IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1106 OF 2013

M/s.Heart & Soul Entertainment Ltd. ...Petitioner
vs
Shri Deepak S. Bahry,
prop. Of M/s.Bahry Films ...Respondent

Mr.Yasin Mohammed, director, Party in person for Petitioner.
Mr.Viabhav Sugdare with Bijal Gandhi I/b. Jaykar & Partners for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 26 MARCH 2019

P.C. :

This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of an agreement between the parties executed on 20 February 2006 read with its addendum dated 7 November 2006 ("agreement").

2 By this agreement, the Respondent agreed to work as a director for a film, which was being produced by the Petitioner. The film was tentatively titled then as "LARA". The agreement provided for a consideration to be paid to the Respondent for his work. The agreement *inter alia* contained representations and declarations by the Respondent. One of these declarations was that no person had got any claim against the Respondent which might be a ground for objection to the registration of the film with any trade organisation or person. The agreement provided that the entire responsibility to get the things settled in that case to the satisfaction of the Petitioner was of the Respondent and was to be

performed at his own costs. The agreement also provided that in case the Petitioner took any initiative and got things cleared, the Respondent irrevocably promised and agreed to deduction of any amount spent by the Petitioner for such settlement from out of the remuneration payable to him. The film was completed around April 2007 but could not be sold. It is the case of the Petitioner that the film could not be sold because the Respondent was owing debts to two film distributors, namely, one Sahyog Films, Nizam Circuit, Hyderbad and one Anurita Film Distributors. It is submitted that as a result of these dues owed by the Respondent, no distributor was willing to buy the film. The Petitioner, in the premises, invoked the arbitration clause contained in the agreement. On an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act"), the present arbitrator was appointed. The Petitioner was the claimant before the arbitrator, whereas the Respondent herein was the respondent, who had also filed his counter-claim. The arbitrator, by his impugned award dated 30 August 2013, rejected the Petitioner's claim and allowed the Respondent's counter-claim. This award has been challenged in the present arbitration petition.

3 So far as the Respondent's counter-claim is concerned, the arbitrator appears to have proceeded on the basis of the original agreement between the parties made on 20 February 2006 and cross-examination of the Petitioner's witness. The arbitrator came to a conclusion that Rs.17 lakhs were payable by the Petitioner under the agreement, out of which, a total sum of Rs.12.05 lakhs was paid by the Petitioner, leaving an amount of Rs.4.5 lakhs as due and payable. The arbitrator, in the premises, allowed the Respondent's counter-claim in the sum of Rs.4.5 lakhs together with

interest at the rate of 12% per annum from 28 October 2006 till payment or realisation. The agreement of 20 February 2006, which provided for a consolidated remuneration of 20% of total profits to be paid in the manner stated therein, was admittedly modified by an addendum executed on 7 November 2006. Under this addendum, in consideration of his obligations and services in respect of the film “LARA”, the Respondent was to be paid a total remuneration of Rs.7 lakhs. The agreement provided that a sum of Rs.5 lakhs out of this sum was already paid in instalments, leaving a balance of only Rs.2 lakhs, payable on or before the release of the film. It has also come on record and in fact accepted by the learned arbitrator that a sum of over Rs.7 lakhs was paid in the aggregate by the Petitioner as the Respondent's fees. The entire amount of Rs.7 lakhs, which was the total consideration for all obligations and services of the Respondent under the agreement, thus, having been paid, there was no amount due or owing by the Petitioner to the Respondent. The arbitrator's award, thus, on the counter-claim of the Respondent is wholly untenable. It is rendered after completely disregarding the addendum of 7 November 2006. If one takes into account the addendum, which is an admitted document, the arbitrator's view on the counter-claim is an impossible view. It is a view, which no fair or judiciously minded person would take if he were to take into account the addendum of 7 November 2006. This part of the impugned award, thus, cannot be sustained.

4 Coming now to the Petitioner's claim, the arbitrator appears to have considered its case that dues were owed by the Respondent to the two distributors referred to above, Anurita Films in the sum of Rs.2.75 lakhs and Sahyog Films in the sum of Rs.2.5 lakhs. The arbitrator found it

impossible to believe that for these paltry claims (aggregating to Rs.5.25 lakhs), the Petitioner's film worth over Rs.4 crores could not be sold. The arbitrator held that if indeed, there were dues owed by the Respondent to some distributors, as a result of which the film was not being sold, nothing could have prevented the Petitioner from taking the initiative and getting things sorted out and then recover the amount of settlement from out of the remuneration payable by the Petitioner to the Respondent. The arbitrator found it impossible to believe that the Petitioner would rather incur loss of Rs.4 crores, being the cost of production of the film, than settle a negligent sum of Rs.5.25 lakhs, which anyway could be reimbursed or adjusted from the remuneration of the Respondent as per the contract. The arbitrator, in the premises, found the huge claim of about Rs.37.90 crores made by the Petitioner against the Respondent, when the latter was to merely receive a sum of about Rs.7 lakhs for having directed the film, as an impossible and unbelievable claim. The arbitrator also noted that so far as Sahyog Film distributors were concerned, they were said to have liked the film but did not purchase the rights on account of a pending claim. (The pending claim, as noted above, was merely for a sum of Rs.2.50 lakhs.) The arbitrator observed that it was anytime open to a wise and prudent purchaser in that case to adjust his claim against the price payable by the distributor for purchasing the rights of a film. The arbitrator observed that there was no cogent evidence to substantiate any part of the Petitioner's claim against the Respondent or to indicate that the Respondent was in any way responsible for the film not being sold. These views of the learned arbitrator, so far as the Petitioner's claim is concerned, can certainly be described as possible views. They cannot be termed as views which no fair or judiciously minded person would take or views that would shock the conscience of the court. In the facts of the case, considering the material placed by the parties before the learned arbitrator, it was not unreasonable to take the view which the arbitrator has taken.

5 The Petitioner's director, who appears in person, submits that the fact that the Petitioner could have itself settled the dues of the distributors and adjusted the amount expended towards such settlement from out of the remuneration payable to the Respondent, is no reason for denying the Petitioner's claim. It is submitted that the agreement merely gave an option to the Petitioner to settle the dues and then adjust the amount spent towards such settlement against the remuneration payable to the Respondent. It is submitted that settlement of dues in this manner was not an obligation of the Petitioner. That may be so. The arbitrator takes this aspect into account not to lay the blame at the door of the Petitioner for not having settled the alleged dues but to assess the Petitioner's claim on a balance of probabilities. Basically, what the arbitrator appears to have observed is that for a paltry claim of Rs.5.25 lakhs, it was impossible to believe that the Petitioner's film worth Rs.4 crores could not be sold, particularly, when the Petitioner had the requisite option in that case to settle the dues, paltry as they were, and then sell his film or at any rate, propose adjustment of these dues against the price of the film. Anyway, as I have noted above, no fault can be found with the view of the learned arbitrator in this behalf within the parametres of the law of challenge to an arbitral award under Section 34.

6 The Petitioner relies on various judgments of the Supreme Court including the cases of **OIL & Natural Gas Corporation Ltd. vs. Saw**

Pipes Ltd.[1], **New India Civil Erectors (P) Ltd. vs. Oil and Natural Gas Corporation**[2], **ONGC Ltd. vs. Garware Shipping Corporation Ltd.**[3] and **Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corporation Ltd.**[4] None of these judgments can come to the aid of the Petitioner. In **ONGC vs. Saw Pipes**, the court considered the tenability of an award, which was contrary to substantive provisions of law or provisions of the Act or against the terms of the contract. The court held that such award could be said to be patently illegal and would be subject to interference under Section 34 of the Act. There is nothing in the present case to suggest either the award is contrary to any substantive provision of law or of the contract between the parties or the Arbitration Act itself. The case of **New India Civil Erectors (P) Ltd.** was under the old Arbitration Act and has no bearing on the challenge to an award under Section 34 of the Act of 1996. In **Garware Shipping Corporation Ltd.,** the court faulted an award on the ground that it contained a perverse conclusion and was founded on a wrong premise and thus, called for judicial interference. There is no such finding to be rendered in the present case. In **Ace Pipeline Contracts (P) Ltd.,** the ground of bias or malice in law or fact on the part of the arbitrator was held to be a ground for setting aside the award. In the facts of the present case, there is no such suggestion. In the premises, insofar as the Petitioner's challenge to the award on its claim is concerned, no interference is called for.

7 Accordingly, the petition partly succeeds. The impugned award dated 30 August 2013 is set aside to the extent it awards the Respondent's

1 **(2003) 5 SCC 705**
2 **AIR 1977 SC 980**
3 **(2007) 13 SCC 434**
4 **(2007) 5 SCC 304**

counter-claim and interest thereon. The rest of the award is sustained.

8 In view of the disposal of the arbitration petition, the notice of motion does not survive and the same is disposed of.

(S.C. GUPTE, J.)