel appearing for the respondent applies for decree in terms of the award under section 787(5) of the Bombay High Court (Original Side) Rules. I am inclined to accept this request of the learned counsel for the respondent. There shall be a decree in terms of the impugned award dated 14th June, 2011.

(R.D. DHANUKA, J.)