

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION NO. 6 OF 2009

M/s. Bharat Petroleum Corporation,
A Company incorporated in India
Under the Indian Companies Act,
1913, and having its registered
Office at Bharat Bhavan, 4 & 6
Currimboy road, Ballard Estate,
Mumbai 400 0001.

... Appellant

V e r s u s

Mrs. Anuradha Ajit Malgaonkar,
Major, Married, resident of H6,
Goa Housing Board Colony,
Porvorim, Bardez, Goa.

... Respondent

Mr. S. D. Padiyar and Mr. P. Phadte, Advocates for the
Appellant.

Mr. A. D. Bhobe and Ms. Kalpa Govenkar, Advocates for the
Respondent.

Coram :- C. V. BHADANG, J.

Reserved for Judgment on : 10th June 2019

Judgment Pronounced on : 4th July 2019

JUDGMENT

This is an appeal under Section 37 of the Arbitration and Conciliation Act 1996 (Act, for short), challenging the judgment and order dated 27.01.2009 passed by the learned District Judge in Civil Misc. Application No.251/2006. By the impugned judgment, the learned District Judge has dismissed the petition, filed by the appellant under

Section 34 of the said Act, challenging the award dated 23.08.2006 passed by the learned sole Arbitrator.

2. The brief facts giving rise to the present appeal may be stated thus :

The respondent – Anuradha Malgaonkar (claimant before the learned Arbitrator) had obtained LPG distributorship at Ponda, under the name and style as 'Ponda Gas Service' from the appellant-Corporation, vide agreement dated 21.05.1986. Disputes and differences arose between the parties as, according to the appellant, the respondent was not maintaining the shop registers, refill registers and customer service registers and was not keeping proper account of the LPG cylinders and pressure regulators and was also violating the safety regulations. According to the appellant, in an inspection conducted on 07.05.1992, 643 cylinders and 324 pressure regulators were found missing from the godown of the distributorship. The appellant in accordance with clause 29 of the said agreement, terminated the dealership which was the principal dispute between the parties.

3. By an order dated 15.07.2003, passed by the learned Senior Civil Judge at Panjim in CMA No.246/1998/A filed by the respondent, the dispute came to be referred for

arbitration of the sole arbitrator which arbitration was initially governed by the Arbitration Act 1940 (Old Act), inasmuch as the dealership agreement containing the arbitration clause was dated 21.05.1986 i.e. prior to the coming into force of the Act.

4. The respondent filed a statement of claim, inter alia, seeking a declaration that the termination of the distributorship agreement dated 21.05.1986 was wrongful and for restoration of the distributorship and for compensation, etc.

5. The appellant (the respondent before the Arbitrator) resisted the claim and also raised a counter claim in the sum of Rs.10,45,500/- (towards the cost of 643 cylinders and 324 pressure regulators) along with interest.

6. The appellant filed a reply to the counter claim and, inter alia, contended that the counter claim was not maintainable.

7. The parties produced documents and filed a joint application dated 14.04.2005, inter alia, agreeing for the dispute being adjudicated following the provisions of the Arbitration and Conciliation Act, 1996. The parties also agreed

that the documents produced are the photo copies of the originals and unless any of the document is disputed and the inspection of the original is called for, the copies of the documents as produced will be considered as true copies of the original.

8. The learned Arbitrator by an Award dated 23.08.2006, dismissed the claim of the respondent, as well as the counter claim filed by the appellant. The learned Arbitrator refused to hold that the termination of the distributorship agreement was wrongful. He, therefore, refused the relief of restoration of distributorship and compensation as raised by the respondent. The counter claim filed by the appellant was also dismissed.

9. Feeling aggrieved, the appellant challenged the same before the learned District Judge in an application under Section 34 of the Act. It may be mentioned that the respondent did not carry the matter any further, as to the dismissal of her claim. The learned District Judge has dismissed the petition filed by the appellant . Hence this appeal.

10. I have heard Mr. S. D. Padiyar, the learned Counsel

for the appellant and Mr. Bhole, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

11. Mr. Padiyar, the learned Counsel for the appellant, has made the following submissions :

(i) That the finding recorded by the learned Arbitrator, both on facts and on the point of law, are perverse and not borne out of the evidence on record and, as such, are liable to be set aside. It is submitted that a counter claim can be justifiably lodged under Order VIII Rule 6A of the Code of Civil Procedure (CPC, for short) after the delivery of defence, provided the cause of action for filing such counter claim has arisen prior to the delivery of defence. Reliance in this regard is placed on the decision of the Supreme Court in the case of Mahendra Kumar & anr. vs. State of Madhya Pradesh & anr. **(1987) 3 SCC 265**. It is submitted that the Arbitrator was in error in holding otherwise.

(ii) It is submitted that the learned Arbitrator acted with material irregularity in holding that the appellant has not produced any documentary evidence to show the exact number of cylinders and the pressure regulators lost/which were missing and on the point of cost of such cylinders and pressure regulators. It is submitted that there are voluminous

documents produced, including letters from the respondent, which were not disputed, in which the respondent had not disputed about the number of the missing cylinders and pressure regulators and/or the cost of the same. It is thus submitted that the said finding recorded by the Arbitrator is manifestly illegal and perverse and against the weight of the evidence on record.

(iii) It is submitted that the Arbitrator also failed to properly appreciate clause 19 of the agreement and the policy of insurance which was supposed to be taken by the respondent. It is pointed out that, under the said clause or the policy of insurance, the interests of the appellant-Corporation were not insured and, in any event, in the absence of any such insurance policy being produced on record, the claim of the appellant could not have been dismissed on the basis of clause 19 of the Agreement. It is pointed out that it was for the respondent to have brought the insurance policy on record to prove the defence, based on such insurance policy, which she has failed to do.

(iv) It is submitted that the learned District Judge failed to exercise jurisdiction vested in him under Section 34 of the Act, while refusing to interfere with the Award passed by the Arbitrator.

12. On behalf of the appellant, reliance is placed on the decision of the Supreme Court in the case of (i) **Juggilal vs. General Fibre Dealers, AIR 1962 SC 1123** (ii) **P.C. Purushothama Reddiar vs. S. Perumal, AIR 1972 SC 608** (iii) **Ganges Waterproof Works(P) Ltd. vs. Union of India, (1994) 4 SCC 33**, (iv) **ONGC Limited vs. Garware Shipping Corporation Limited, (2007) 13 SCC 434**, (v) **Associates Builders vs. Delhi Development Authority, (2015) 3 SCC 49**, and (vi) **Sharma & Associates Contractors Private Limited vs. Progressive Constructions Limited (2017) 5 SCC 743** and decision of this Court in **R. S. Jiwani vs. Ircon International Ltd. 2010 (1) Bom C. R. 529**.

13. Mr. Bhole, the learned Counsel for the respondent has supported the impugned judgment. It is submitted that in the reply to the counter claim, the respondent had specifically denied the claim as raised on behalf of the appellant and, thus, it was incumbent upon the appellant to prove the documents by leading oral evidence which is not done. It is submitted that both, the learned Arbitrator as well as the learned District Judge, have concurrently found on fact that the claim as to compensation on account of the missing

cylinders and the pressure regulators has not been substantiated by the appellant and such finding of fact properly recorded cannot be interfered with in an appeal under Section 37 of the Act. It is submitted that re-appreciation of the evidence is not possible even before the learned District Judge in an application under Section 34 of the Act and much less in an appeal under Section 37 of the Act. Reliance is placed on the decision of the Supreme Court in the case **Swan Gold Mining Limited vs Hindustan Copper Limited (2015) 5 SCC 739**. It is submitted that the learned Arbitrator has taken a plausible view of the matter on the basis of the rival pleadings and the documentary evidence on record including clause 19 of the Agreement which provides for insurance of the cylinders and the pressure regulators being obtained. It is submitted that the Arbitrator has rightly held that as per clause 19 of the Agreement, the appellant is not entitled to recover the amount of Rs.10,45,500/- towards the cost of the cylinder and pressure regulators from the respondent and it was for the appellant to have claimed the said amount from the insurance company since the respondent was only a distributor/agent of the appellant.

14. Mr. Bhole, the learned Counsel for the respondent however did not dispute that a counter claim can be raised

even after delivery of the defence, provided the cause of action for such counter claim, has arisen prior to such delivery.

15. Mr. Bhobe, the learned Counsel for the respondent has placed reliance on the decision of the Supreme in the case of **Mc Dermott International Inc. vs. Burn Standard Co. Ltd. 2006(11) SCC 181** and the decision of this Court in the case of **Kaberi Mondal (Mrs.) vs. BMA Commodities Pvt. Ltd. 2015(5) Bom. C.R. 421**, in order to submit that even otherwise in an application under Section 34 of the Act, the District Court could not have decreed the claim in the face of the award of the Arbitrator dismissing the counter claim in its entirety.

16. Mr. Padiyar, the learned Counsel for the appellant has submitted that the documents produced on record which were not disputed constituted evidence which could have been acted upon. Insofar as the reliance placed on the decision in the case of **Mc Dermott** (supra) is concerned, it is alternatively submitted that this Court may set aside the impugned award leaving the parties to take recourse to their own legal remedy, if any, in the matter.

17. The rival contentions now fall for consideration. As

noticed earlier, the respondent has not challenged the award of the Arbitrator dismissing her claim. It is only the appellant-Corporation which challenged the dismissal of its counter claim. The Arbitrator had framed seven issues out of which only issue no.5 is relevant for the present purpose. The learned Arbitrator has discussed the said issue from para 26 of the award. A perusal of the award shows that the counter claim of the appellant has been dismissed on the following three grounds :

(i) that the counter claim which was filed on 22.07.2004 (which was after the delivery of defence on 21.04.2004) was not competent as per Order VIII Rule 6A of CPC.

(ii) that the appellant did not produce any documentary evidence, insofar as the exact number of the cylinders and the pressure regulators lost and the cost of each cylinder and pressure regulator; and

(iii) the appellant admitted that the respondent no.1 insured the goods against all risks including the third party risk and it was for the appellant to have claimed the said amount from the insurance company, since the respondent no.1 was only a distributorship of the appellant. It was held that clause 19 of the distributorship agreement, does not

entitle the appellant to recover the amount as raised in the counter claim.

18. The first ground based on Order VIII Rule 6 CPC may not detain me long. It is now well settled (as has been held by the Supreme Court in the case of **Mahendra Kumar vs State of Madhya Pradesh 1987 (3) SCC 265**) that Rule 6A of Order VIII does not bar the filing of the counter claim by the defendants after filing of the written statement and the counter claim can be filed after delivery of defence provided that the cause of action for the same has accrued prior to such delivery of defence. It cannot be disputed that the cause of action for the counter claim by the appellant seeking compensation in respect of the LPG cylinders and the pressure regulators which were found missing had arisen prior to the delivery of defence and, thus, on this ground, the counter claim could not have been dismissed. Thus, the first ground on which the learned Arbitrator has refused to entertain the counter claim cannot be accepted as it is patently against the settled position of law.

19. It is significant to note that clause 38(d) of the Dealership Agreement, provides that the respondent in the arbitration proceedings, shall be entitled to prefer a cross

claim, counter claim or set off, before the Arbitrator, in respect of any matter in issue arising out of or in relation to the Agreement without seeking a formal reference of arbitration to the Director (Marketing) and the counter claim or cross claim as the case may be, shall be deemed to form part of a reference made by the Director(Marketing). It can thus be seen that the finding by the Arbitrator that the counter claim was not maintainable is patently incorrect both on the point of law as well as on fact i.e. the interpretation which the Arbitrator has placed on Order VIII Rule 6-A of the Civil Procedure Code and the non-consideration of clause 38(d) of the Agreement which the Arbitrator was duty bound to take note of.

20. This takes me to the finding by the Arbitrator that the appellant did not produce any document, insofar as the exact number of cylinders and the pressure regulators which were missing and the cost of each of such cylinders and pressure regulators. As noticed earlier, the parties had filed a joint application before the Arbitrator on 14.04.2005 which reads thus :

“ Joint Petition of Applicant and Respondent herein Applicant and the Respondent have, after mutual discussion, agreed to the following :

- a. The dispute between the parties pending before Adv. Atanasio Monteiro for adjudication will be adjudicated following the provisions of Arbitration and Conciliation Act 1996.
- b. The documents produced by the parties relying on the same, and unless the same document is disputed and inspection of the original is called for the copies of the documents filed by the parties will be considered as true copies of the original and the proceedings will be proceeded with the same presumption."

21. Admittedly, there was no oral evidence led before the Arbitrator and the parties only relied upon the documents which include the exchange of correspondence. The Arbitrator while considering the issue of the termination of the agreement/dealership in para 17 onwards of the award has noticed the various letters written by the respondent particularly the one dated 30.09.1988 in which she had admitted that her brother who was appointed as Manager by her had indulged in malpractice and due to this, there were shortages and the documentation was not proper. The Arbitrator has also noted the letter dated 26.05.1989 addressed by the respondent to the appellant wherein she had admitted that there were shortages of gas cylinders and that she had paid Rs.1,48,250/- towards the cost of 98 cylinders

which were found to be missing. In para 18, the Arbitrator has noticed letter dated 08.07.1991 in which the respondent had admitted that she owed Rs.8,96,000/- to the appellant and had agreed to pay it in instalments as set out in the said letter. In para 22, the learned Arbitrator has held that there is no need of any evidence by appellant when there were clear admissions on the part of the respondent about the shortage of cylinders and the pressure regulators. The Arbitrator has also found that the case set out by the respondent that there was a theft is also not acceptable. The finding of the learned Arbitrator in para 29 is totally contrary to the finding earlier recorded. I am conscious of the legal position that a finding of fact properly recorded by the Arbitrator is not open to challenge in the limited supervisory role attributed to the Court under Section 34 of the Act and much less in a further appeal under Section 37 of the Act. However, if the finding recorded is patently illegal and perverse where the Arbitrator has refused to acknowledge the material on record, the same, in my considered view, would be open to challenge as held by the Hon'ble Supreme Court in the case of **Associates Builders vs. Delhi Development Authority** (supra). One of the heads of the challenge namely the award being in conflict with the public policy of India is based on the principle of *Wednesbury* reasonableness. In the case of **Associate**

Builders (supra), the Supreme Court has noted the observations in the case of **ONGC Limited** (supra) which read as under :

“39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.”

22. Similar view has been expressed in the case of **Swan Gold Mining Limited** (supra), where it has been held that the decision of the Arbitrator is generally considered as binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the face of it erroneous or patently illegal.

23. In my considered view, the Arbitrator in this case has failed to take note of the documents produced while dealing with issue no.5, when in the earlier part of the award,

he has accepted and acted upon the same set of documents.

24. This takes me to the third ground based on clause 19 of the Agreement which reads thus :

“19. The Distributor shall during the continuance of this agreement and valid for a period of three months from the date of the termination thereof at his own cost and expense take out adequate and proper Godown and Goods Insurance from a well reputed Insurance Company against all risks including Third Party risk to persons and properties, fire and explosion risk, riot risk, comprehensive motor vehicle policy risk, workmen's compensation and injury policy. As and when called upon by the Corporation the Distributorship shall produce such insurance policy and the renewals thereof for inspection and verification by the Corporation. The Distributorship shall fully and punctually abide by all the terms, conditions and covenants contained and set out in such insurance policy and shall not do or omit to be done any act, deed or thing whereby such insurance policy is invalidated, cancelled or rescinded by the Insurance Company.”

It can thus be seen that the said clause 19 mandates the distributor to obtain a policy of insurance in respect of the godown and goods covering all risk including third party risk to persons and properties, fire and explosion,

etc. The Arbitrator has also noted that the policy of insurance was obtained in the name of Anuradha. Thus, it is difficult to see as to how the corporation could have staked the claim on the basis of the said insurance policy. The view taken by the Arbitrator is not at all reasonable or a plausible view and is patently incorrect.

25. The learned District Judge, in my considered view, has not addressed to any of these aspects. The learned District Judge has brushed aside this aspect only on the ground that it is a finding of fact recorded by the learned Arbitrator. It is true that the Court will not sit in appeal over a finding of fact, properly recorded by the Arbitrator meaning thereby if the view taken by the Arbitrator is a plausible view, the Court would not be entitled to substitute its view on the ground that it is more plausible than the one taken by the Arbitrator. However, as held by the Supreme Court in the case of **Associate Builders** (supra) where the view taken is patently illegal or perverse, the Court in its supervisory jurisdiction is entitled to intervene.

26. This Court in the case of **Kaberi Mandal** (supra) placing reliance on the decision of the Supreme Court in the case of **Mc Dermott Inc.** (supra) has, inter alia, held that the

Court in exercise of the jurisdiction under Section 34 of the Act cannot substitute or modify the award. Thus, when the Arbitrator has dismissed the claim in its entirety, this Court cannot grant the claim in substitution of the award passed by the Arbitrator. The only option available is to set aside the award leaving the parties to take recourse to such remedy, if any, available in law and if so advised.

27. In the result, the appeal is allowed. The impugned judgment and order dated 27.01.2009 passed by the learned District Judge and part of the Award dated 23.08.2006 passed by the learned Arbitrator, rejecting the counter claim filed by the appellant, are hereby set aside.

28. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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