

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5246 OF 2017

M/S RUSI KHAMBATTA AND ASSOCIATES. THROUGH ITS MANAGING
DIRECTOR RUSHI KHAMBATTA.

VERSUS

PADMASHRI DR VITTHALRAO VIKHE PATIL FOUNDATION'S. THROUGH
ITS DIRECTOR.

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Advocate for Petitioner : Shri V.D.Dixit, Senior Advocate a/w Shri Dixit
Sushant V.

Advocate for Respondent : Shri V.D.Hon, Senior Advocate a/w Shri Hon
Ashwin V..

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**CORAM: S.C. DHARMADHIKARI
AND
MANGESH S. PATIL, JJ.**

DATE :- 06th June, 2017

PC.:

1 This Writ Petition under Article 226 of the Constitution of India challenges the orders of the Arbitral Tribunal and made during the course of the arbitration proceedings.

2 A preliminary objection was raised to the maintainability of this Writ Petition on the ground that in the event the Arbitral Tribunal proceeds to pass an award prejudicing the Petitioner in any manner or against him, he can bring proceedings to challenge such award within the

meaning of Chapter VII of the Arbitration and Conciliation Act, 1996.

3 Presently, all that has transpired is to accept the request of the contesting Respondent/ Opponent before the Arbitral Tribunal, of amendment to the Statement of Defence and based on that an additional issue not to the liking of the Petitioner or not acceptable to the Petitioner, having been framed, this Court should not interfere with the pending arbitration proceedings and contrary to the mandate of the Arbitration and Conciliation Act, 1996.

4 In meeting this objection, Shri Dixit, learned Senior Counsel appearing for the Petitioner, would rely upon certain provisions and particularly, Section 16 of the Arbitration and Conciliation Act, 1996 and would submit that Chapter-VII contemplates "recourse against arbitral award". Even if a award is to be impugned and challenged, there would be some difficulties presented in view of the language of sub-section (2) of Section 34 and particularly, sub-section (2A) of the said section would come in the way of the Petitioner while impugning and challenging this award.

5 After hearing Shri Dixit at some length and perusing this petition, we are unable to agree with Shri Dixit.

6 Relevant prayers in the Writ Petition read thus:-

"(A) *For a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, calling for record and proceedings of order*

dated 05.12.2016, passed by learned Arbitral Tribunal thereby allowing Application under Section 23 of the Arbitration and Conciliation Act of the Respondent be called for and after examining legality, validity and propriety thereof, order dated 05.12.2016 passed by learned Arbitral Tribunal thereby allowing application under Section 23 of the Arbitration and Conciliation Act of the respondent be quashed and set aside.

- (B) *For a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, calling for record and proceedings of order dated 22.02.2017 passed by learned Arbitral Tribunal thereby rejecting application of the petitioner for recasting of issue be called for and after examining legality, validity and propriety thereof, order dated 22.02.2017 passed by learned Arbitral Tribunal there by rejecting application of the petitioner for recasting of issue be quashed and set aside."*

7 The Petitioner would submit that the dispute amongst him and the Respondent has been referred to arbitration. The Petitioner then points out that earlier suit was laid, but finding that there was existence of an arbitration agreement, eventually the matter was referred to arbitration. The Petitioner filed his Statement of Claim on 18.03.2013 along with annexures. Later on, on such statement being served, the Respondent filed his Statement of Defence on 03.12.2015. The Petitioner also filed the rejoinder. The Petitioner then contends that there was site visit by the Arbitrators and two witnesses were examined. The Petitioner advanced his closing argument on 14.09.2016 after which the Respondent was expected to make his final/ closing argument. It is at that stage, the

Respondent invoked Section 23 of the Arbitration and Conciliation Act, 1996 and filed an application seeking amendment to the Statement of Defence and also for framing an additional issue in respect of limitation. A reply was filed to this amendment application, which was contested by the Petitioner.

8 By order dated 05.12.2016, the amendment application was allowed. The Petitioner was also asked to respond to the additional Statement of Defence. The Petitioner claims that he submitted his rejoinder to this amended Statement of Defence on 14.01.2017. Thereafter, draft issues were placed before the Arbitral Tribunal and thereafter, final issue was framed on 20.01.2017.

9 The Petitioner submits that this issue framed by the Arbitral Tribunal was inadequate to address the submissions raised by the Petitioner. Hence, an application seeking re-casting of the issue was filed. That was also heard and rejected on 22.02.2017.

10 It is in these circumstances the argument is that the remedy under the Arbitration and Conciliation Act, 1996 is not available or cannot be taken recourse to challenge the above order. The Petitioner, therefore, maintains that this petition is the only remedy.

11 After hearing both sides and particularly, Shri Dixit, we find that on the own showing of the Petitioner, the Respondent invoked Section 23 of the Arbitration and Conciliation Act, 1996. The said provision reads

as under:-

- "23. *Statement of claim and defence :-*
- (1) *Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.*
 - (2) *The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.*
 - (2A) *The respondent, in support of his case, may also submit a counter-claim or plead a set off, which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement.*
 - (3) *Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."*

12 A bare perusal of Section 23 and particularly sub-section (3) thereof would indicate that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of arbitral proceedings, unless the Arbitral Tribunal considers it inappropriate to allow the amendment or supplement to the claim/ defence having regard to the delay in making it.

13 If the Petitioner is indeed aggrieved by the exercise of the above power by the Arbitral Tribunal and contrary to sub-section (3) of

Section 23, then, the Petitioner can, in the event ultimate award is adverse to him, in impugning or challenging it, point out that such award could not have been made against well settled canons of fairness and justice and which are patent in their application even to the arbitral proceedings. He can also point out that the Arbitral Tribunal should have given a fair and reasonable opportunity to the Petitioner of meeting the case and by not allowing the Petitioner's request to re-cast or re-frame the issue in terms of the amended pleas, the Arbitral Tribunal has acted contrary to these basic tenets .

14 We do not see as to how the wording of the provision and particularly Section 34 would come in the way of the Petitioner in the event that provision is required to be invoked by him. He can press all pleas irrespective of what the Arbitral Tribunal has done or has not accepted the contentions of the Petitioner or disinclination of this Court to interfere in this Writ Petition. It is for the competent court before whom the award is challenged, to decide the matter uninfluenced by this order and strictly in accordance with law. There is no impediment to invoke the jurisdiction of the competent court for challenging the award and it is for that court to consider the grievance projected by the Petitioner. Today, it is pure speculation as there is no award made by the Arbitral Tribunal. In the event, that award is challenged before the competent court, the process as above can be followed. We keep all the contentions of the

parties open and uphold the preliminary objection.

15 The Writ Petition is, accordingly, disposed of.

(MANGESH S. PATIL, J.)

(S.C. DHARMADHIKARI, J.)

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