

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 577 OF 2017**

Ashesh Busa)
A proprietor of Apex Chemicals,)
having its address at)
F-501, Remi Bizcourt,)
9, Shah Industrial Estate,)
Off.Veera Desai Road, Andheri)
(West), Mumbai 400 053)

..... Petitioner
(Original Claimant)

VERSUS

Atul Gandhi,)
having his address at)
Karshan Natha Trust Building,)
328/332, Samuel Street,)
3rd Floor, Room No.301,)
Opposite Mahavir Chambers,)
Vadgadi, Mumbai – 400 003)

..... Respondent
(Original Respondent)

Mr.Sahil Mahajan for the Petitioner.

Mr.Kunal Mehta, a/w. Mr.Kayomars Kerawala, i/b. Mr.Gautam Sahni
 for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 17th JUNE, 2019

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the award dated 27th February, 2017 passed by the arbitral tribunal rejecting the claims made by the petitioner and allowing the counter claims made by the respondent.

2. The arbitral award is challenged on the ground that the arbitral tribunal was comprising of three members (1)Mr.Kirit C.Mehta, (2) Mr.Ashish Tawakley and (3) Mr.Rajesh Tapuriah. However the impugned award is signed by only Mr.Kirit C.Mehta and Mr.Rajesh Tapuriah and not by Mr.Ashish Tawakley. It is the case of the petitioner that under section 31(2) of the Arbitration and Conciliation Act, 1996, (for short Arbitration Act) in the arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. It is submitted by the learned counsel that there are no reasons recorded in the arbitral award as to why Mr.Ashish Tawakley, the third arbitrator has not signed the impugned award.

3. Learned counsel for the petitioner invited my attention to the e-mail dated 19th April,2017 sent by the petitioner to the arbitrator Mr.Ashish Tawakley enquiring whether he was aware of the impugned award and whether he had signed the said award and the same was shown to him. He also invited my attention to the reply of the third arbitrator Mr.Ashish Tawakley informing the petitioner that he had not signed the award though the award was sent to him but he had not gone through it or signed it. This reply of the third arbitrator was dated 28th April,2017 i.e. before the arbitration petition came to be lodged by the petitioner.

4. Learned counsel appearing for the petitioner placed reliance on

the judgment of Delhi High Court in case of ***Mahanagar Telephone Nigam Ltd. vs. Siemens Public Communication Network Ltd., 2005(1) Recent Arbitration Judgment 463*** in support of the submission that since the arbitral award was not signed by the third arbitrator and there were no reasons recorded as to why the third arbitrator did not sign the arbitral award, the award being contrary to the section 31(2) of the Arbitration and Conciliation Act, 1996 deserves to be set aside on this ground alone.

5. Learned counsel appearing for the petitioner also placed reliance on section 34(2)(v) and would submit that since the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, the award can be set aside on that ground also. He submits that the procedure allowed by the arbitral tribunal under section 31(2) was not in accordance with the provisions of Part (I), the award deserve to be set aside on this ground also. Learned counsel for the petitioner did not urge any other submissions before this court.

6. Learned counsel for the respondent invited my attention to the e-mail dated 26th December, 2017 sent by the third arbitrator Mr. Ashish Tawakley confirming that he was a part of the arbitration team, heard the matter jointly with other two arbitrators. Though he had not signed the arbitration award sent by the association, he confirmed his participation in the same in spirit and action. He also confirmed the reasons recorded by other two arbitrators in the said e-mail dated 26th December, 2017. Learned counsel submits that it is thus clear that all

the three arbitrators had participated in the proceedings and were of the unanimous decision rejecting the claims of the petitioner and allowing the counter claims made by his client. He submits that this e-mail of the third arbitrator confirming his participation in his substantial compliance of the provisions of section 31(2) of the Arbitration and Conciliation Act, 1996.

8. Learned counsel for the respondent distinguished the judgment of Delhi High Court in case of ***Mahanagar Telephone Nigam Ltd.*** (supra) relied upon by the learned counsel appearing for the petitioner on the ground that the impugned award was set aside by the Delhi High Court in the said judgment on the ground that the award was beyond the claims made by the claimants and the findings of the other two arbitrators were not only mutually inconsistent but were self destructive.

9. Learned counsel appearing for the respondent placed reliance on the judgment of this Court in case of ***Patel Engineering Company Ltd. vs. Konkan Railway Corporation Ltd., (2009) 5 Bom.C.R. 256*** and in particular paragraphs 16 to 18 in support of the submission that the petitioner has not raised any ground in the arbitration petition that the third arbitrator had not read the award rendered by the other two arbitrators and not had participated in the proceedings. In support of this submission, he also invited my attention to an unreported judgment of this court rendered on 8th January, 2013 in case of ***M/s. Maneesh Pharmaceuticals Limited vs. M/s. Contract Advertising India Private Limited in Arbitration Petition No.654 of 2012*** and in

particular paragraphs 26, 27 and 31.

10. Learned counsel invited my attention to the grounds of challenge raised in the arbitration petition and more particularly ground (B) and (C). He submits that those grounds are totally vague and without particulars. He submits that it is not urged by the petitioner in the grounds of challenge that the third arbitrator had not participated in the proceedings. There was no rejoinder filed by the petitioner to the affidavit in reply filed by the respondent annexing copy of the e-mail sent by the third arbitrator confirming his participation in the arbitration proceedings with other two arbitrators.

11. Insofar as submission of the learned counsel for the petitioner that the impugned award is in violation of section 31(2) of the Arbitration and Conciliation Act, 1996 on the ground that no reasons are recorded in the impugned award as to why the third arbitrator has omitted his signature is concerned, a perusal of the correspondence exchanged between the petitioner and the third arbitrator and the e-mail sent by the third arbitrator which is forming part of the record in these proceedings clearly indicates that the third arbitrator has confirmed his participation in the arbitral proceedings. He had concurred with the views taken by the other two arbitrators.

12. Insofar as reply sent by the third arbitrator Mr. Ashish Tawakley in response to the e-mail sent to the petitioner stating that he had not signed the award though the award was sent to him that he had not gone through or not signed is concerned, would not conclude that the

learned arbitrator had not participated in the arbitral proceedings. He has already confirmed by sending a separate e-mail to the Association about his participation jointly with the other two arbitrators. The views expressed by the third arbitrator in the said e-mail clearly indicates that he has concurred with the views taken by the other two arbitrators. Be that as it may, the view of the majority of arbitrators prevails under section 31 of the Arbitration and Conciliation Act, 1996. In my view, the compliance made by the other two arbitrators is thus substantial compliance under section 31(2) of the Arbitration and Conciliation Act, 1996 and thus the impugned award cannot be set aside on that ground.

13. Insofar as judgment of Delhi High Court in case of ***Mahanagar Telephone Nigam Ltd.*** (supra) relied upon by the learned counsel for the petitioner is concerned, a perusal of the judgment clearly indicates that the impugned award has been set aside by the Delhi High Court on the ground that the findings of the two arbitrators were not only mutually inconsistent but were self-destructive. It was held that a person is not entitled to a relief which is not claimed by him and thus the award of that amount was wholly contrary to the view taken by the two arbitrators. In my view the said judgment of Delhi High Court would not even remotely apply to the facts of this case.

14. Insofar as the grounds raised in the petition by the petitioner is concerned, a conjoint reading of the ground (B) and (C) clearly indicates that the petitioner has not challenged the impugned award on the ground that the third arbitrator had not participated in the proceedings or that he was not consulted by the other two arbitrators

before passing the impugned award. The only ground raised in paragraph 5(2) and 5(c) is that the impugned award is to be set aside on the ground that the impugned award is signed only by two arbitrators and not by the third arbitrator. The petitioner seeks this court to draw an inference based on the letter addressed by the learned arbitrator on 28th April, 2017 that he had not signed the award though the award was sent to him. The third arbitrator has not alleged in the said letter that he was not aware of the award or that other two arbitrators had rendered the award without his participation or without his knowledge.

15. The Division Bench of this court in case of ***Patel Engineering Company Ltd.*** (supra) has categorically held that there has to be a specific ground raised in the petition filed under section 34 of the Arbitration and Conciliation Act, 1996 and if there is no such specific ground, the court has no *suo-motu* power under section 34 of the Arbitration and Conciliation Act, 1996.

16. Learned single Judge of this court in case of ***M/s. Maneesh Pharmaceuticals Limited*** (supra) has followed the principles of law laid down by the Division Bench of this court in case of ***Patel Engineering Company Ltd.*** (supra) and has held that the petitioner ought to have submitted the details in support of the grounds raised in the petition and such grounds cannot be vague. The ground raised in the petition was that the impugned award was against and in violation of the principles of natural justice. The principles of law laid down by this court and the Division Bench in the said judgments would apply to the facts of this case. I am respectfully bound by the said judgments.

17. Insofar as the merits of the award is concerned, since the learned counsel for the petitioner did not address this court to point out as to how the award deserves to be set aside on the other grounds raised in the petition, I do not propose to deal with those grounds not pressed before this court.

18. Insofar as reliance placed on section 34(2)(b) of the Arbitration Act by the learned counsel in support of his submission that since the award rendered by the majority of the arbitrator did not record the reasons as to why the third arbitrator has not signed the impugned award and thus the award shall be set aside on the ground of section 34(2)(a)(v) is concerned, in my view there is no merit in this submission of the learned counsel for the petitioner. Under section 34(2)(a)(v), an arbitral award may be set aside by the court when the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part. Since this court is of the view that there is substantial compliance by the arbitral tribunal, in this case, no case is made out under section 34(2)(a)(v) of the Arbitration and Conciliation Act, 1996.

19. Arbitration Petition is devoid of merits and is accordingly dismissed. No order as to costs.

[R.D.DHANUKA, J.]