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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.18 OF 2014

Mr.Iftekhar Ahmad Khan ..Appellant
Vs.
Mr.Vikhar Ahmad Khan & Anr. ..Respondents

WITH
CIVIL APPLICATION NO.36 OF 2018
IN
ARBITRATION APPEAL NO.18 OF 2014

Mr.Iftekhar Ahmad Khan ..Applicant
In the matter of
Mr.Iftekhar Ahmad Khan ..Appellant
Vs.
Mr.Vikhar Ahmad Khan & Anr. ..Respondents

WITH
CIVIL CONTEMPT PETITION NO.458 OF 2018
IN
ARBITRATION APPEAL NO.18 OF 2014

Mr.Iftekhar Ahmad Khan ..Petitioner
Vs.
Mr.Vikhar Ahmad Khan & Anr. ..Respondents

Mr.Rohan Barge for Applicant/Appellant/Petitioner.
Mr.Ashutosh Gole for Respondent No.1.

CORAM : G.S. KULKARNI, J.

DATE : 10th JULY, 2019

P.C.:

Order on Arbitration Appeal No.18 of 2014

Heard learned Counsel for the appellant and learned Counsel for respondent No.1. Respondent No.2 is the arbitrator who is not represented.

2. This is an arbitration appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the appellant/original respondent before the arbitral tribunal challenges the judgment and order dated 2 August 2014 passed by the learned Principal District Judge, Thane, whereby Civil Miscellaneous Application No.171 of 2014 filed by the appellant under Section 34 of the Act challenging the arbitral award dated 5 April 2014 stands dismissed. The dispute between the parties arises under a Partnership Deed dated 31 December 2003 of the partnership firm in the name and style "Visa Chemical Industries". Respondent No.1-claimant invoked arbitration on the principal ground that the appellant being a partner of the said firm had unauthorizedly withdrawn about Rs.1 Crore, whereas the capital as brought by respondent No.1 was Rs.1,17,89,034/- and that of the appellant was rendered to only Rs.7,59,066/-. The learned arbitrator taking into consideration evidence on record made the following award:-

> "1. The Arbitrator is arrived at the conclusion, in the argued dispute between both the parties, that dissolution of the company is not the right solution for the same. Instead the business should be continued in the best interest and welfare of the company. The interest of company and the people working for the company is supreme.
> 2. The share capital for the opening balance for FY

> 2013-2014 for Dr. Vikhar A. Khan is Rs.1,17,89,034 and for Mr.Iftekhar A. Khan, the share capital is Rs. 7,59,066. The Arbitrator directs Mr.Iftekhar Khan to immediately refund back to the company the excess share capital which he has withdrawn from the company accounts. He must equalize his share capital with that of Dr. Vikhar A. Khan.
>
> 3. Till the time Mr. Iftekhar A. Khan equalizes his capital, he is directed not withdraw any capital from the company directly or indirectly. All his salary and profits will be accrued in the company accounts. This will help company achieve stability and cope up with the present financial burden.
>
> 4. Since Mr. Iftekhar Khan has amply made clear that he has no intention of refunding the excess capital which he has withdrawn from the company, the Arbitrator directs the company banker M/s.TJSB Sahakari Bank Ltd. at Panchpakadi, Thane, to suspend Mr. Iftekhar A. Khan as an authorized signatory for signing cheques for account No. cc/137. Only Dr. Vikhar A. Khan will operate the bank account No. cc/137. This will be a temporary restriction on Mr.Iftekhar Khan. It will be immediately lifted after Mr.Iftekhar Khan equalizes his share capital with that of Dr. Vikhar A. Khan subject to the verification and satisfaction of the Arbitrator.
>
> 5. The Arbitrator also directs Dr. Vikhar A. Khan not to hasten the process of equalizing his share capital so as to put the company in a financial crisis.
>
> The above award is sent by registered post and email to Mr. Iftekhar Khan and Dr. Vikhar Khan. A copy of this award is also sent to M/s. TJSB Sahakari Bank Ltd."

3. Thus the learned arbitrator held that the appellant had made it clear before the arbitral tribunal that he had no intention to bring in the excess capital which he had withdrawn from the partnership firm. Eventually as the circumstances desired, the learned arbitrator directed that the authority of the appellant to operate the firm's account be suspended. The above award was challenged by the appellant by approaching the Court of the Principal District Judge, Thane by filing proceedings under Section 34 as noted above.

4. A limited challenge was raised to the award passed by the learned arbitrator and more particularly as set out in paragraph 8 of the application filed by the appellant before the learned Principal District Judge. It would be appropriate to note the challenge which read thus:-

> "i) The Award passed on dated 05.04.2014 is not sustainable either in Law or on facts;
> ii) The Arbitrator has not consider the defense of Appellate and also not consider the evidence / reply filed by appellate at the time of Arbitration
> iii) The Arbitrator also failed and neglected to consider that in the original partnership deed there is no appointment of Arbitrator, but for the benefit arbitrator and respondent no.1 they have amended deed on dated 18.11.2013, but said deed is unregistered hence that cannot be biding on Appellate.
> iv) The Arbitrator also failed and neglected to consider the fact that the Appellant is partner since 1985 as per the registered partnership deed dated 11.03.1985 and thereafter appellate become 50% share holder in the firm from dated 31.12.2003, but from that date to till 18.02.2014 there is no dispute regarding the share hold capital and suddenly the respondent no.1 has created dispute regarding the share hold capital which is illegal and unauthorized.
> v) The Appellant / Applicant states that the arbitrator regularly granting favor to respondent no. 1 only.
> vi) The Appellant / Applicant states that the arbitrator also failed and neglected to consider that there is a huge differences in the income of both partner.
> vii) The Appellant / Applicant states that it is also record that respondent no. 1 getting more salary than Appellant, it is also record that respondent no. 1 has liable to pay salary amount of Rs. 35,51,130/- to Appellant.
> viii) The Appellant / Applicant states that it is also record that respondent no.1 and arbitrator themselves has earn unlawful gain from the product manufacture by Appellant and Appellant is suffers loss for sum of Rs. 33,86,11,130/- (Rs. Thirty Three Crores, Eighty Six Lacs Eleven Thousand one hundred Thirty). The Appellant/Applicant states that the arbitrator has also no rights to restrained the appellant from authorized signatory in to the bank account hence award is illegal. The arbitrator also has not rights to

> restrained the appellant from getting salary from his firm.
> (ix) The Appellant / Applicant states that the arbitrator award is bias and one side because arbitrator allowed the respondent no.1 to act whole and sole in to the partnership act.
> x) The arbitration award is based on insufficient discussion and assumptions and on humanitarian ground and same is liable to be set aside."

5. The learned Principal District Judge considering the rival contentions, by the impugned judgment and order has rejected the said application filed by the appellant under Section 34 of the Act inter-alia observing that there is no perversity in the finding as recorded by the learned arbitrator and more particularly when the appellant has taken a position that he is not willing to refund the excess capital which he has withdrawn. In regard to the appellant's contention, that the arbitrator would not have any jurisdiction as there is no arbitration agreement as contained in the partnership deed, the same was rejected as there was no material brought on record by the appellant to support such contention. In paragraph 23 of the impugned judgment, the learned Principal District Judge has taken into consideration the principal issues of challenge to the award as agitated on behalf of the appellant to conclude that there is no ground made out under Section 34 of the Act to set aside the impugned award.

6. Learned Counsel for the appellant in assailing the impugned judgment and order passed by the learned Principal District Judge, again

has argued very limited grounds. The primary contention as urged on behalf of the appellant is that the learned arbitrator ought not to have made a conditional award in as much as on one hand it is directed that the appellant should bring deficit capital to the partnership account and on the other hand, precluded the appellant from not operating the bank account. It is his submission that it is a conditional award and it is required to be set aside.

7. Perusal of the grounds indicates that no such ground was raised either before the District Court or is pleaded before this Court. In fact this is no ground. The observations made in paragraph 4 of the award in my opinion, were correct and justified, considering the materials as placed on record and clear admission on the part of appellant that he does not intend to bring back the capital amount which was withdrawn by him and which was against the terms and conditions of the partnership deed.

8. The second contention as urged on behalf of the appellant in assailing the impugned order is that the learned arbitrator had proceeded to pass the award only after a criminal complaint was lodged by the appellant against the respondent No.1. Such a contention cannot be accepted as challenge is to the impugned judgment and order passed

by the learned Principal District Judge deciding the Section 34 application filed by the applicant. In any case, no such case was either argued before the learned Principal District Judge or at any point of time raised earlier in the arbitral proceedings.

9. Lastly and as an argument in desperation, it is contended on behalf of the appellant that the arbitral tribunal had no jurisdiction as the learned arbitrator is father of the petitioner and respondent No.1 and arbitral award thus suffers from a bias. There are no material particulars of any such charge, either placed before the arbitral tribunal or before the Principal District Judge. The parties had agreed in the partnership deed for arbitration by a named arbitrator who had no concern with the partnership firm or having any relation with the partners. It is the settled principal of law that any challenge to the arbitrator appointed is required to be raised at the threshold before the arbitrator as permissible under Section 13 of the Act. Moreover the appellant had acquiesced in the appointment of the arbitral tribunal with full knowledge of the appointment. No case is made out on record to establish any bias.

10. It is only on the above three grounds as argued, the impugned order passed by the learned Principal District Judge is sought to be

challenged. No other ground is urged or argued.

11. In the light of the above discussion, I may observe with certainty, that none of the grounds of challenge can be accepted, to set aside the order passed by the learned District Judge. In any case these grounds are completely outside the parameters of interference as envisaged under Section 34 of the Act.

12. The appeal is without any merit. It is accordingly rejected. No costs.

Order on Civil Application No.36 of 2018

13. This application was filed praying for interim reliefs till disposal of the above arbitration appeal. It needs to be noted that during the pendency of the appeal, the parties had entered into Consent Minutes of the Order dated 8 April 2015. It is not in dispute that in pursuance of the Consent Minutes of the Order, certain monthly salaries were withdrawn by the applicant as also respondent No.1.

14. Learned Counsel for respondent No.1 has filed further affidavit dated 9 July 2019 to point out that respondent No.1 has not withdrawn any salary after 1 December 2016. Both the parties have withdrawn

their salaries upto November 2016 and thereafter no salary was withdrawn. It is stated in the affidavit of the respondent that certain amounts about Rs.3,70,000/- were withdrawn which were not attributed for any personal use of respondent No.1, but to make payments to auditors and other statutory payments, etc. This is being objected by the applicant. Be that as it may, the learned arbitrator has clearly observed that ultimately respondent No.1 having maintained his capital at Rs.1,17,89,034/-, it was permissible for respondent No.1 to operate the bank account. Admittedly, the applicant having failed to bring back the said amount, prima-facie there is nothing illegal in respondent No.1 utilizing Rs.3,70,000/- to make such payments. Accordingly the prayers as made in the civil application that the respondent No.1 be directed to continue paying the applicant an amount of Rs.85,000/- cannot be accepted and would be required to be rejected. In any case it is an admitted position that business of the partnership firm has come to an end since April 2017. There is thus no merit in the civil application. It is accordingly rejected.

<u>Order on Civil Contempt Petition No.458 of 2018</u>

15. Heard learned Counsel for the parties. The contempt which is alleged is that the respondent No.1 has not paid salary remuneration after December 2016 to the petitioner. It is also alleged that certain amounts are withdrawn and appropriated by the respondent No.1 which

is contrary to the consent terms as agreed between the parties.

16. Having heard learned Counsel for the parties and keeping in view the observations which are made in disposing of the appeal and the civil application filed by the petitioner and the fact both the partners namely petitioner/ applicant and respondent No.1 have withdrawn their respective salaries of Rs.85,000/- each as agreed under the Consent Terms upto November 2015, no case of contempt is made out. The contempt petition is without any merit. It is accordingly rejected.

[G.S. KULKARNI, J.]