

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL UNDER ARBITRATION ACT NO.4 OF 2017

Harmony Agencies	... Appellant
<i>Versus</i>	
Cosme Farma Laboratories Ltd	... Respondent

Mr AD Bobe, *Advocate for the applicants*
Mr Menezes Myron D'Sozua, *Advocate for the respondent*

CORAM: G.S. PATEL,J
DATED: 8th September 2017

PC:-

1. Mr Bhobe confirms that the amount of Rs.1,38,125/- and interest as ordered on 11th August 2017 in Civil Application No.23/2017 has been deposited in this Court. The amount will be remitted by the Registry to the learned Arbitrator, Shri V.P. Shetye, at the following address: “M-54, Kamal Kunj, Housing Board Colony, Porvorim, Goa-403 521”. This having been done, I will now proceed to take up the arbitration appeal.

2. Heard. The appeal is directed against an order dated 22nd June 2016 of the Principal District & Sessions Judge, North Goa, Panaji in an Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996. The present Appellant was the Applicant before the District Judge. The application was dismissed on the ground that it was beyond the time.

3. The matter arises in the following context. On 29th December 2009, one Mr V.P. Shetye was appointed as a sole Arbitrator to decide the disputes between the parties. A copy of the Award is annexed to the present appeal from page 23 onwards. At this stage, the merits of the rival claims are unimportant. What is relevant appears towards the end of the Award and it relates to a lien exercised by the Arbitrator under Section 39(1) of the Act in regard to his fees that remained unpaid by the Appellant. The amount was Rs.1,38,125/-. It is best to set out the relevant portion of the Award.

‘Before I part with this judgment/award, it is necessary for me to make a reference to the costs i.e. the arbitrator’s fees that are payable by the parties. A bill of payment of fees to the arbitrator was prepared by me as per the rates in the Goa Government Order No.1-24-84/LD (Pt.File)/1344 dated 09/08/2011, published in Official Gazette dated 18/08/2011 which works out to Rs.3,46,250/-. This amount was equally divided between the 2 parties which works out to Rs.1,73,125/-, for each party. The claimants have deposited a sum of Rs.40,000/- during the course of the proceedings. Whereas the Respondents have deposited a sum of Rs.35,000/-. As the Respondents have deposited Rs.35,000/- during the proceedings, this sum was deducted and accordingly they were asked to pay Rs.1,38,125/- through his advocate on record, on 20/08/2014. Thereafter the claimant has paid his part of the fees but the Respondent did not. The Respondent was given opportunities for payment on 16/09/2014, 07/10/2014, 03/11/2014, 17/11/2014, 16/12/2014, 20/1/2015 and 4/2/2015 on which dates Advocate for the Respondents did appear before me and every time they said that they have already intimated to the Respondent of the costs/fees to be paid by the Respondents to me as the

Arbitrator but they have heard nothing from the Respondents.

On 4/2/2015 the Advocate for the Resp., with their application, also enclosed a copy of the last email sent by them to the Resp., wherein mention was made of the various phone calls and emails sent by them to the Resp. in relation to the pending Arbitrator's Fees and their (Advocate's) professional fees, but that the Resp. have not been responding regarding the same and that in those circumstances, it is difficult for them to continue appearing in the matter and further that they will no longer be appearing in the matter and lastly asking the Resp. to clear their professional fees and Arbitrator's Fees, at the earliest.

In view of this Application filed by the Ld. Advocate for the Resp. and as I thought that the Resp. were given more than sufficient opportunities to pay my Bill and that it was high time that the Award be delivered in the matter, I sent a Notice by Regd. A/D to the Resp. with a copy to the Claimants informing them of the number of opportunities given to them to pay my Bill and their failure to do that and that as their Advocates will not be appearing for them that I will deliver/make the Award on 10/3/2015 at 10:30 a.m. in terms of law and especially Section 38 r/w 39 of the Act 1996.

I have received a reply dated 2/3/2015 to the said Notice from the Resp. on 7/3/2015, stating inter alia, therein "our response to the matter was undecided at the times mentioned by you and therefore the delay. As briefed by our advocates and the way the arbitration proceedings have taken place we have noticed a bias has been shown against us all along. The bias was inexplicable and very marked. Under these circumstances it is not possible for us to settle your bill". In this regard I may only state that the

alleged bias can never be a ground for non-payment of the Bill of fees of the Arbitrator, in respect of which the Arbitrator has already put in his work.

Section 39 of the Act provides that the Arbitral Tribunal shall have a lien to the arbitral award for any unpaid costs of the arbitration. In that view therefore I shall hold a lien on the award I am going to make as far as the Respondents are concerned for the unpaid costs as mentioned above. To be effective, for this lien I shall not hand over any copy of the award to the Respondent (Commentary on Section 39 by JJ B.P.Saraf & Jhunjhunwala, pg. 594, Law of Arbitration & Conciliation, 5th Edition) but only deliver the award in the open tribunal before the parties/their advocates that might be present.

As and when an Execution Application/Appeal may be filed before the Hon'ble Competent Court, such Court is requested to kindly consider my right to receive Rs.1,38,125/- as my Fees as Arbitrator, from the Respondents and my lien on this Arbitral Award for that amount, in terms of Section 39 of the Act. In the result, I pass/make the following award.

AWARD

The Respondents are hereby ordered to pay to the claimants a sum of Rs.1,70,36,344/- with interest thereon at the rate of 6% p.a. from 26/04/2011 till the date of the award and @ 18% per annum from the date of the award till its payment, with legal fees of Rs.5000/- to be paid by the Respondent to the claimants. The Respondents are also liable to pay the sum of Rs.1,38,125/- mentioned above as arbitration costs i.e. fees to the Arbitrator and the arbitrator hereby holds a lien on this award for that sum.

Pronounced in open Tribunal, this 10th day of March 2015, at Porvorim-Goa."

4. A few things are important from this passage. First, that the Appellant was given multiple opportunities to make payment. The dates are noted. Second, that the learned Arbitrator even sent a notice by Registered Post to the Appellant, to which the Appellant replied saying that it was not possible for them to settle the arbitrator's bill and alleging bias. In his notice, the Arbitrator specified the date of 10th March 2015 for pronouncing the Award.

5. It appears that on 10th March 2015, none was present on behalf of the Appellant. Till date, the Appellant does not have a signed copy of the Award.

6. The argument of the Respondent is, of course, that the challenge on merits under Section 34 of the Act is time barred in view of Section 34(3) of the Act. It is also submitted that the Appellant ought to have made an application under Section 39(2) to compel the delivery of an Award to the Appellant if any such arbitral lien was being exercised. Section 31(5) makes it clear that after the arbitral Award is made, a signed copy is to be delivered to each party.

7. I find it difficult to accept that there is a question of limitation that can be said to operate against the Appellant. The District Court itself clearly noted that limitation would begin to run upon the Appellant obtaining a signed copy of the Award. There is no quarrel with this proposition. What the District Court ought to have done

was to compel the Appellant to make the deposit of the unpaid fees and to transmit those fees to the Arbitrator and then to have heard the arbitration application under Section 34 on merits. This was always within the power of the District Court. If, given that opportunity, the Appellant declined to avail of it, then, of course, they could not be heard to complain. But to straightaway dismiss the application under Section 34 without giving them an opportunity or putting them to terms is, in my view, quite unjustified.

8. In the present appeal, I have done precisely that, and, in fairness, from the very beginning Mr Bhobe for the Appellant has not once resisted making the deposit or advanced any arguments that the Appellant should not be required to do so. By my order dated 11th August 2017, I required the Appellant, as a condition precedent, to make that deposit and made it clear that if it did not do so, I would dismiss the appeal on that ground. The Appellant has complied. The amount is deposited, as I have noted earlier. This amount has been ordered to be transmitted to the Arbitrator in full payment of his fees and the amount deposited is with interest at 6% per annum.

9. In this view of the matter, I do not think it is necessary to enlarge the controversy. The appeal can be disposed of by restoring the petition under Section 34 to file and by requesting the District Judge to dispose this of on merits at the earliest.

10. Arbitration Petition No.15 of 2015 is restored to the file of the Principal District Judge, North Goa, Panaji. The District Judge is

requested to dispose of the petition at the earliest and if possible by 30th November 2017. All contentions are expressly kept open. The Respondent may, if so advised, raise the question of limitation before the District Judge.

11. In the peculiar facts and circumstances of the case, Mr Bhobe seeks leave to be able to prosecute the arbitration application under Section 34 on the basis of the unsigned copy that is available with him. Leave granted.

G. S. PATEL J.