

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
**COMMERCIAL ARBITRATION PETITION NO. 1384 OF
2018**

JPR Channel and Anr. .. Petitioners
Vs.
Digicable Network (India) Pvt. Ltd. and Ors. .. Respondents

Mr. M. S. Doctor, Senior Counsel a/w Mr. Rahul V. Moghe I/b Sweta Mehta & Girdharlal, for the Petitioners.
Mr. Chetan Kapadia a/w Mr. Malhar Zatakia, Mr.Aagam Doshi, Ms.Pooja Bhaidkar, Ms.Shweta Rankhambe I/b Mr. Aagam J.Doshi, for Respondent No.1.

CORAM : B. P. COLABAWALLA, J.

DATE : 21st FEBRUARY, 2019

P.C. :

1. This Arbitration Petition has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '**Act**') challenging a part of an interim order dated 02/11/2018 passed by the Arbitral Tribunal under Section 17 of the Act. By the impugned order, the Arbitral Tribunal granted to the Claimant (Respondent No.1 herein) interim relief in

terms of prayer clauses (a) and (c) of the application. Present Petition impugns the said interim order only so far as it relates to grant of interim relief in terms of prayer clause (c). Prayer clause (c) which has been granted by the Arbitral Tribunal reads as under:

“(c) pending commencement of the arbitration proceedings this Hon'ble Court may be pleased to direct Respondent Nos. 1 and 3 to provide the Petitioner with access to the books of accounts, bank statements and fixed assets register of Respondent No.1.”

2. Before I deal with the submissions made by the respective Counsel, it would be an apposite to advert to a few facts. The Petitioners herein were Respondent No.1 and Respondent No.3 before the Arbitral Tribunal. Petitioner No.1 is a sole proprietary concern of Petitioner No.2. Respondent No.1 herein was the Claimant in the Arbitration and Respondent No.2 was a Respondent No.2 in the Arbitration. As far as Respondent No.3 herein is concerned, he was Respondent No.4 in the Arbitration. For the sake of convenience, I shall refer to the parties as they were arrayed before the Arbitral Tribunal.

3. The brief facts that give rise to the present Petition

are that the Claimant and Respondent No.3 (along with his relatives and Respondent No.4) have a 51% and a 49% shareholding respectively in Respondent No.2 and which is a Joint Venture Company (for short **“the J.V. Co.”**) floated by the Claimant and Respondent No.3. Respondent No.4 is a Director of this J.V. Co. (Respondent No.2).

4. It is the case of the Claimant that the Claimant and Respondent No.3 had a business association in relation to Respondent Nos. 1 and 2 since 2008. There were various agreements and arrangements between the parties during this period. It is the Claimant's case that it had invested substantial money in the business of Respondent No.2 (the J.V. Co.) and that despite this, there were various breaches/non-compliance of the terms of those agreements/arrangements by Respondent No.1 and Respondent No.3. According to the Claimant, ultimately matters were discussed between the parties at the meeting of the Board of Directors of Respondent No.2 on 16/04/2015, at which meeting, Respondent Nos. 3 and 4 as well as representatives of the Claimant were present. Ultimately, these discussions culminated in a Memorandum of

Understanding (for short **“MOU”**) dated 25/10/2016 which was executed between the Respondent No.1, Respondent No.3, the Claimant and Respondent No.2 (the J.V. Co.). This MOU inter alia provided that the entire digital cable television network and hardware of Respondent No.1 would be transferred to Respondent No.2 from the date of the MOU. Clause 4 of this MOU inter alia recorded the acknowledgment on behalf of Respondent No.1 having collected money from subscribers of Respondent No.2 (the J.V. Co.) directly, instead of routing it through Respondent No.2, and which amounts were to be ascertained and accounts were to be settled. Since disputes arose under this MOU, Arbitration was invoked by the Claimant vide its letter dated 01/08/2018. Despite requests by the Claimant, Respondent No.3 had not furnished the Claimant with the information required to be given to it under the MOU and in these circumstances the Section 17 application came to be filed seeking various reliefs.

5. It was claimed in the Section 17 application that under the MOU, the entire digital cable television network and hardware of Respondent No.1 was to be transferred to

Respondent No.2 on 25/10/2016 (the 'effective date' under the MOU). The Claimant submitted that despite this, Respondent Nos. 1 and 3 created a 'virtual server' through which they were collecting subscription fees directly from subscribers without Respondent No.2's knowledge and thereby diverting the money and revenues of Respondent No.2 to themselves (namely Respondent Nos. 1 and 3). It is in these circumstances that the Claimant prayed for interim relief in terms of prayer clauses (a), (c), & (d) of the interim application.

6. By the impugned order, the Tribunal granted interim relief in terms of prayer clause (a) [as reproduced by it on page 5 of the impugned order] subject to a caveat that Respondent Nos. 1 and 3 will be free to deal with Respondent No.1's stock of set top boxes in the usual course of business. As far as prayer clause (c) is concerned, it was granted in its entirety. As mentioned earlier, the relief granted in terms of prayer clause (a) [as modified] has not been challenged in the present Petition. The only grievance is granting of reliefs in terms of prayer clause (c).

7. I must mention that before the Arbitral Tribunal,

the grant of prayer clause (c) was resisted by Respondent Nos.1& 3 on the following grounds:

(i) that the Claimant has not even made averments in support of prayers (c) and (d) and therefore no case is made out for grant of these prayers;

(ii) that it is premature to grant these reliefs at the present stage as the Claimant is yet to file its statement of claim and is yet to satisfy the Tribunal as to the merits of its case of specific performance of the MOU and these reliefs being in aid of the grant of specific performance, until the Tribunal is satisfied that specific performance is to be granted there can be no question of granting such reliefs;

(iii) that there is no power under Section 17 of the Arbitration and Conciliation Act, 1996 to grant these reliefs;

(iv) that the averments made in para 26 of the Section 17 Application is that the MOU was fraudulently executed and therefore the Claimant appears to seek to avoid the MOU, in which case there can be no merit in granting these reliefs;

(v) that the Claimant itself breached its obligation

under the MOU to make payment of Rs. 5 lakhs to JPR Channel within 7 days of the MOU and further neither party has taken any steps in pursuance of the MOU since November 2017 and hence the Claimant is not entitled to these reliefs;

(vi) that the Claimant has by a letter dated 31 August 2018 indicated its intention to sell its 51% shareholding in the J.V. Co. If the Claimant does in fact sell its shareholding in the J.V. Co., then it will cease to be a shareholder thereof and hence will have no locus to seek specific performance of provisions of the MOU which enure to the J.V. Co's benefit, such as the transfer of JPR Channel's business to the J.V. Co.

8. After hearing the parties, the Tribunal gave its findings with reference to prayer clause (c) as under:-

“With regard to prayer (c), prima facie I see no merit in the Respondent's submission opposing the relief, for the following reasons:

(i) I see no merit in the submission that there is no averment in support of prayer (c). Para 27 of the Section 17 Application read with some of the earlier paras of the application make out a satisfactory case for grant of this relief. Further, Clause 4 of the MOU itself adequately sets out the reason why it is imperative that JPR Channel's entire accounts are disclosed to the Claimant.

(ii) I do not see how the disclosure of the entire accounts of JPR Channel is premature at this stage. The MOU itself

requires the disclosure of JPR Channel's entire accounts. In fact, it is the Respondent's own case that it has furnished the necessary information to the Claimant. I do not see what harm or prejudice will be cause to Respondent Nos. 1 and 3 if JPR Channel's entire accounts are to be disclosed to the Claimant. In Clause 4 of the MOU, Respondent No.3 has admitted to having received moneys in JPR Channel which ought to have been routed through the JV Co. This amount will need to be ascertained, even if the Claimant does not succeed in its claim for specific performance of the transfer of JPR Channel's digital cable television network to the JV Co. I don't see why this disclosure should be postponed.

(iii) I do not see merit in the submission that there is no power under Section 17 of the Arbitration and Conciliation Act, 1996 to grant reliefs in terms of prayer (c). Section 17(1)(ii)(e) is very wide in its scope and empowers an arbitral tribunal to grant any measure of protection that is just and convenient. In the present case, given what is recorded in Clause 4 of the MOU, particularly regarding the collection of the JV Co's monies by JPR Channel and the agreement to disclose JPR Channel's entire accounts, it is just and convenient that relief in terms of prayer (c) is granted. Such disclosure will be necessary to determine the amount of the JV Co's money collected by the JPR Channel.

(iv) Para 26 of the Section 17 Application cannot be read in isolation and in a hair-splitting manner. Para 26 only sets out the Claimant's case that Respondent No.3 executed the MOU even though he had no intention of complying with his obligations. The fact that the Claimant is not seeking to avoid the MOU is evident from para 29 of the Section 17 Application where the Claimant has said that it seeks specific performance of the MOU.

(v) In so far as the delay in the payment of Rs. 5 lakhs to JPR Channel is concerned, it is the admitted position that this amount was paid to JPR Channel, albeit with some delay, and that this amount was accepted by JPR Channel. Respondent Nos. 1 and 3 did not at any stage terminate the MOU on the ground that the amount of Rs. 5 lakhs had not

been paid as per the agreed timeline. Accordingly, even if there was a breach of the MOU by the Claimant, prima facie this breach appears to have been waived. Further the contention that neither party has taken any steps since November 2017 is also no real answer to resist disclosure of JPR Channel's entire accounts if the MOU is valid and subsisting.

(vi) As far as the Claimant's letter indicating its intention to see its shareholding in the JV Co is concerned, the Claimant has clarified that it has not acted upon this notice and that it continues to be a 51% shareholder in the JV Co. All that prayer (c) requires is for a disclosure of JPR Channel's entire accounts. This is something the Claimant was entitled to at the time of signing the MOU and even though it was always open to the Claimant to sell its shareholding in the JV Co. Although a sale of the Claimant's shareholding in the JV Co, at some time in the future, may have some impact on its ultimate claim for specific performance of the MOU in favour of the JV Co, I do not see how it can be used by JPR Channel to resist disclosure of its entire accounts pursuant to Clause 4 of the MOU.

Accordingly, relief in terms of prayer (c) is granted in favour of the Claimant."

9. It is this part of the order that is impugned in the present Petition.

10. In this factual backdrop, Mr. Doctor, the learned Senior Counsel appearing on behalf of the Petitioners (Respondent Nos.1 and 3 before the Tribunal), submitted that prayer clause (c) was extremely wide and could not have been granted by the Arbitral Tribunal. Mr. Doctor submitted that in

terms of prayer clause (c), the Petitioners (Respondent Nos.1 and 3 before the Tribunal) were directed to provide the Claimant with access to the entire books of accounts, bank statements and the fixed assets register of Respondent No.1. He submitted that said relief, vide the impugned order, could not have been granted by the Tribunal considering that Respondent No.1 was engaged in other business activities, other than what was being transferred under the MOU to Respondent No.2 and which businesses were distinct and separate from its cable TV network business.

11. Learned Senior Counsel - Mr. Doctor submitted that even clause 4 of the MOU contemplated that Respondent No.1 had agreed to inform the entire accounts of Respondent No.1 pertaining to purchase, sales and collection of digital hardware and set top boxes within 30 days. According to Mr. Doctor this was all that could be ordered to be disclosed and not entire accounts of Respondent No.1. By doing so, Mr. Doctor submitted that, the Arbitral Tribunal has travelled beyond the scope of Section 17 of the Act and had in fact gone beyond the scope of the reference made to it under the MOU dated 25/10/2016. He submitted that directing Respondent No.1 to

give access to the Claimant of all its bank statements and its fixed assets register was neither pertinent to or contemplated in the MOU dated 25/10/2016. He submitted that the Arbitral Tribunal is a creature of the agreement between the parties, namely the MOU dated 25/10/2016, and granting any reliefs without any basis and outside the scope of the agreement between the parties is patently illegal and liable to be struck down at the threshold. Mr. Doctor submitted that the relief granted in terms of prayer clause (c) is based upon erroneous interpretation and reading of clause 4 of the MOU by the Arbitral Tribunal. This being the case, Mr. Doctor submitted that the interim order be modified to restrict the disclosure only to the extent as mentioned in clause 4 of the MOU dated 25/10/2016.

12. On the other hand, Mr. Chetan Kapadia, learned Counsel appearing on behalf of the Claimant, submitted that there was no merit in the arguments canvassed by Mr. Doctor. He submitted that admittedly, Respondent Nos. 1 and 3 were not maintaining separate accounts with reference to their alleged separate businesses and were maintaining consolidated accounts in relation to all their businesses. This being a factual

position, Mr. Kapadia submitted that it would be impossible to order disclosure only of the accounts maintained with reference to the television business, when no such independent accounts were kept by Respondent No.1. He therefore submitted that the Tribunal was fully justified in granting prayer clause (c) in its entirety, as it was not possible to restrict it only to the business relating to the cable television network.

13. In the alternative, Mr. Kapadia submitted that the order passed by the Arbitral Tribunal is one of disclosure and did not cause any prejudice to Respondent No.1. He submitted that Respondent No.1 and the Claimant or Respondent No.2 were not competitors that would prejudice Respondent No.1 from disclosing its entire accounts. He submitted that this disclosure was necessary not only because Respondent No.1 under the MOU was to disclose the entire accounts pertaining to purchase, sales and collection of the digital hardware and set top boxes, but also for determining the consideration under the MOU and the amounts which Respondent No.1 had admittedly collected directly from the subscribers of Respondent No.2 and which it could not have done. This disclosure was ordered in

aid of the final relief sought by the Claimant for specific performance of MOU and which power is specifically granted to the Arbitral Tribunal under section 17(1)(ii)(c) of the Act. He submitted that on the facts before it, the Arbitral Tribunal thought it fit and proper to exercise its discretion and order Respondent No.1 to disclose its entire accounts. The exercise of this discretion can certainly not be termed as perverse requiring interference under Section 37 of the Act, was the submission. Looking to the facts of the case, Mr. Kapadia submitted that the view of the Tribunal and discretion exercised by it in granting relief was certainly of plausible view. In these circumstances, Mr. Kapadia submitted that there was no merit in this Petition and the same ought to be dismissed.

14. I have heard the learned Counsel for the parties at length and I perused the papers and proceedings in the Arbitral Petition. I have also carefully perused the impugned order. I find considerable force in the arguments canvassed by Mr. Kapadia. Clause 4 of the MOU inter alia records an acknowledgment made by Respondent No.1 that it had collected amounts from the subscribers of Respondent No.2 directly without routing it through the accounts of Respondent

No.2. In other words, Respondent No.1 acknowledges that it had taken monies directly from the subscribers of Respondent No.2, when in fact the monies ought to have gone into the account of Respondent No.2. It is for this reason that the MOU records that these amounts would be ascertained within a period of 30 days from 25/10/2016 (the effective date). Clause 4 further contemplates that Respondent No.1 has agreed to inform its entire accounts pertaining to purchase, sales, collection of digital hardware and set top boxes within 30 days. When one reads clause 4 in its entirety and also considering that the MOU itself contemplated that the consideration between the parties for the transfer of hardware in the digital cable television business from Respondent No.1 to Respondent No.2 was yet to be arrived at, this disclosure was necessary. As reproduced earlier, the Arbitral Tribunal considered the submissions made on behalf of the Claimant as well as objections raised by Respondent Nos. 1 and 3. After noting the objections in paragraph 11 of the impugned order, the Tribunal has given detailed reasons as to why it was necessary to grant prayer clause (c) in its entirety.

15. I must mention that after the impugned order was

passed, Respondent Nos. 1 and 3 sought a clarification and the Tribunal by its E-mail dated 10/11/2018 recorded that the impugned order was clear. In fact, it recorded that during the hearings, Respondent Nos.1 and 3 were asked whether Respondent No.1 maintained separate accounts for its digital business, to which Respondent No.1 responded by stating that for all the businesses of Respondent No.1, a consolidated account is maintained. It is in these circumstances, that the Tribunal recorded that Respondent No.1 ought to grant access to the Claimant of its entire books of accounts, bank statements, and fixed assets register.

16. Faced with this situation, Mr. Doctor submitted that even though Respondent No.1 maintains consolidated accounts, the Chartered Accountant of Respondent No.1 would certainly give a certificate disclosing only that part of the account which is related to the cable television network business. I am not impressed with this argument. Mr. Kapadia is right in contending that in such a situation, it would be impossible for the Tribunal or the Claimant to determine whether such disclosure is a true and full disclosure. This being the position, I find no merit in this argument either.

17. Even otherwise, I find that the order passed by the Tribunal is not going to cause any prejudice to Respondent No.1. Though it was sought to be argued before me by Mr. Doctor that the Claimant and/or Respondent No.2 are competitors of Respondent Nos. 1 and 3, there is nothing on record to indicate that such is the situation. The only statement in that regard can be found in paragraph (a) of the Petition. What is important to note is that at least from the record, it does not appear that this argument was ever canvassed before the Arbitral Tribunal. Though several objections were taken before the Arbitral Tribunal opposing the grant of relief in terms of prayer clause (c), this was not one of the grounds agitated before the Tribunal. I, therefore, have no hesitation in rejecting the argument of Mr. Doctor that since Respondent Nos. 1 and 3 were competitors of the Claimant and/or Respondent No.2, this disclosure seriously prejudiced the rights of the Respondent Nos. 1 and 3. There is absolutely nothing on record to indicate this.

18. On going through the impugned order, I find that it is a well reasoned order passed by the Arbitral Tribunal. It has

considered the arguments canvassed on behalf of the Claimant as well as Respondent Nos. 1 and 3. Thereafter, the Tribunal has given its findings in paragraph 11 which have been reproduced earlier. On going through these findings, I do not think that the discretion exercised by the Tribunal in ordering disclosure suffers from any perversity that would require my interference under Section 37 of the Act.

19. In view of the forgoing discussion, I find no merit in this Petition. It is accordingly, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P. COLABAWALLA J.)