

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.190 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO.550 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO.190 OF 2018

ICICI Bank Limited ... Petitioner
Vs.
I-Pay Clearing Services Private Limited ... Respondent

ALONG WITH
COMMERCIAL NOTICE OF MOTION NO.1549 OF 2019

I-Pay Clearing Services Private Limited ... Applicant
In the matter between
ICICI Bank Limited ... Petitioner
Vs.
I-Pay Clearing Services Private Limited ... Respondent

Mr. Janak Dwarkadas, Senior Advocate a/w. Mr. Cyrus Bharuha, Ms Sanaya Dadachanji, Mr. Rohit Lalwani i/b. Manilal Kher Ambalal & Co. for Petitioner in CARBP No.190 of 2018 and for Applicant in Notice of Motion No.550 of 2018 and for Respondent in Notice of Motion No.1549 of 2019.

Mr. Sagar Ghogre i/b. Mr. Sagar Kasar for Respondent in CARBP No.190 of 2018 and for Respondent in Notice of Motion No.550 of 2018 and for Applicant in Notice of Motion No.1549 of 2019.

CORAM : R. G. KETKAR, J.
DATE : JULY 16, 2019

P.C. :

Heard Mr. Dwarkadas, learned Senior Counsel for the petitioner - ICICI Bank Limited (for short 'ICICI Bank') in the Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act') and for applicant in Notice of Motion No.550 of 2018 and for respondent in Notice of Motion No.1549 of 2019 and Mr.Ghogre, learned Counsel for the respondent - I-Pay Clearing Services Private

Limited (for short 'I-pay') in the Petition and in Notice of Motion No.550 of 2018 and for applicant in the Notice of Motion No.1549 of 2019 at length.

2. By this Petition under Section 34 of the Act, the ICICI Bank has challenged the Award dated 13.11.2017 made by the learned Sole Arbitrator. By that Award, the learned Arbitrator directed the ICICI Bank as under:

“a) The respondent (ICICI Bank) is ordered and directed to pay to the claimant (I-pay) an amount of Rs.50,00,00,000/- (Rupees Fifty Crores) together with interest thereon to be calculated at the rate of 18% per annum as from the date of award till payment of realization, whichever is earlier;

b) The respondent (ICICI Bank) is ordered and directed to pay to the claimant (I-Pay) Rs.50,000/- (Rupees Fifty Thousand) as cost on the application under Section 16 made before this Arbitral Tribunal.”

3. ICICI Bank has taken out Notice of Motion No.550 of 2018 for the following relief:

“a. Pending hearing and final disposal of the present Petition, this Hon'ble Court be pleased to stay the effect, operation, implementation and execution of the Award dated 13.11.2017 passed by the learned Sole Arbitrator;”

4. I-Pay has taken out Notice of Motion No.1549 of 2019 under Section 34(4) of the Act for the following relief:

“a) That this Hon'ble Court adjourn the present proceedings for a period of three (3) months or such other time as may be determined by this Hon'ble Court; and direct the Ld. Arbitrator to issue appropriate directions / instructions / additional reasons and / or to take such necessary and appropriate action;”

5. In support of Petition under Section 34 of the Act, Mr. Dwarkadas submitted that the first Service Provider Agreement (for short 'SPA') was

executed on 04.11.2002. The said agreement was in force for a period of 18 months from the effective date i.e. 04.11.2002. The said agreement was valid upto 03.05.2004 unless either party terminating the agreement by giving prior notice of three months. The Agreement could be renewed for a further period of such duration as agreed by the parties. Under this agreement, I-pay was to provide technology, manage operations and process pre-paid smart card based loyalty programs for Hindustan Petroleum Corporation Limited (for short 'HPCL') (Smart One Retail Cards Program). The said agreement was extended from time to time upto 31.03.2011. The said agreement was not renewed thereafter.

6. On 04.02.2003, the second SPA was entered into. Under this agreement, the I-Pay was required to develop the software for post-paid smart card based loyalty program known as 'Drive Smart Loyalty Program'. The tenure of the agreement was 18 months unless either party terminating the agreement by giving prior notice of three months. The said agreement was valid upto 03.08.2004. The agreement could be renewed for a further period of such duration as agreed by the parties. The said agreement was extended upto 03.08.2006. The said agreement was thereafter not renewed.

7. Mr. Dwarkadas submitted that the Equipment Lease Agreement (for short 'ELA') was entered into on 01.07.2006 and was valid upto 30.06.2011. Under this agreement, I-pay was required to provide card machines i.e. Contactless Smart Card Readers on lease basis to the ICICI Bank. The lease period was 60 months. The said agreement was not renewed. He submitted that the last date of this agreement was 30.06.2011.

8. Mr. Dwarkadas submitted that the contractual relationship

between the parties was mutually and amicably closed. He invited my attention to the letter dated 01.06.2010 jointly signed by the parties recording the terms of closure of the existing agreements in the following manner:

- Parties exchanged 3 correspondences and held 3 meetings to arrive at the closure.
- Amounts already paid to the I-pay and certain amounts to be paid.
- I-pay to assist in winding up the programs.

9. By email dated 02.08.2010 sent by Selvan Xavier, representative of I-Pay to Mohan Jayaraman, representative of ICICI Bank, I-Pay recorded that it had benefited from the service business relationship with ICICI Bank; that ASP operations and programmes had been closed on 31.07.2010. By letter dated 08.11.2010, I-pay recorded that letter of 01.06.2010 was mutually agreed and signed by the parties and requested for payment of outstanding amounts under the said letter. On 20.01.2011, I-Pay sent letter confirming receipt of all dues other than Rs.22,95,000/- towards cost of card readers machines. I-Pay confirmed that pursuant to the above payment, there will be no dues remaining. I-pay requested ICICI Bank to issue testimonial for validation of the work done. On 20.01.2011, ICICI Bank issued testimonial validating the services provided by I-Pay and mentioned that the end date of the project as June 2010.

10. Mr. Dwarkadas submitted that the award made by the learned Arbitrator awarding a sum of Rs.50,00,00,000/- to I-Pay towards damages for purported loss of projected income is perverse as-

- a) it is on the basis of a table containing two assumptions:
 - i) trends of hike in fuel prices;
 - ii) increase in number of vehicles by 10% in the affidavit of evidence.

- b) without any documentary evidence in support as is evident from answers given by C.W.2, Qs. 73-78.
- c) without distinguishing purported claim of Rs.50 crores is based on loss of projected revenue / income and not actual loss or profit;
- e) applied the principle of judgments based on Works Contracts where damages for loss or profit are not insisted on being strictly proved and ignoring the fact that the present case was in fact a service contract.

11. Mr. Dwarkadas submitted that no document is produced by I-Pay to show that there was any abrupt or illegal termination. Equally, there is no document or pleading to support that the first SPA was extended till March 2012 as held by the learned Arbitrator. The parties mutually and amicably closed the contractual relationship and in fact I-Pay had no objection for appointment of a third party for HPCL's new program. Claim for damages of Rs.50 crores is awarded without any evidence led by I-Pay to prove the damages except for the averment in the claim statement. The learned Arbitrator has awarded damages on claim No.4 on the basis of the table referred in paragraph 17 of the award.

12. Mr. Dwarkadas submitted that claim of item No.4 of Rs.50 crores is answered in favour of I-Pay Clearing Services without there being any evidence substantiating the said claim. He also invited my attention to the communications dated 01.06.2010 signed by the authorized signatories on behalf of ICICI Bank and I-Pay Clearing Services. He submitted that in pursuance of clause (G), ICICI Bank had made various payments to I-Pay Clearing Services and I-Pay Clearing Services has accepted the payments as full and final settlement for the services provided under the agreement and letter of renewal. He also invited my attention to the email dated 02.08.2010 sent by Selvan Xavier,

representative of I-Pay Clearing Services to Mohan Jayaraman, representative of ICICI Bank expressing thanks to the management of ICICI Bank and HPCL for giving opportunity to serve them in the last 8 years. It was further set out therein that on 31.07.2010, I-Pay Clearing Services closed the Application Service Provider operations of I-Pay for HPCL-ICICI loyalty programs. It was also further set out that I-Pay Clearing Services look forward to associate in the future, if any, business opportunity arises.

13. While opposing the Motion filed by I-Pay under Section 34(4) of the Act, Mr. Dwarkadas submitted that the impugned order is unsustainable in the eyes of law as it suffers from patent illegality and any remission in the impugned award to the learned Arbitrator would not lead to elimination of the grounds for setting aside the impugned award. The impugned award suffers from defects, which are fundamental in nature and are not curable. Assuming for the sake of argument that the learned Arbitrator in terms of Section 34(4) of the Act gives additional reasons on point No.1, the same will not change outcome of the award. He, therefore, submitted that - (i) Petition requires consideration; (ii) Notice of Motion No.550 of 2018 for stay may be made absolute in terms of prayer clause (a); (iii) Notice of Motion No. 1549 of 2019 taken out by I-Pay deserves to be dismissed.

14. On the other hand, Mr. Ghogre supported the impugned award. He gave emphasize on the following portion of communication dated 01.06.2010:

“Nothing contained herein would be construed as admission of either party's allegation / statements made in the letter/s and the payment/s made hereto by ICICI Bank and the services being provided by I-Pay shall not be construed as waiver of any right (contractual, legal or otherwise) of either party including but not limited to the right to defend any legal action initiated against either party by the other.”

15. He prayed for relief in terms of prayer clause (a) of the Notice of Motion No.1549 of 2019. He invited my attention to the affidavit dated 08.10.2018 made by Ravi Bhushan Dashore. In paragraph 2, it is set out that the present Motion is taken out of abundant caution and without prejudice to the rights and contentions of I-Pay under law and with respect to the captioned proceedings seeking indulgence of this Court and directions to the learned Arbitrator to provide detailed and express reasons in addition to the reasons already stated in the arbitral award dated 13.11.2017 on the issues framed and in support of the factual findings given in the award by the learned Arbitrator.

16. In paragraph 3, it is stated that the learned Arbitrator has already given reasons in rendering the award. In the interest of justice and to ensure that the rights of I-Pay are not defeated because of mere technicalities of law, it is essential that additional reasons be made available by the learned Arbitrator in support of his findings so that no prejudice will be caused to I-Pay as I-Pay has bonafide and diligently conducted the arbitral proceedings.

17. In paragraph 10, it is set out that the efforts of I-Pay should not be defeated by the technicalities of law i.e. substantial reasons. If the award is sought to be set aside on technicalities of law, it would lead to injustice. If I-Pay is not permitted to remove the technical objections (if any) to the said Award, it will cause irreparable and grave loss, damage and injury to I-Pay.

18. In paragraph 13, it is set out that ICICI Bank is trying to approbate and reprobate. On one hand, it does not want to rectify or seek additional reasons and on the other, it has raised various technical objections (if any) i.e. learned Arbitrator has failed to give any reasons etc. in respect of Issue No.1 so as to defeat the claims of I-Pay Clearing

Services on mere technicalities of law.

19. Mr. Ghogre submitted that the defect in the impugned award, namely, not giving reasons against point No.1 is a curable defect and the same can be remedied by issuing appropriate directions to the Tribunal by recording reasons.

20. He further submitted that under Section 34(4) of the Act, this Court has power to issue appropriate directions to the Arbitral Tribunal for giving reasons. He relied upon the following decisions:

- a. ***Som Datt Builders Ltd. Vs. State of Kerala, (2009) 10 SCC 259*** and in particular paragraphs 25 and 26; and
- b. ***Kinnari Mullick Vs. Ghanshyam Das Damani, (2018) 11 SCC 328***, and in particular paragraphs 12 and 13.

21. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The learned Arbitrator had framed following points for determination:

- “(1) Whether the claimant (I-Pay) proves that respondent (ICICI Bank) illegally and abruptly terminated the contract?
- (2) Whether the respondent (ICICI Bank) proves that the claims made by the claimant (I-Pay) are barred by limitation?
- (3) Whether the respondent (ICICI Bank) proves that the claimant (I-Pay) is not entitled to the claim amount in light of the full accord and satisfaction of claims.
- (4) Whether the claimant (I-Pay) is entitled to the claim on account of losses and damages to the tune of Rs.95 Crores as more particularly stated in the particulars of claims?
- (5) If yes, whether the claimant (I-Pay) is entitled to the interest and at which rate?”

22. I-pay had instituted Suit against ICICI Bank and HPCL on the

Original Side of this Court on or about 25.01.2012 inter alia praying for the following reliefs:

“(a) that the Central Bureau of Investigation (C.B.I.) or any other competent investigating agency be ordered and directed to investigate the financial frauds committed on and off the field in the loyalty programs of the defendant No.2 which has resulted in huge financial losses to the Public exchequer as well as to the shareholders of the Defendant No.1 and to take appropriate action in accordance with law against those guilty of committing the same.

(b) that the defendants be ordered and decreed to jointly and severally pay to the plaintiff a total sum of Rs.95 crores as per the particulars of claim as set out in the Schedule at Exhibit-GG to the plaint along with interest thereon @ 18% p.a. from the date of the filing of the present Suit till payment or realisation thereof.”

23. In paragraph 28, I-Pay contended that the monetary losses, it had suffered and will suffer on account of the abrupt, illegal and unlawful severance of the SPA dated 04.11.2002 between ICICI Bank and I-Pay, will easily surpass Rs.95 crores, which the ICICI Bank and HPCL are jointly and severally liable to pay to them as they have connived and colluded with each other to cause losses to I-Pay as set out in the Schedule at exhibit-GG. Schedule at exhibit-GG is to the following effect:

EXHIBIT GG

SCHEDULE

<u>Sr.No.</u>	<u>Description of monetary losses</u>	<u>Amount</u>
1.	Interest costs due to intentional delayed payments made by the defendant No.1 to the plaintiff.	Rs.2 crores
2	Compensation for the costs of the inputs for the software used in the loyalty solutions developed by the plaintiff which have been copied for use in the pre-set software of the loyalty programs of the defendant No.2.	Rs.15 crores

3	Costs of development of software by the plaintiff for use in the loyalty programs of the defendant No.2 as recorded in their books of accounts.	Rs.25 crores
4	Damages for loss of projected income till March 2012 due to the abrupt discontinuation of the Application Service Provider Agreement.	Rs.50 crores
5	Losses incurred due to layoffs, retrenchment and terminal benefits paid to the employees of the plaintiff	Rs.3 crores
	Total	Rs.95 crores

24. A perusal of the award shows that in paragraphs 5 and 6, the learned Arbitrator has discussed points of limitation, jurisdiction and maintainability of claim because of accord and satisfaction. In paragraph 7, the learned Arbitrator recorded a finding that ICICI Bank has not established that the claim of I-Pay is fully and finally settled. The learned Arbitrator also recorded that the period mentioned in the terms of agreements was extending beyond June 2010. In paragraph 9, the learned Arbitrator dealt with the first item relating to Interest Cost due to intentional delayed payments made by ICICI Bank to I-Pay. The learned Counsel for I-Pay did not advance any arguments on this point.

25. In paragraphs 10 and 11, the learned Arbitrator dealt with item No.5 regarding losses incurred due to lay-off, retrenchment and terminal benefits paid to the employees of I-Pay. Items 2 and 3 are dealt with in paragraphs 12 and 13. Item No.4 is dealt with in paragraphs 15 to 17 of the award.

26. As mentioned earlier, it is common ground between the parties that the learned Arbitrator has not recorded any finding against point No.1, extracted hereinabove. Prima facie, without first recording any finding against point No.1, the learned Arbitrator was not justified in

proceeding to determine other points, and more particularly, point No.4.

27. One of the contentions raised in ground (P) of the Petition is that the learned Arbitrator without determining the point No.1 awarded Rs.50 crores to I-Pay. The impugned award does not reveal the exact nature of the purported breach and the date of alleged termination. In the absence of expressly addressing vital issues i.e. whether there is an illegal and abrupt termination and if held in the affirmative, what is the date and the manner of termination of the agreements, the learned Arbitrator's assertions of breach, abrupt termination, date of termination at various places in the award is without any basis and therefore, the impugned award suffers from a grave lacuna. Even, the I-Pay has taken out Notice of Motion under Section 34(4) of the Act for adjourning the present proceedings for the period of three months and directing the learned Arbitrator to issue appropriate directions / instructions / additional reasons and / or to take such necessary and appropriate action. Thus, prima facie, the learned Arbitrator without first recording any finding against point No.1 proceeded to deal with items in exhibit-GG. In my opinion the learned Arbitrator, with utmost request, should have first recorded a finding against point No.1 and thereafter proceeded to record findings on point No.4, reproduced hereinabove. Unless and until, the finding is recorded against point No.1 first, the learned Arbitrator, with respect, could not have proceeded to record findings against point No.5. This goes to the root of the matter and is a jurisdictional error committed by the learned Arbitrator.

28. As the defect in the Award is not curable, the decisions in **Kinnari Mullick** (*supra*) and **Som Datt Builders Ltd.** (*supra*) relied by Mr. Ghogre do not advance his case.

29. During the course of hearing, I suggested to Mr. Ghogre that if I-

Pay is agreeable for setting aside the impugned award, the parties will be at liberty to adopt further proceedings, if so advised. Upon taking instructions, Mr. Ghogre states that I-Pay is not agreeable to this suggestion.

30. In view thereof, a fairly arguable case is made out. Hence, **Admit**. Mr. Ghogre waives service for the respondent. There shall be interim order in terms of prayer clause (a) subject to ICICI Bank filing undertaking within two weeks from today in this Court through its authorized representative stating that in case the Petition is dismissed, ICICI Bank will pay Rs.50,00,00,000/- along with interest at such rate and within such time, as may be specified by this Court. Notice of Motion No.550 of 2018 is disposed of.

31. In view thereof, no case is made out for granting any interim relief in Notice of Motion No.1549 of 2019 taken out by I-Pay under Section 34(4) of the Act. Notice of Motion No.1549 of 2019 is dismissed.

(R. G. KETKAR, J.)

Minal Parab