

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12647 OF 2015

Kekare Accident Hospital,]
A Proprietary Concern,]
Having its business place at]
163/A-4, Bhosale Garden,]
Opposite Tiranga Hotel,]
Pune-Solapur Road, Hadapsar,]
Pune - 411 028.]
Through its Proprietor]
Mr. Dasharath Dagadu Kekare,]
Adult, Occupation - Doctor,]
Residing at Flat No.E-702,]
Grevilla, S. No.147, 148, 149,]
Magarpatta City, Hadapsar,]
Pune - 411 028.] ... Petitioner

Versus

1. Abhyudaya Co-op. Bank Ltd.,]
A Body incorporated, registered and]
converted under Multi State Co-op.]
Societies Act, 2002.]
Having its Registered Office at Mumbai]
and Zonal Office at Dhanwant Plaza,]
598, Budhwar Peth, Pune - 411 002.]
Through Yerwada Branch, Pune.]
Manager Mrs. Neha Deshpande.]
]
2. Dr. Rahul Namdev Ghule,]
Adult, Occupation - Doctor,]
Residing at S. No.15, Vitthal Nagar,]
Opposite Tupe Chawl,]
Pune-Solapur Road, Gitanjali Clinic,]
Ghule Bungalow, Hadapsar,]
Pune - 411 028.]
]
3. Dr. Jitendra Ramesh Deshmukh,]
Adult, Occupation - Doctor,]
Residing at 25/26, Raghukul Plaza,]
Opposite Akashwani Kendra,]
Pune-Solapur Road, Hadapsar,]
Pune - 411 028.]

4. Mrs. Kamal Dashrath Kekare,]
Adult, Occupation - Household,]
Residing at - Flat No.406, Building No.'E',]
S. No.147, 148, 149, Magarpatta City,]
Hadapsar, Pune - 411 028.] ... Respondents

Mr. Madhav Jamdar for the Petitioner.

Mr. Vishal C. Ghosalkar for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 15TH DECEMBER 2017.

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, by consent of Mr. Jamdar, learned counsel for the Petitioner, and Mr. Ghosalkar, learned counsel for Respondent No.1.

2. By this Petition, filed under Article 227 of the Constitution of India, Petitioner is challenging the order dated 5th August 2015 passed by District Judge-13, Pune, below Exhibit-29 in Miscellaneous Application No.848 of 2013. The said Miscellaneous Application No.848 of 2013 was filed by the Petitioner, under Section 34 of the Arbitration and Conciliation Act, 1996, for challenging the Award passed by the Arbitrator. The application (Exhibit-29) therein was filed by the Petitioner-Applicant seeking permission to file evidence affidavit in support of the contentions raised in the application for setting aside the Arbitral Award. It was contended that, the Petitioner has deposited

certain amounts in Respondent No.1-Bank towards repayment of loan, but Respondent No.1-Bank has concealed this important fact and made false claim against the Petitioner. In these circumstances, the permission was sought to lead the evidence.

3. The said application was opposed by Respondent No.1-Bank contending, *inter alia*, that, there was no specific provision under the law for leading oral or documentary evidence for challenging Arbitral Award in the proceedings filed under Section 34 of the Arbitration and Conciliation Act, 1996.

4. After hearing the submissions advanced by learned counsel for the Petitioner and Respondents, the learned District Judge has rejected the said application holding that, there is no such provision under Section 34 of the Arbitration and Conciliation Act for entertaining an application for leading evidence. It was held that, the Court is not empowered to re-appreciate the evidence and examine the correctness of the conclusions arrived at by the Arbitrator in considering the application for setting aside the Award. The learned District Judge also held that, the Petitioner has failed to point out any provision by which he can be permitted to lead evidence in such proceedings under Section 34 of the Arbitration and Conciliation Act.

5. The submission of learned counsel for the Petitioner is that, these

observations made by the learned District Judge are not correct, proper or legal, because, as per Section 19 of the Arbitration and Conciliation Act, the rules of procedures so far as Arbitration Proceedings are concerned, are flexible and not rigid and as far as Original and Appellate Side Rules framed by the High Court of Bombay are concerned, the provisions of Civil Procedure Code are made applicable to the proceedings under the Arbitration and Conciliation Act also. Therefore, the learned District Judge was not correct in observing that there are no provisions empowering him to permit the Petitioner to lead evidence.

6. Per contra, learned counsel for Respondent No.1-Bank has relied upon two decisions; one is that of the Apex Court in the case of *Associate Builders Vs. Delhi Development Authority*, (2015) 3 SCC 49, and second decision is of Madras High Court in the case of *Brick Steel Enterprises Vs. The Superintending Engineer*, 2006 (5) CTC 519, to submit that, having regard to the scope of the jurisdiction under Section 34 of the Arbitration and Conciliation Act, there is no lee-way or scope for production of any oral or documentary evidence.

7. If one considers Section 34 of the Arbitration Act and its scope, as laid down in various Judgments; especially, *Associate Builders (Supra)*, then, it is clear that, only on the grounds mentioned in Section 34, which read as follows, the Court can set aside the Award passed by the Arbitrator.

“34. Application for setting aside arbitral award :

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

(b) *the Court finds that—*

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*

(ii) *the arbitral award is in conflict with the public policy of India.*

Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) *An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may

entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

8. Except for these grounds, the Court cannot entertain any other ground for challenging the Award under Section 34 of the Arbitration and Conciliation Act. Hence, under Section 34 of the Arbitration and Conciliation Act, the Court cannot go into the merits or reappraise or reexamine the evidence or look into the inefficiency of the evidence. The law is also well settled that, under Section 34 of the Arbitration and Conciliation Act, the Court cannot sit as a Court of Appeal over the factual finding recorded by the Arbitrator. The Court can interfere only when the conditions enumerated in Section 34 of the Act are satisfied and, therefore, so far as leading any oral evidence or relying upon certain documents is concerned, needless to state that, there is no scope. Though it is true that the provisions of Civil Procedure Code can be used as a guiding principle while considering the application under Section 34 of the Arbitration and Conciliation Act, having regard to the fact that the role of interference under Section 34 being very limited, the Court cannot permit liberally the production of any additional evidence, which

was not led before the Arbitrator. It may be true that, there is no express provision under the Arbitration and Conciliation Act, excluding Civil Procedure Code; however, considering the object of the Arbitration and Conciliation Act and taking into consideration the facts of the case, if the provisions of Civil Procedure Code can only be used as a 'guiding principle' in the present case, this Court does not find that any grounds are made out for production of evidence. Ample opportunity was available to the Petitioner to lead such evidence before the Arbitrator. If, according to the Petitioner, the proceedings before the Arbitrator were decided ex-parte in his absence, then, the remedy is also available to him to get the Arbitral Award set aside on that count. Be that as it may, however, having regard to the minimum supervisory role, which is given to the Court in Arbitration Proceedings under Section 34 of the Arbitration and Conciliation Act, allowing the parties to lead oral or documentary evidence therein; especially, having regard to the facts of the present case, is not at all permissible.

9. The impugned order, therefore, passed by the District Judge does not call for any interference. Writ Petition, hence, being devoid of merits, stands dismissed.

10. Rule is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.]