

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.754 OF 2016
WITH
NOTICE OF MOTION NO.2683 OF 2016
IN
ARBITRATION PETITION NO.754 OF 2016**

Sushma B. ChandakPetitioner

vs

SMC Global Securities Ltd. ...Respondent

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Mr. Simil Purohit, i/b. M/s. Purohit & Co., for the Petitioner.

Mr. Ashok Singh, a/w. Mahi Lalka, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 9 APRIL 2019

(Oral Judgment):

. This arbitration petition challenges an award passed by a Panel of arbitrators and confirmed by the appellate tribunal in an arbitration reference under Bye-laws, Rules and Regulations of National Stock Exchange of India Ltd.

2. The petition is opposed by the Respondent *inter alia* on the ground that after the declaration of the award, the parties entered into a deed of settlement, under which the Petitioner herein, along with others, agreed to pay Rs.46,25,657.56 in full and final settlement of the award and the Respondent accepted this payment in full and final settlement of all its claims whatsoever, including its debit balance outstanding in UCC No.ZAN0001, which was the subject matter of the

arbitration reference. Both parties agreed that no further claims, disputes, actions, by whatever name called, by and between the parties shall lie and the parties would unconditionally and immediately withdraw each and every claim against each other; such claims included, in terms, the present arbitration petition filed under Section 34 of the Arbitration and Conciliation Act, 1996.

3. There is no dispute between the parties that the deed of settlement produced by the Respondent in support of its contention, was in fact executed, though it is the case of the Petitioner that she never personally signed the deed even though her name has been mentioned as 'first party' in it. Learned Counsel for the Petitioner submits that the so called compromise reflected in the deed of settlement is void, since one of the considerations for the compromise was withdrawal of a criminal prosecution involving *inter alia* charges under Sections 467 and 468 of Indian Penal Code, which are non-compoundable. Learned Counsel relies on the judgment of the Supreme Court in the case of **V. Narasimha Raju vs. Gurumurthy Raju**¹ and the decisions of Calcutta High Court and our Court, respectively, in the cases of **Sumitra Devi Agarwalla vs. Sulekha Kundu**² and **Misrilal Jalamchand vs. Sobhachand Jalamchand**³ in support of his case.

4. Before we consider the deed of settlement as a compromise or satisfaction of the impugned award, in the light of the case law cited by the Petitioner, a few salient facts bearing on the compromise may be

1 AIR 1963 SC 107

2 AIR 1976 Cal 196

3 AIR 1956 Bom 569

noted:

The appellate award was passed by the Appellate Tribunal of NSE on 31 December 2015. On 23 March 2016, the present challenge petition was filed by the Petitioner. Pending the hearing and final disposal of the petition, on or about 28 February 2017, a complaint was filed by the Respondent herein against the Petitioner and some of her family members at Golabari Police Station, Sadar Howrah, West Bengal. Based on that complaint, on the same day, an FIR was registered by the concerned police station against the accused. Based on such FIR, a notice under Section 41A of the Criminal Procedure Code was issued by Golabari Police Station to the Petitioner and others. After this notice, following the procedure prescribed by law, family members (husband and son) of the Petitioner were arrested by police. In the backdrop of these facts, on 5 January 2018, the present deed of settlement was arrived at between the parties. (The deed was executed by the husband and son of the Petitioner whilst in police custody.) The settlement *inter alia* records (i) the debit balance in the account of the Petitioner of an amount of Rs.53,83,203.28 (UCC No.ZAN0001), (ii) the arbitration reference commenced by the Respondent before NSE arbitrators seeking recovery of this debit balance, (iii) the original and appellate awards passed by the NSE arbitrators in favour of the Respondent herein, awarding a sum of Rs.46,25,657/- and (iv) the challenge petition herein pending adjudication at that time. The settlement deed provides for payment of Rs.46,25,657.56 by the Petitioner and others, who were described collectively as parties of the first part therein, in full and final settlement of the Respondent, described in the deed as the party of the

second part, in respect of all its claims, including the claim forming part of the debit balance of UCC No.ZAN0001, which gave rise to the award impugned in the present petition. The settlement further records that pursuant to the satisfaction of the terms of settlement laid down in the deed and subject to realization of the demand draft/pay order for the sum stipulated therein, there would be no further claim, dispute, action, by whatever name called, by and between the parties and the parties unconditionally agreed to withdraw immediately each and every claim, action, complaint, including the arbitration petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. Not only did this agreement record a declaration and affirmation by the Petitioner and others that the settlement was arrived at without any inducement or coercion and out of free will of the parties, simultaneously with the agreement, a no objection certificate was signed by the husband of the Petitioner confirming handing over of a demand draft in the stated sum “*towards the settlement of outstanding balance in UCC No.ZAN0001 at Sushma Chandak*” (i.e. the Petitioner herein). Based on this settlement, an application was made before Calcutta High Court for granting bail to the accused. On 17 June 2018, Calcutta High Court granted bail to all the accused. Subsequently, on 4 December 2018, on a joint application by the parties made under Section 320 (6) read with Section 482 of Criminal Procedure Code for quashing of the FIR against all the accused, the High Court *inter alia* noted that as per the deed of settlement between the parties, the parties had compromised their disputes; all the dues had been paid by demand draft; and accordingly, the parties were not willing to proceed further and prayed for quashing of the criminal proceedings. The Court noted that considering the background of the

case and the commercial nature of the transaction, which gave rise to the criminal prosecution, *“it would be sheer abuse of the process of Court to allow continuation of the proceeding”*. The Court, in the premises, quashed the pending proceedings in Golabari Police Station Case No.154 of 2017 and disposed of the criminal revision and miscellaneous application accordingly.

5. The conduct of the parties unmistakably demonstrates that the Petitioner not only compromised the Respondent's claim, forming part of the award, but sought express benefit of such compromise from Calcutta High Court by first seeking bail for all accused and later having the criminal prosecution quashed. It is immaterial that the Petitioner herself, though stated to be a signatory to the deed of settlement, did not subscribe her hand to the document. What is material is that she agreed to the arrangement, by which the Respondent's claim was compromised and she allowed her husband to submit a demand draft on her behalf in full and final settlement of the awarded claim and, based on such payment, allowed her family members, who were then under arrest, to secure bail and finally had the criminal prosecution against herself and the others quashed and after doing all that, she now wants this Court to believe that the deed of settlement was void.

6. Mr. Purohit, learned Counsel for the Petitioner, relies on the decisions of the Supreme Court in **Narasimha Raju** (supra) and of our Court and Calcutta High Court in **Misrilal Jalamchand** and **Sumitra Devi Agarwalla** (supra) in support of his case on unlawfulness of the consideration of the deed of settlement on account of public policy. The

cases of **Misrilal Jalamchand** and **Sumitra Devi Agarwalla** are on recording of a compromise in a suit and are quite beside the point. Whilst considering whether or not to decree the suit by recording the compromise, the Court is bound to consider whether the compromise was lawful and every argument on voidness or voidability is bound to be considered in such a case on merits. In **Narasimha Raju's** case, what was under challenge before the Supreme Court in the civil appeal was an arbitration award. The application for setting aside that award was on the ground that the arbitration agreement was not valid or binding on the party, since its consideration was to withdraw a criminal prosecution for offences, which were non-compoundable. In other words, what was claimed was that the arbitration agreement was invalid under Section 23 of the Contract Act. Under Section 23, every agreement of which the object or consideration is unlawful is void. Every consideration of an agreement is lawful unless it is *inter alia* opposed to public policy. What was argued before the Supreme Court was that having set the machinery of criminal law in motion on the ground that the opponent had committed a non-compoundable offence, if the party, by use of coercive criminal process, compelled the opponent to enter into an agreement, such agreement would be treated as invalid for the reason that its consideration was opposed to public policy. The Court observed that the particular offences involved in that case were non-compoundable and since non-prosecution of the complaint involving such non-compoundable offences, was a consideration for the arbitration agreement, the Court considered it to be opposed to public policy and the agreement based on it as invalid in law. The Court in this connection referred to the decisions of the Privy Council in **Bhowanipur Banking**

Corporation Ltd. vs. Sreemati Durgesh Nandini Dassi⁴ and Kamini Kumar Basu vs. Virendra Nath Basu⁵. In Bhowanipur Banking Corporation case, Lord Atkin had observed as follows:

“to insist on reparation as a consideration for promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so whole-heartedly in the interests of justice, and must not seek his own advantage.”

The Supreme Court noted that in dealing with the question as to whether the consideration for an agreement is opposed to public policy or not, it was immaterial whether the debt, in respect of which the agreement was made for illegal consideration, was real or whether the crime had, in fact, been committed. The Court held that all that was necessary to prove in such a case is that “*each party should understand that the one is making his compromise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting.*” In **Kamini Kumar Basu's** case, Their Lordships of the Privy Council had observed as follows:

“if it is an implied term of a reference to arbitration, and of an 'ekrarnama' pursuant to an award, that a complaint that a non-compoundable offence under [the Indian Penal Code](#) has been committed shall not be proceeded with, the consideration is unlawful on the ground of public policy, and the award and ekarnama are, therefore, unenforceable, and this would be so irrespective of whether in law a prosecution has been commenced or not”.

Based on these propositions of law, the Supreme Court, in

⁴ MANU/PR/0010/1941

⁵ I.L.R. [1930] IndAp 117

Narasimha Raju's case, held that the sequence of events in the case before it clearly indicated that the parties had entered into an understanding; the essence of this understanding was that Respondent No.1 was to get the criminal case dismissed and as a consideration for that, the appellant and the other accused had agreed to refer their disputes to arbitration. The Court held that this consideration of the arbitration agreement being unlawful, the agreement was not valid in law and an award based on such agreement was liable to be set aside.

6. What is important to note from the foregoing narration is that what the Court was essentially considering in **Narasimha Raju's** case or, for that matter, the Privy Council in the two cases referred to above, was whether an arbitration agreement supported by an illegal consideration could result into an enforceable award. The courts came to the conclusion that withdrawal from criminal prosecution in respect of non-compoundable offences, if offered, as a consideration for an arbitration agreement, was opposed to public policy and the agreement arrived at as a result was invalid in law. In the present case, that is not the subject matter of challenge before this Court. It is not that the arbitration agreement or the award, in any event, is vitiated by any illegal consideration. What needs to be considered in the present case, and that in the context of a challenge petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, is whether the compromise between the parties, reflected in the deed of settlement and on the basis of which orders were sought from Calcutta High Court in a quashing petition, was or was not supported by a lawful consideration. No doubt some of the offences in the present case, such as offences under Sections

467 and 468 of the Indian Penal Code, are non-compoundable. At the same time, the other offences such as offences under Sections 406, 409, 415, 420, 421 and 422, read with Sections 120B and 34 of the Indian Penal Code, are indeed compoundable with permission of the Court. What is important to note is that the parties not only agreed to termination of a criminal prosecution but actually implored the High Court to quash the same on the basis of their compromise, essentially submitting before the Court that the transaction between them was of a commercial nature and considering the backdrop of the case, any further prosecution in the matter would amount to abuse of the process of the Court and, on that basis, the prosecution ought to be quashed. In other words, the Petitioner and others clearly relied on the deed of settlement and called upon the Court to act on such settlement and the Court in fact accepted the compromise as lawful and proceeded to quash the prosecution on its basis. The question now is, whether the Petitioner, who not only entered into a compromise with her opponent but also made use of it in a criminal prosecution and, on that basis, managed to get bail for her co-accused and eventually have the criminal prosecution quashed, should be heard to challenge the award, which was the subject matter of such compromise. And we must note that this has to be considered in the context of Section 34. In every case, merely because the challenger satisfies the court that the award is in contravention of either of the clauses of sub-section (2) of Section 34, the Court is not bound to set aside the award. The Court has a discretion whether or not to do so. The real question in this case is whether or not to use that discretion and reject the challenge; whether or not the party, having compromised the award and entered into an agreement of satisfaction

and sought benefit thereof, should be permitted to prosecute her challenge.

7. Learned Counsel for the Petitioner submits that the Petitioner was made to accept the compromise by practising coercion; it was under the threat of continuation of a criminal prosecution, which was a false prosecution, that the Petitioner was made to accept the settlement. If, indeed, the Petitioner was made to accept the settlement in that manner, that would make the compromise between the parties voidable at the instance of the Petitioner. The challenge Court hearing the Petitioner's challenge under Section 34 of the Act is not a proper forum to consider whether the Petitioner should be allowed to avoid such contract. For that, the remedy would lie elsewhere. What we have to consider in the present challenge petition, if at all, is whether the compromise is void and that this Court is unable to persuade itself to hold.

8. The agreement cannot be said to be supported by an unlawful consideration. Many of the offences, in the first place, were compoundable with the permission of the Court and, secondly, and, at any rate, the parties asked the Court to quash the prosecution on the ground that in view of the settlement as also the nature of the transaction between them, continued prosecution of the criminal proceedings would amount to abuse of a process of law. That was indeed a lawful object and the Calcutta High Court in fact went on to accept the compromise on that basis as lawful and acted on it by quashing the criminal complaint. Once that is done, it is not open to the

parties to challenge it in a Section 34 petition, though in an appropriate case, the petitioner may have a cause of action on the basis of a case of a voidable compromise. The present Petitioner, for example, may have a case to urge that she was made to accept the compromise on the threat of a false criminal prosecution, that is to say, by practising coercion. This Court need not, however, express any opinion on it.

9. In the premises, there is no merit in the challenge. The arbitration petition is dismissed.

10. Learned Counsel for the Respondent agrees that two bank accounts of the Petitioner, which have been attached in pursuance of the impugned award, shall be raised in view of the settlement between the parties referred to above. It is ordered accordingly.

(S.C. GUPTE, J.)