

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.12556 OF 2015

M/s Chandan Builders)
A Partnership Firm)
16-B, Dr. Ambedkar Road,)
Sarosh Apartments,)
Pune - 411 001.)
through its partner Ashish Shah) .. Petitioner

Versus

Union of India)
through the Chief Engineer (AF))
Ahmedabad having office at)
Military Engineer Services)
Lekawada Patia, Chiloda,)
P.O. CRPF Campus,)
Gandhinagar- 382042.) .. Respondent

Mr.Aditya Bapat I/by Mr.Nachiket Khaladkar for the petitioner.
Ms.S.I.Shah i/by S.I. Shah & Co. for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 10th September 2018

Judgment :-

. The petitioner has impugned the order dated 2nd April 2015 passed by the Extra Joint Ad-hoc District Judge, Pune thereby dismissing

the civil appeal bearing No.457 of 2011 filed by the petitioner under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (for short “the said Act”).

2. It is not in dispute that there was an arbitration agreement recorded in the agreement entered into between the parties. The dispute arose between the parties. The respondent appointed an arbitrator. The respondent had filed an application under Section 16 of the said Act on 19th December 2005 before the learned arbitrator alleging that none of claims were arbitrable in view of the petitioner having allegedly signed the final bill and all the claims made by the petitioner were made after signing of final bill by the petitioner. The respondent had placed reliance on several judgments of the Supreme Court in support of the application filed on 19th December 2005. The petitioner (original claimant) filed reply opposing the said application filed by the respondent under Section 16 of the said Act. Parties granted extension of time to the learned arbitrator to pass an appropriate order. Learned arbitrator passed an order dated 21st July 2006 in the nomenclature of an award accepting the plea of jurisdiction raised by the respondents holding that none of claims made by the petitioner were arbitrable.

3. Being aggrieved by the said award dated 21st July 2006, the petitioner preferred civil appeal bearing No.457 of 2011 under Section 37(2) of the said Act before the learned Extra Joint Ad-hoc District Judge, Pune. By an order dated 2nd April 2015, the learned District Judge rejected the said civil appeal on the ground that the said appeal filed under Section 37(2) was not maintainable and the remedy of the petitioner, if any, was to file an application under Section 34 of the said

Act. This judgment of the learned District Judge, Pune is impugned before this Court in this petition under Article 227 of the Constitution of India.

4. Learned counsel for the petitioner invited my attention to the claims made by the petitioner and the application filed by the respondent under Section 16 of the said Act raising an issue of jurisdiction of the arbitrator and the observations made in the said so called award dated 21st July 2006 passed by the learned arbitrator holding that none of the claims of the petitioner were arbitrable. He submits that no written statement was filed by the respondent before the learned arbitrator. By the so called award, the learned arbitrator accepted the plea of jurisdiction raised by the respondent under Section 16 of the said Act and rejected all the claims of the petitioner as not arbitrable. He submits that the only remedy of the petitioner against the said so called award passed by the learned arbitrator accepting the plea of jurisdiction was by way of filing an appeal under Section 37(2)(a) and not by filing of arbitration petition under Section 34 of the said Act. He submits that the impugned order passed by the learned District Judge is *ex facie* erroneous and contrary to Sections 16 read with 37(2) of the said Act.

5. Ms.Shah, learned counsel for the respondent, on the other hand, submits that none of the claims made by the petitioner were arbitrable. She submits that the parties had granted extension of time to the learned arbitrator to make an award. She submits that the learned arbitrator had rendered an award and has not passed any order and thus the remedy of the petitioner was to file an application under Section 34

of the said Act and not any appeal under Section 37 of the said Act. The learned District Judge has thus rightly rejected the appeal filed under Section 37(2) of the said Act as not maintainable. It is lastly submitted by the learned counsel for the respondent that under Section 34(6) of the said Act, the remedy of the petitioner would be to challenge the said award along with the order passed by the learned arbitrator under Section 16 of the said Act.

6. A perusal of the record clearly indicates that the respondent had filed an application under Section 16 raising an issue of jurisdiction in respect of all the claims made by the petitioner on the ground that the petitioner had made all the claims after signing of the final bill. The said application was admittedly filed under Section 16 of the said Act. No written statement was filed by the respondent on merit of the claims.

7. A perusal of the order which was the subject matter of the said civil appeal bearing No.457 of 2011 clearly indicates that the learned arbitrator has accepted the plea of jurisdiction under Section 16 and rejected all the claims on the ground that none of the claims made by the petitioner were arbitrable. It is an admitted position that no written statement was filed by the respondent. Merely because the parties had granted extension of time to the learned arbitrator to pass an award would not indicate that the order passed by the learned arbitrator was an arbitral award. Learned arbitrator has not dealt with the claims of the petitioner on merit nor has passed such an order after considering any written statement.

8. If any plea of jurisdiction raised under Section 16 is accepted, the arbitral proceedings have to be terminated, if nothing survives in the proceedings. The remedy of other party would be only to file an appeal under Section 37(2)(a) of the said Act. In my view, the plea of jurisdiction raised by the respondent and accepted by the learned arbitrator cannot amount to an arbitral award within the meaning of an arbitral award under Section 2(1)(c) of the said Act. The arbitral proceedings stood terminated and no claims were left to be determined on the merits.

9. In so far as the submission of the learned counsel for the respondent that under Section 34(6) of the said Act, the petitioner ought to have filed an arbitration petition is concerned, in my view, this argument is totally absurd and contrary to Section 34(6) of the said Act. Section 34(6) can be invoked only if the plea of jurisdiction raised under Section 16 is rejected and the arbitral proceedings thereafter have been proceeded with culminating into an arbitral award. At that stage, the party raising a plea of jurisdiction can challenge the order passed under Section 16 read with final award under Section 34(6) of the said Act. In this case, the plea of jurisdiction raised by the respondent under Section 16 had been accepted and the arbitral proceedings are terminated. Reliance placed on Section 34(6) of the said Act is thus totally misplaced.

10. A perusal of the order dated 2nd April 2015 passed by the learned District Judge, Pune indicates that the learned District Judge has rendered a perverse finding that the order passed by the learned arbitrator

accepting the plea of jurisdiction under Section 16 was an award and thus could be challenged under Section 34 of the said Act.

11. In my view, no award is rendered by the learned arbitrator which could be challenged under Section 34 of the said Act. The petitioner had rightly filed an appeal under Section 37(2)(a) of the said Act. The impugned order thus passed by the learned District Judge deserves to be set aside.

12. I therefore pass the following order :-

- (i) The impugned order dated 2nd April 2015 passed by the Extra Joint Ad-hoc District Judge, Pune is quashed and set aside.
- (ii) Civil Appeal No.457 of 2011 filed by the petitioner below Exhibit- 14 is restored to file before the Extra Joint Ad-hoc District Judge, Pune or before the learned Judge who is assigned this matter. Hearing of the appeal is expedited.
- (iii) The learned Judge shall make an endeavour to dispose of the said appeal expeditiously.
- (iv) Parties are directed to co-operate with each other and with the learned Judge in expeditious disposal of the said appeal.
- (v) Writ petition is allowed in aforesaid terms. No order as to costs.

R.D. DHANUKA, J.