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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.160 OF 2018
WITH
NOTICE OF MOTION NO.1153 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO.160 OF 2018**

Harikishan Daga and 3 others ... Petitioners.
V/s.

Hrim Finance and Securities Pvt. Ltd
and 2 others ... Respondents

- Mr. Harish Pandya a/w Mr. Rajendra kookada, Mr. Mittal Munoth i/by Kookoda & Associates, for the Petitioners.
- Mr. Karl Shroff a/w Ms. Sneha Phene i/by Mukesh B. Nayak, for respondent No.1.

CORAM : G. S. KULKARNI, J.

DATE : 5th MARCH, 2019.

P.C. :

1] Heard Mr. Harish Pandya, learned counsel for the petitioner and Mr. Karl Shroff, learned counsel for the respondent No.1.

2] The challenge in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “ACA”), is to an award dated 8th August, passed by the learned sole Arbitrator.

3] At the outset it needs to be noted that respondent No.1 initiated arbitral proceedings in which the petitioners were impleaded as respondent Nos. 2 to 5 in the Statement of Claim. The case of the petitioners is that they responded to the arbitral notice and also filed their statement of defence. Mr. R. K. Bhise, Advocate, was the sole Arbitrator at the relevant time. The learned sole Arbitrator was subsequently substituted by Mr. Ankit Lohia, Advocate, who was so appointed to adjudicate the disputes between the parties.

4] It so transpired that a Notice of Motion No.3011 of 2016 was moved in Arbitration Application No.308 of 2015, which was filed under Section 11 of the ACA, by the petitioners on which, this Court (G.S. Patel, J.), on 25th January, 2017 passed the following order:-

“Mr. Lohia, the learned Arbitrator previously appointed by an order dated 8th July 2016, expresses his disinclination to continue with the reference of his arbitration. In my view, this is not only understandable but quite correct given the correspondence that preceded the filing of this Notice of Motion. I note that annexed to the Affidavit in support of the Notice of Motion is a copy of the minutes of a meeting dated 8th December 2016. These minutes make for the most unfortunate reading. Mr. Lohia found himself in a situation where he had no option but to respond with a paragraph by paragraph traverse to correspondence, by the Advocate for one of the parties. There is no reason why any Arbitrator, and particularly a counsel at our Bar, should be subjected to this.

2. Mr. Lohia's resignation as an Arbitrator is accepted.

3. In view of this, nothing survives in the Notice of Motion, one that

seeks a clarification as to the scope of the arbitral reference. Obviously, that order is partially modified by this order. The order of 8th July 20168 disposes of the Arbitration Application. Consequently, there is no surviving proceeding before me.

4. The Notice of Motion is disposed of in these terms with no order as to costs.

At 3.00 p.m.

5. At this stage, handwritten Consent Terms are now tendered. These are signed by the Advocates for the Applicant and for the Respondent as also the original Applicants. These Consent Terms are taken on record and marked "X" for identification with today's date. It is agreed that the claim in arbitration by the Petitioners against HRIM Finance & Securities Pvt. Ltd before the arbitral tribunal will be restricted to a claim against Shree Hanuman Trading Company for recovery of debit in the amount of Rs.8,19,16,435/- plus interest at the rate of 15%. Respondent Nos. 2 to 10 in the Statement of Claim previously filed before the previous Arbitrator, Mr. Lohia are dropped from this arbitral claim".

(emphasis supplied)

5] As noted in paragraph No.5 of the aforesaid order, by consent of the parties in terms of the said consent terms tendered before the Court, respondent Nos. 2 to 10's therein were dropped from the array of party respondents in the Statement of Claim as filed before arbitral Tribunal. This deletion included the petitioners who were respondent Nos. 2, 3, 4 and 5. The consequence of this deletion was that the petitioners who were respondent Nos. 2 to 5, were no more parties to the arbitral proceedings and thus they were not required to defend the said arbitral proceedings.

6] This definitely has consequences in law as urged on

behalf of the petitioners. The learned Arbitrator, who passed the impugned award on 8th August 2017, also proceeded only against respondent No.1 therein (before the arbitral tribunal), namely against "Shri. Hanumant Trading Company" the partnership firm. A perusal of the award, shows that the award is published only against Shri. Hanuman Trading Company, respondent No.1, in the Statement of Claim as originally filed. The operative part of the award as noted in paragraph No.38 of the impugned order reads thus :-

“38 Conclusion:

I have heard both the Advocates and gone through the records of filed with me. I called upon the claimants to produce the bank statements which they produced along with their letter dated 3rd August 2017 for my own satisfaction as to the genuineness of their claim. The Claimants have already given details of the dates and account details on days when the amounts were transferred from claimant's bank to the Respondent's Bank account. I have verified and the bank accounts sought by me show that the amounts were in fact transferred. There is no dispute raised by the Respondent on this issue though represented by the Advocates. I entirely agree with the contentions of Mr. Shroff that ample opportunity was available with the partners to oppose the proceedings and have with full knowledge chosen to stay out of the same. I therefore, conclude that the claimants have proved their claim to which the Respondent has no defence. The Respondent has failed to lead any evidence to substantiate their bald statements and denials in the Written Statement. The Respondent has also failed to pay their share of the fees save and except for the first sitting. The Claimants have duly paid the said fees.

39. The Respondent is accordingly liable to pay the sum of Rs.8,19,16,435/- along with interest @ 15% per annum from 1st February 2015 till date of realization of the payment by the Respondent. The Claimant in my view is also entitled to costs of

arbitration in the sum of Rs.1,00,000/- as prayed for.

(emphasis supplied)

7] Mr. Pandya, learned counsel for the petitioners submits that although the award is against the partnership firm and the petitioners were consciously deleted from the arbitral proceedings, the petitioners have a serious objection to the observations of the learned sole arbitrator in paragraph No.38 of the award as underlined above. He would submit that although the petitioners were not parties to the arbitral proceedings on the basis of the said observations, the petitioners apprehend that respondent No.1 may proceed to execute the award against the petitioners. To support this contention, Mr. Pandya, learned counsel for the petitioners has referred to letter of the advocate of respondent No.1 dated 24th October, 2017 (Exhibit “E-1” page No.200 of the paper book), which has been addressed to the petitioners.

8] The contention of Mr. Pandya, is that once the petitioners were not parties to the arbitral proceedings, the said letter could not have been be issued to the petitioners. Mr. Pandya, would submit that the deletion of the petitioners from the arbitral proceedings is significant, as at the relevant time the petitioners had resigned from the partnership firm on 1.1.2012.

The petitioners, thus, had no concern with any transactions of the firm after 1.1.2012. It is submitted that right from the inception this was the contention of the petitioners on the basis of their resignation, which was also the case of the petitioners in the statement of defence, as presented before the arbitral tribunal, that they were neither necessary nor proper parties to the arbitral proceedings. Mr. Pandey's contention is that the impugned award of the arbitral tribunal is bad and being required to be set aside, if in case, in any manner, the same is executed against the petitioners.

9] On the other hand Mr. Shroff learned counsel for respondent No.1 would contend that the submissions as made on behalf of petitioners are unfounded. He submits that the perusal of the award makes clear that the petitioners are not parties to the arbitral proceedings. It is submitted that the award as made would be binding only against respondent No.2 Shree Hanuman Trading Company a partnership firm against whom the respondent had asserted its claim. It is thus, submitted that the petitioners have no cause of action to maintain this petition under Section 34 of the ACA.

10] Having heard learned counsel for the parties and on perusing

the documents as placed on record and the original arbitral proceedings as called for from the learned sole Arbitrator, it appears to be clear that consent terms were entered between the parties and were taken on record in the Notice of Motion No.3011 of 2016 as moved in Arbitration Application No.308 of 2015 and by an order dated 25th January 2017, passed by this Court, the petitioners were deleted as party respondents to the arbitral proceedings. Thus, there was no question of petitioners being called upon to defend the arbitral proceeding. This is the clear position as appearing on record.

11] The contention as urged on behalf of the petitioners on the basis of respondent's advocate letter dated 24th October, 2017, that award becomes binding on the petitioners, thus, cannot be accepted as the petitioners were deleted as party respondents, learned Arbitrator has not passed any award against the petitioners and thus the apprehension on the part of petitioners on the basis of letter dated 24th October, 2017 of the advocate of respondent No.1, may not be a correct apprehension. In any case the respondent's advocate letter cannot be contrary to the award of the arbitral tribunal. In any case it is not the case of the respondents that the award is binding on the petitioners.

12] As regards Mr. Pandya's objection in regard to the observation as made by the learned sole Arbitrator in paragraph No.39 of the impugned award (supra), to the effect that partners had not come forward to oppose the proceedings, it appears to be inadvertent mistake and of no consequence inasmuch as the the respondent No.1 in a consensual arrangement with the petitioners had deleted the petitioners as a party respondent. Thus, the said observations although made, are of no consequence once the petitioners are deleted from the arbitral proceedings.

13] In view of above discussion I am of the clear opinion that this petition would not require any adjudication, it is accordingly disposed of, however keeping open the rights of the petitioners to pursue such appropriate remedies as and when need so arises, as also rights and contentions of the respondent to execute award. All contentions of the parties in that regard are expressly kept open. No costs.

14] The arbitral proceedings are received by the office in a sealed cover from the learned Arbitrator. The parties are permitted to take inspection in the presence of all the advocates of the opposite parties and obtain copies of the relevant proceedings from the Registry on payment of the usual charges. After the copies are made available, the original

proceedings be returned to the learned sole arbitrator.

15] In view of dismissal of Arbitration Petition, pending Notice Motioqn No.1153 of 2018 therein becomes infructuous and it is accordingly disposed of.

[G. S. KULKARNI, J]