

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1752 OF 2015
ALONGWITH
NOTICE OF MOTION NO.531 OF 2018

Board of Control for Cricket in India

..... Petitioner

VERSUS

Kochi Cricket Private Limited

..... Respondents

Mr.Rafique Dada, Senior Advocate, a/w. Mr.T.N.Subramanian, Senior Advocate, Mr.Simil Purohit, Mr.Indranil Deshmukh, Mr.Aditya Mehta, Rachyeta Shah, Mr.Arjun Sreenivas, i/b. Cyril Amarchand Mangaldas for the Petitioner.

Mr.Darius Khambatta, Senior Advocate, a/w. Ms.Dhanashree Shah, Ms.Tanvi Dattani, i/b. AZB & Partners for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 13th APRIL, 2018

P.C.

Admit. Mr.Khambatta, learned senior counsel for the respondents waives service.

2. Insofar as Notice of Motion No.531 of 2018 filed by the petitioner is concerned, the same is for granting stay of the impugned award which is subject matter of the Arbitration Petition No.1352 of 2014.

3. Mr.Dada, learned senior counsel for the petitioner invited my attention to some of the paragraphs of the impugned award and also the prayers in the statement of claim filed by the respondents before the

learned arbitrator. It is submitted by the learned senior counsel that though in the statement of claim filed by the respondents, the respondents had prayed for an amount of Rs.700 crores or such other amount towards the losses/damages alleged to have been suffered by the respondents on account of the alleged repudiatory breaches committed by the petitioner herein as claim no. III and without prejudice to and in the alternate to prayer (iii) had prayed for an order and direction to pay an amount of Rs.231,50,40,042.70 towards the wasted expenses alleged to have been incurred by the respondent under the franchise agreement till the date of interest of claimed, the learned arbitrator in the impugned award has allowed both the claims i.e. claim in the sum of Rs.1,53,33,31,800/- towards general damages under claim no.(iii) and Rs.2,31,50,40,042/- towards special damages under claim no.(iv).

4. Learned senior counsel also invited my attention to the findings of the learned arbitrator in paragraph 8.1.21 in support of his submission that the learned arbitrator has awarded the claim for loss of profit and also the wasted expenses. It is submitted that both the claims which were in alternate to each other could not have been awarded by the learned arbitrator. He further submits that insofar as the claim for wasted expenses is concerned, the respondents had themselves made it clear in their written arguments filed before the learned arbitrator that the said claim of the wasted expenses would be reduced to Rs.176,65,42,535.28 if the income generated out of such wasted expenses would be considered. He submits that the learned arbitrator had awarded the entire claim under claim no.(iv) in the sum

of Rs.2,31,50,40,042/-.

5. The next submission of the learned senior counsel is that though in paragraph 8.1.21 of the award, the learned arbitrator has stated that to meet the end of justice, the amount equivalent to 25% of the franchise fee of two years is allowed to the respondents herein by way of general damages, the learned arbitrator has allowed the entire claim.

6. It is submitted that though under clause 21.11 of the agreement entered into between the parties, if the learned arbitrator would have come to the conclusion that any amount was due and payable to the respondents herein, the interest could not have been awarded more than 4% of the base lending rate declared by the State Bank of India from time to time. He submits that the learned arbitrator has however awarded interest at the rate of 18% on the sum of Rs.3,84,83,71,842/- w.e.f. 19th September,2011 till the date of award which is contrary to the clause 21.11 taking into consideration the alleged prime lending rates. In support of this submission, he also invited my attention to the finding of the learned arbitrator in paragraph 8.1.23 and would submit that though the respondents had alleged to have produced a chart of State Bank of India showing the prime lending rate downloaded from the State Bank of India, the learned arbitrator has though considered this prime lending rates which is contrary to clause 21.11 of the contract, has mentioned the base lending rates in the said 8.1.23 and has awarded interest at the rate of 18% as if the said rate is awarded for base lending rate.

7. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Kanchan Udyog Limited vs. United Spirits Limited, (2017) 8 SCC 237*** and in particular paragraphs 30 to 32 in support of his submission that the learned arbitrator could not have awarded the claim of loss of profit as well as wasted expenses at the same time. He also placed reliance on the judgment of Supreme Court in case of ***Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49*** and in particular paragraph 36 and would submit that since the impugned award *ex facie* shows patent illegality and perversity, the impugned award deserves to be stayed unconditionally without imposing any condition.

8. Mr.Khambatta, learned senior counsel for the respondents on the other hand invited my attention to the prayers in the statement of claim and more particularly prayer clauses (iii) and (iv) and would submit that though the respondents herein had made a claim for losses/damages in the sum of Rs.700 crores under claim (iii) and had claimed sum of Rs.2,31,50,40,042.70 towards wasted expenses, the learned arbitrator has not awarded the entire claim of Rs.700 crores under claim (iii). It is submitted that the claim (iii) is not awarded by the learned arbitrator towards loss of profit but has been awarded as general damages. He submits that the claim no.(iv) was also a claim for special damages and thus both the claims for damages could be claimed by the respondents and has been rightly awarded by the learned arbitrator.

9. Insofar as submission in respect of the rate of interest awarded by the learned arbitrator is concerned, it is submitted by the learned senior counsel that when the respondents had led the evidence and produced a chart of statement of Prime Lending rates downloaded from State Bank of India website, the petitioner herein did not raise any objection before the learned arbitrator. It is submitted that the learned arbitrator has thus rightly rendered a finding that the prime lending rates during the relevant period was bearing from 14% to 14% plus and thus 4% above the said rate was considered and thus interest at the rate of 18% per annum was rightly awarded. It is submitted that it is thus clear that the base lending rate and the prime lending rate were same which were considered by the learned arbitrator and thus at this stage, the petitioner cannot be allowed to raise such issue in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

10. In support of the submission that this court shall not grant any unconditional stay, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Malwa Strips Private Limited vs. Jyoti Limited, (2009) 2 SCC 426*** and more particularly paragraph (14). It is submitted that even if the powers of court under section 36 are discretionary, unless this court comes to a conclusion that a strong case has been made out by the applicant for grant of unconditional stay, this court shall not exercise its discretion for granting an unconditional stay in favour of the applicant in the facts of this case.

11. Both the learned senior counsel addressed this court only for the limited purpose for considering whether any condition shall be imposed by this court while considering this application for grant of stay of the impugned award. For such limited purpose, both the learned senior counsel pointed out some of the paragraphs of the impugned award. I have also thus heard the learned senior counsel only for the purpose of deciding this notice of motion and for admitting the petition.

12. A perusal of the statement of claim filed by the respondents before the learned arbitrator indicates that the respondents herein had made several claims including two monetary claims in claim nos. (iii) and (iv). Insofar as claim no.(iii) is concerned, it *prima facie* indicates that the respondents had demanded a sum of Rs.700 crores or such other amount as may be quantified towards losses/damages alleged to have suffered by the respondents. Insofar as claim no.(iv) is concerned, the said prayer is for recovery of amount of Rs.231,504,00,42.70 towards wasted expenses alleged to have incurred by the respondents herein. A perusal of the said prayer clearly indicates that the said claim no.(iv) is made without prejudice to and in the alternative to prayer clause (iii).

13. A perusal of the arbitral award indicates that insofar as claim no.3 is concerned, the learned arbitrator has observed that to substantiate the said claim of Rs.700 crores, the respondents herein had chosen to adduce the evidence of the financial experts. After considering the evidence of the witnesses, the learned arbitrator

however has allowed this claim in the sum of Rs.1,53,33,31,800/-. In paragraph 8.1.21, the learned arbitrator has held that the principles of mitigation of damages comes into play. The claimant could not just sit in the arm chair with folded hands and dreams of the earnings for the next nine years. The learned arbitrator accordingly considered the said claim for a period of two years. It is mentioned in the said paragraph that it would suffice and meet the end of justice if an amount equivalent to 25% of the franchise fee of two years is allowed to the claimant by way of general damages. While computing the said claim, the learned arbitrator has held that the franchise fee of two years being Rs.3,06,66,63,600/- (Rs.1,53,33,31,800 x 2), the loss of profit or loss of the business opportunity would be 50% of the said amount which comes to Rs.1,53,33,31,800/-. The learned arbitrator accordingly awarded the said claim. However in paragraph 8.1.24 the learned arbitrator has classified the said amount under general damages.

14. A perusal of the award further indicates that insofar as claim no. (iv) is concerned, the learned arbitrator has allowed the said claim towards special damages in toto.

15. In my *prima facie* view, the learned arbitrator has allowed claim no.(iii) and claim no.(iv) though the prayer clause (iv) clearly indicates that the same was without prejudice to the prayer clause (iii) and in the alternate to the said prayer.

16. It is not in dispute that even in the written arguments filed by the respondents before the learned arbitrator, it was the case of the

respondents that if the learned arbitrator comes to the conclusion that the income generated out of such wasted expenses if is required to be deducted, the claim would be in the sum of Rs.176,65,42,535.28. The same stand is taken by the respondents in the affidavit in reply filed in this arbitration petition. Learned arbitrator has however allowed the entire claim no.(iv).

17. Supreme Court in case of ***Kanchan Udyog Limited*** (supra) has dealt with similar issue and has quoted a quotation from Pollock and Mulla, 14th Edition with approval and has held that the claim for loss of profit and wasted expenses, both cannot be granted under section 73 of the Contract Act, 1872. In my *prima facie* view, the principles laid down by the Supreme Court in the said judgment would apply to the facts of this case.

18. For the purpose of considering the issue whether the applicant shall be granted stay or not in the facts of this case or not, I am of the view that whether the learned arbitrator could allow both the claims or any one out of two claims in view of there being alternate prayer in claim no.(iv) or both the claims could have been rejected or whether the claim no.(iii) which was for Rs.700 crores included the other claims for damages or not as canvassed by the respondents before this court would require detail consideration at the time of hearing of the arbitration petition. The applicant has made out a *prima facie* case for grant of stay.

19. Insofar as interest awarded by the learned arbitrator is concerned, though clause 21.11 of the contract clearly provided that the interest if any payable on sum due at the annual rate of 4% p.a. above the base lending rate from time to time of the State of India, in paragraph 8.1.23 of the award, the learned arbitrator has considered the chart of State Bank of India in respect of the Prime Lending rates downloaded from State Bank of India website. However in paragraph 8.1.23 while awarding the interest at the rate of 18%, the learned arbitrator has mentioned that he was awarding 4% above base lending rate. There is no finding rendered by the learned arbitrator insofar as claim of interest is concerned that the base lending rate and prime lending rates were the same.

20. In my *prima facie* view, the claim for interest awarded by the learned arbitrator is contrary to the clause 21.11.

21. In view of the aforesaid reasons, I am of the view that the matter requires detail hearing and in view of the *prima facie* findings rendered by this court referred to aforesaid the applicant deserves to be granted unconditional stay of the impugned award. I, therefore pass the following order :-

(a) Notice of motion is made absolute in terms of prayer clause (a) without imposing any condition of deposits upon the applicant.

(b) It is however made clear that the

observations made by this court in this order are for the purpose of considering the application for grant of stay and the same are *prima facie*.

(c) Hearing of the arbitration petition is expedited.

(d) No order as to costs.

[R.D. DHANUKA, J.]