

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****NOTICE OF MOTION NO. 1552 OF 2017****IN****ARBITRATION PETITION NO. 600 OF 2017****Chetan R. Shah) Applicant****IN THE MATTER BETWEEN****Chetan R. Shah,)
Residing at 703, Jamuna Vihar,)
7th Floor, Juhu Lane, Andheri-West,) Petitioner
Mumbai – 400 058)****VERSUS****Emkay Fincap Ltd.,)
Having its registered office at)
4-D, 4th Floor, Hamam House,)
Ambala Doshi Marg, Fort,) Respondent
Mumbai – 400 023)**

Ms.Prachi Pandya, i/b. M/s.Corporate Attorneys for the Applicant/Petitioner.

Mr.Vishal Talsania, a/w. Mr.Akshay B.Udeshi, i/b. M/s.Sanjay Udeshi & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.**DATE : 22nd OCTOBER, 2019****ORAL JUDGMENT**

By this notice of motion, the applicant seeks stay of the impugned award dated 27th March,2017. By a separate order passed by this court, the arbitration petition is admitted by this court.

2. Ms.Pandya, learned counsel for the applicant submits that in this case notice invoking arbitration agreement was issued sometime in the

month of June 2011. The arbitral award was rendered on 27th March, 2017. The arbitration petition was filed in the month of June 2017. On 21st August, 2019, this court admitted the said arbitration petition.

3. Learned counsel invited my attention to the arbitration agreement recorded in clause 50(d) of the contract entered into between the parties which reads as under :-

The award delivered by the Sole Arbitrator shall be final and binding upon the parties. The provisions of The Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) along with all the statutory modifications and re-enactment so far as they are consistent with this reference shall be deemed to have been incorporated herein and all the provisions of the “said act” shall apply to the reference hereunder contemplated.

4. It is submitted by the learned counsel that since the arbitration proceedings have commenced prior to 23rd October, 2015 and the arbitral award was also rendered prior to 23rd October, 2015, the applicant would be entitled to the unconditional stay of the impugned award. She strongly placed reliance on section 87 of the Arbitration and Conciliation Act, 1996 inserted by the Arbitration and Conciliation (Amendment) Act, 2019 and would submit that since the case of the applicant was governed by the unamended section 36 of the Arbitration and Conciliation Act, 1996, no condition of deposit can be imposed upon the applicant for granting stay of the impugned arbitral award.

5. Learned counsel also placed reliance on the judgment of Supreme Court in case of ***Thyssen Stahlunion GMBH vs. S.A.I.L., (1999) 9 SCC 334*** and would submit that the proceedings already commenced prior to the amended section 36 would be governed by the unamended provision. Learned counsel made an attempt to distinguish the order passed by this court on 13th September, 2019 in case of ***Godrej Industries Limited vs. Darius Rutton Kavasmaneck & Ors.*** in Commercial Arbitration Petition No. 1021 of 2019 and the order in case of ***The Kolhapur Municipal Corporation vs. Fairdeal Construction*** in Commercial Arbitration Petition No. 1018 of 2019 dated 15th October, 2019 on the ground that the arbitral proceedings in this case were commenced in the month of June 2011 i.e. much prior to the date of Arbitration and Conciliation (Amendment) Act, 2015 to section 36 of the Arbitration and Conciliation Act, 1996.

6. Mr. Talsania, learned counsel for the respondent on the other hand submits that the arbitration agreement between the parties clearly recorded that not only the provisions of Arbitration and Conciliation Act, 1996 would apply but all statutory modifications and re-enactment to the Arbitration and Conciliation Act, 1996 also would apply. He submits that in view of the said specific arbitration agreement, amendment to section 36 inserted by the Arbitration and Conciliation (Amendment) Act, 2015 which provides that there would be no automatic stay would clearly apply to the facts of this case, though arbitration agreement in this case was invoked prior to 23rd October, 2015.

7. Insofar as reliance on section 87 of the Arbitration and Conciliation Act, 1996 relied upon by Ms. Pandya, learned counsel for

the applicant is concerned, it is submitted by Mr.Talsania, learned counsel for the respondent that even the said provision makes it clear that unless the parties otherwise agree, the amendments made to the Arbitration and Conciliation (Amendment) Act, 2015 shall not apply. He strongly placed reliance on the judgment of this court in case of **The Kolhapur Municipal Corporation** (supra) in support of the submission that this case would be governed by the amended section 36 of the Arbitration and Conciliation Act, 1996.

8. There is no dispute in this case that the arbitration agreement was invoked by issuing notice in the month of June 2011. The arbitral award was also rendered on 27th March, 2015. Arbitration petition was filed in the month of June 2017. It is thus clear that the arbitral proceedings were commenced when the notice invoking arbitration agreement was issued in the month of June 2011 much prior to the amended to section 36 of the Arbitration and Conciliation Act, 1996 and was received by the opposite party. However, in view of the specific agreement between the parties that the provisions of the Arbitration and Conciliation Act, 1996 along with all the statutory modifications and re-enactment shall apply to the reference made under the said arbitration agreement in clause 15(d) of the contract, the parties would be governed by the Arbitration and Conciliation Act, 1996 in force on the date of the execution of the said arbitration agreement and also the statutory modifications and re-enactment.

9. This court in case of **Godrej Industries Limited** (supra) and in order dated 9th October, 2019 in case of **Iqbal A. Parekh vs. J.P.B.Developers LLP & Ors.** in **Notice of Motion No.1066 of 2019 in Commercial Arbitration Petition No.500 of 2019** has clearly held that

since the arbitral proceedings were commenced prior to 23rd October, 2015, section 36 of the Arbitration and Conciliation (Amendment) Act, 2015 would not apply. In the facts of these cases, there was however no similar arbitration agreement by which the parties had agreed to the applicability of not only the Arbitration and Conciliation Act, 1996 but also the statutory amendment modification made and re-enactment thereto.

10. In case of **The Kolhapur Municipal Corporation** (supra) this court has considered a similar situation where the agreement was entered into between the parties on 14th November, 1995 i.e. even much prior to the enactment to Arbitration and Conciliation Act, 1996. However in the arbitration agreement it was clearly provided that the arbitration shall be conducted in accordance with the Arbitration Act, 1940 or any statutory modification thereafter. In that matter, the arbitration agreement was invoked after 1996 and thus this court held that a reference to the Arbitration Act, 1940 made in the agreement shall be read as the Arbitration and Conciliation Act, 1996 in view of section 8 of General Clauses Act and since the arbitration agreement was invoked prior to the Amendment Act, 2015, the applicant would not be entitled to automatic stay.

11. The judgment of this court in case of **The Kolhapur Municipal Corporation** (supra) squarely applies to the facts of this case. This court in the said judgment has also considered the judgment of this court in case of **Mrs.Padmini Chandran Menon vs.Vijay Menon & Ors., 2018 (1) BCR 743** and also the judgment of Supreme Court in case of **Thyssen Stahlunion GMBH** (supra) which judgment is pressed in service by Ms.Pandya, learned counsel for the applicant. This court

has interpreted the judgment of Supreme Court in case of **Thyssen Stahlunion GMBH** (supra) and has rejected the similar contention raised before this court by the learned counsel for the applicant. I am respectfully bound by the judgment of this court in case of **The Kolhapur Municipal Corporation** (supra)

12. In my view since the parties had agreed that not only the provisions of Arbitration and Conciliation Act, 1996 would apply but also statutory modifications of re-enactment, though the arbitration notice was invoked in June 2011 i.e. much prior to the amendment to section 36 of the Arbitration and Conciliation Act, 1996 inserted by Arbitration and Conciliation (Amendment) Act, 2015, the applicant is not entitled to any automatic stay of the impugned arbitral award. There is thus no merit in this submission of the learned counsel for the applicant.

13. Mr.Talsania, learned counsel for the respondent states that as on today, the amount awarded by the learned arbitrator with interest would be in the sum of Rs.1,64,17,044/-. Ms.Pandya, learned counsel for the applicant states that her client would not be able to deposit even 50% of the amount if directed by this court as a condition for grant of stay.

14. Notice of motion is accordingly made absolute in terms of prayer clauses (a) and (b) on the condition that the applicant deposits 50% of the awarded sum with interest to be computed upto the date of deposit within four weeks from today in this court with intimation to the respondent's advocate which shall be made within one week from the date of such deposit. It is made clear that no further extension of time would be granted. If the amount is not deposited within the time

prescribed, interim stay granted by this court to stand vacated without further reference to court.

15. If the amount is deposited by the applicant, the respondent would be at liberty to withdraw the said amount upon furnishing a bank guarantee of a nationalized bank which shall be furnished within four weeks from the date of such deposit which shall be kept alive for a period of two years and for a like period after obtaining further orders from this court. The bank guarantee shall include interest at the rate of 16% upto the period of validity of the bank guarantee. A copy of the bank guarantee shall be furnished to the applicant's advocate.

16. It is made clear that if the bank guarantee is not furnished with the time prescribed, the learned Prothonotary and Senior Master to invest the amount if deposited by the applicant in the fixed deposit of a nationalized bank initially for a period of two years and for a like period after obtaining further orders from this court depending upon the pendency of the arbitration petition. Notice of motion is disposed of on the aforesaid terms. No order as to costs.

[R.D.DHANUKA, J.]