

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1020 OF 2017**

Atlantis Entertainments, Rep. By
its Partner, Baldevraj Arora And Anr.,

... Petitioners

Versus

La Calypso Hotels (P) Ltd., and 2 Ors.,

... Respondents

Mr. Parag Rao, Advocate with Ms. A. Lobo, Advocate for the Petitioner.
Mr. Ashwin Bhobe, Advocate with Ms. Shradha S. Bhobe, Advocate for
the Respondents.

Coram: C. V. BHADANG, J.

Date : 22nd November 2017

ORAL ORDER:

In this Petition under Article 226 and 227 of the Constitution of India, the Petitioner is seeking following reliefs:

- A) This Hon'ble Court be pleased to issue a writ of prohibition or order or direction in the nature of prohibition or any other appropriate writ, order or direction, restraining the Respondent no. 2 from conducting any further proceedings pursuant to notice dated 16/11/2017 without complying with mandatory provisions of Section 12 of the Arbitration and Conciliation Act 1996;
- B) This Hon'ble Court be pleased to issue a writ of prohibition or order of direction in the nature of

prohibition or any other appropriate writ, order or direction restraining the Respondent no. 2 from conducting arbitration at Surat, Gujarat and or at any place other than in the State of Goa;

C) This Honourable Court be pleased to grant a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction to quash and set aside the impugned Order dated 16.11.2017 passed by the Respondent no. 2.

2. The brief facts necessary for the disposal of the Petition may be stated thus:

That the Petitioner no. 1 has entered into a Hotel Operation Agreement with the Respondent no. 1, for a period nine years with effect from the year 2010 which contains an arbitration clause. It appears that disputes and differences arose between the parties as to the manner of the operation which led to the Petitioners to file Special Civil Suit no. 38 of 2016 before the Senior Civil Judge at Mapusa in which the Petitioners were granted ad-interim relief. The Petitioners also approached the learned District Judge at Panaji, Goa under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act' for short) and were granted interim relief in terms of prayer clause 'C' of their application. The Respondent no. 1 also approached the learned Principal District Judge under Section 9 of the Act in which certain

orders were passed.

3. The material dispute pertaining to the present Petition arose when the Petitioners received a communication dated 28.10.2017 from the Arbitrator Mrs. Neena Kapoor fixing the first hearing in Goa. In the meantime, the parties also explored the possibility of a settlement which did not materialise. Subsequently, the Arbitrator, Mrs. Neena Kapoor expressed her inability to continue with the arbitration proceedings. On 29.10.2017, the Petitioner no. 1 received an email from the Managing Director of Respondent no. 1 informing about the appointment of Mr. Atul Kapoor as the new Arbitrator. On 01st November, 2017 the Petitioner no.1 received email from the Arbitrator indicating that the arbitration proceedings are fixed on 05.11.2017 at Surat (Gujrat). The Petitioner no. 1 informed the Arbitrator that it would not be possible for them to attend the arbitration proceedings at Surat and requested the Arbitrator to hold the sittings in Goa. On 04.11.2017 the Petitioner no. 1 received an email intimating that the arbitration proceedings are fixed on 11th and 12th November, 2017 at Surat. In such circumstances, the Petitioners approached this Court in Writ Petition no. 976 of 2017 by and large, for similar reliefs as sought in the present Petition. The said Petition was disposed of by consent of parties on 09.11.2017 in the following terms:

“(i) The respondent no. 1 agrees that the seat of the arbitration continues to be in Goa although the venue of the arbitration can be elsewhere as agreed between

the parties.

- (ii) The petitioners shall be at liberty to make a request to the learned Arbitrator to have the venue of the arbitration changed from Surat (Gujarat) to at any place other than in Gujarat.
- (iii) It will also be open to the petitioners to point out to the Arbitrator about the inadequacy of the declaration made in pursuance of Section 12 of the Arbitration and Conciliation Act.
- (iv) If the request as indicated in paras (ii) and (iii) above is made, the learned Arbitrator shall decide the same, after hearing the parties and in accordance with law.
- (v) All rival contentions of the parties are left open.
- (vi) The petition is disposed of in the aforesaid terms.

4. In the present Petition it is contended that the Arbitrator by a one line order has fixed the venue of the arbitration at Surat and, secondly, it is contended that the declaration/disclosure made by the Arbitrator as required by Section 12 of the Act does not conform to the requirement of the schedule 6 of the Act.

5. I have heard Shri Rao, the learned Counsel for the Petitioners and Shri A. D. Bhobe, the learned Counsel for the Respondent no. 1.

6. The Petitioners have today produced additional affidavit on record which shows that the arbitration proceedings are now fixed on

26.11.2017.

7. It is submitted by Shri Rao, the learned Counsel for the Petitioners that once the seat of the arbitration is in Goa and, further, having regard to the fact that the erstwhile Arbitrator had conducted the proceedings in Goa, the venue can only be changed by consent of the parties and not otherwise, as noted by the Arbitrator Mrs. Neena Kapoor on 06.02.2017.

8. The learned Counsel has placed reliance on the Division Bench Judgment of this Court in the case of **Dowell Leasing & Finance Ltd., Versus Radheshyam B. Khandelwal & ors.,: 2007 SCC OnLine Bom 655** in order to submit that the Arbitrator would be a person to whom a writ can be issued under Article 226 of the Constitution of India and the Arbitrator would be a tribunal amenable to the jurisdiction of this Court under Article 227 of the Constitution of India.

9. On the contrary, it is submitted by Shri Bhobe, the learned Counsel for the Respondent no. 1 that except the order refusing to change the venue from Surat(Gujarat) there is no other order which is subject matter of challenge in this Petition. It is submitted that the declaration given by the Arbitrator is in compliance of the requirements of schedule VI of the Act and in such circumstances as per law laid

down by the Hon'ble Supreme Court, in the case of **SBP & Co. versus Patel Engineering Ltd And Another: (2005) 8 Supreme Court Cases 618**, this Court may not interfere during the pendency of the arbitration proceedings.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that the Petition can be favourably entertained.

11. The Hon'ble Supreme Court in the case of **Patel Engineering** had an occasion to consider the availability of jurisdiction under Article 226 of the Constitution of India against the order passed by the Arbitral Tribunal. The Supreme Court, inter alia, held in para 45 of the said Judgment as under.

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to

wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that an order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 of 227 of the Constitution. Such an intervention by the High Courts is not permissible.”

12. The Division Bench of this Court in the case of **Dowell Leasing & Finance Ltd**, after considering the decision of the Supreme Court in the case of Patel Engineering (supra), observed thus:

“10. It would be clear from a reading of the paragraph as also the directions, the Hon'ble Supreme Court has held that the High Courts ought not to invoke its extraordinary jurisdiction under Article 226 and 227 in respect of orders passed in pending arbitral proceedings. This is more so in respect of proceedings in respect of which a remedy is available under the Act. The judgment has not taken a view that no writ can go to an Arbitral Tribunal or that Arbitral Tribunal is not a person to whom a writ cannot be issued.”

It can thus be seen that although the Division Bench has held that, in the case of Patel Engineering the Supreme Court has not taken a view that no writ can go to as Arbitral Tribunal or that the Arbitral Tribunal is not a person to whom a writ cannot be issued, the fact remains that this Court would be slow in exercising such jurisdiction, in pending arbitration proceedings.

13. Coming to the facts of the present case, there are two challenges made. First, with reference to the venue of the arbitration and, secondly, about the declaration under Section 12 of the Act not being in compliance of schedule VI of the Act. In so far as the first aspect is concerned, the Arbitration Agreement provides thus:

Article XIX - Disputes and resolutions reads thus:

Arbitration:

“

. That in case of any disputes arises between the parties to the agreement then the dispute shall be referred to sole arbitrator appointed by the owner. The owner shall have the full authority and right to appoint the sole arbitrator. The Seat of Arbitration will be in Surat (Gujrat) or Goa as per the choice of owner exclusively and all Arbitration proceedings will be conducted in Surat(Gujarat) or Goa as per the choice of owner exclusively.”

(Emphasis supplied)

14. It can thus be seen that as per the agreement the arbitration proceedings shall be conducted at Surat(Gujarat) or Goa as per the choice of the owner exclusively. It is thus clear that under the Agreement, the venue of the Arbitration, shall be as per the choice of the owner, i.e. Respondent no.1.

15. It is submitted on behalf of the Petitioner that the erstwhile Arbitrator had conducted five seatings in Goa and thereafter the venue of the arbitration can only be changed by consent of the parties. I do not find that the submission can be accepted. The Petitioner has not been able to show that the minutes as recorded before the erst while Arbitrator would have the effect of modification of the arbitration clause as referred to above. It is also not shown as to what is the prejudice caused if the proceedings are held at Surat (Gujarat).

16. This takes me to the submissions based on Section 12. The Section 12 of the Act. Section 12 of the Act provides that the Arbitrat or terms shall give declaration/disclosure in form as specified in the VI schedule. The Arbitrator in his communication dated 01.11.2017 has stated thus:

“I hereby disclose that I am not connected with any of the party directly or indirectly either in relation or professionally. I am even not connected with any of the party in connection with present dispute, which may given rise to justifiable doubts for my independence or

impartiality. No circumstances are there which are likely to affect my ability to devote sufficient time to arbitration.”

17. The only contention raised on behalf of the Petitioner on the aspect of inadequacy of the disclosure is that the Arbitrator has not stipulated as to whether he is having any other arbitration proceedings on hand, which will have bearing on his ability to devote sufficient time to the arbitration. After going through the communication dated 1.11.2017 *prima facie*, I find that there is substantial compliance with the requirements of Section 12 read with schedule VI of the Act. In that view of the matter, no case for interference is made out. However it is made clear that the observations herein shall not come in the way of the Petitioner in any statutory appeal under the Act. With this, the Petition is dismissed with no order as to costs.

C. V. BHADANG, J

msr.