

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5270 OF 2020

M/s. Rusi Khambatta & Associates,
B/19, Creative Industrial Estate,
12, N.M.Joshi Marg, Mumbai-400 011
Through its Managing Partner,
Rusi Khambatta, Age 87 years,
Occu.Business

..PETITIONER
(Orig.Complainant)

VERSUS

Padmashri Dr.Vitthalrao Vikhe Patil
Foundation's Ahmednagar Medical
College and Hospital, Opposite
Government Milk Dairy,
Post : MIDC, Vadgaon Gupta,
Ahmednagar,Through its Director.

.. RESPONDENT
(Orig.Opponent)

.....

Mr. V.J.Dixit, Senior Advocate i/b Adv. Mr.S.V. Dixit for the petitioner.
Mr. V.D.Hon,Senior Advocate for respondent.

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**CORAM : MANGESH S. PATIL, J.
RESERVED ON :28/09/2020
PRONOUNCED ON : 09.10.2020**

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned advocate for the respondent waives service. With the consent of both the

sides the matter is heard finally at the stage of admission.

2] In this Petition under Articles 226 and 227 of the Constitution of India the petitioner is challenging the order passed by the learned District Judge-1, Ahmednagar on the Application (Exh.5) in Arbitration Case No.10/2018 initiated by the respondent under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as the Act) challenging the arbitral award dated 27/4/2018 and 13/6/2018. By the impugned order, the learned District Judge allowed the Application (Exh.5) and stayed execution and operation of the arbitral award till final disposal of the Application under Section 34 of the Act.

3] The learned Senior Advocate Mr.V.J.Dixit for the petitioner vehemently submitted that the petitioner had prepared the designs being an Architect as per Memorandum of Understanding (M.O.U.) but the contract was terminated and the Arbitrator was appointed pursuant to the terms and conditions agreed upon in that M.O.U. dated 11/11/2003. Since the petitioner was having Copy Right over the designs prepared by him, he had filed a Suit but the parties were directed to resort to the arbitral proceeding. It is pursuant thereto that one Mr.Madhav Devbhakta was appointed as an Arbitrator and a communication was made with the respondent to suggest/propose the second Arbitrator as per Clause No.9.01. Pursuant thereto the respondent nominated one Mr.S.S. Banhatti as its nominee and in turn Mr.Devbhakta and Mr.Banhatti appointed Mr.V.B.Badawe as the Chief Arbitrator. The arbitral tribunal conducted the hearing and passed the award now being impugned by the respondent under Section 34 of the Act.

4] The learned Senior Advocate would point out that the Application preferred by the respondent under Section 34 of the Act is devoid of the grounds on which there could be a challenge to the arbitral award. Though one of the Arbitrators Mr.Banhatti had died, since the hearing was already concluded, the award was passed by the remaining two Arbitrators Mr.Devbhakta and Mr.Badawe which is permissible by virtue of Sub Section 2 of Section 31 of the Act. Therefore, even without there being any ground the respondent has filed the Application (Exh.34) to delay in making the payment of legitimate dues. He would further submit that oblivious to the provisions of Section 36 of the Act, the learned District Judge by the impugned order has granted a blanket stay overlooking the fact that the award is in the nature of a money decree. He did not insist for deposit of a part of the amount of the award or even has not insisted for any security.

5] The learned Advocate further submitted that Section 12 of the Act has undergone an amendment w.e.f. 23/10/2015. Since the arbitration proceeding had commenced prior to such amendment, Section 12 of the Act as it then existed would be applicable and therefore the learned District Judge has committed an error in applying the amended Section 12 and in expecting Mr.Devbhakta to have made necessary disclosure according to Schedule V. It is in view of such state of affairs, the impugned order granting blanket stay to the enforcement of the award is grossly illegal and may be quashed and set aside.

6] Per contra, learned Advocate Mr.Hon supported the impugned order and submitted that the respondent has been challenging the award under Section 34 of the Act strictly in accordance with the circumstances provided

therein. He would point out that the challenge was put to the appointment of Mr.Devbhakta at the inception by sending a letter dated 1/8/2005 that the respondent was not agreeable to his name. In spite of such objection, the Arbitration Tribunal continued to complete the process.

7] The learned Senior Advocate Mr.Hon further submitted that even if the unamended Section 12 of the Act as it then existed is taken into account, still it provided that the Arbitrator even then was under an obligation to disclose to the parties in writing the circumstances which would give rise to a justifiable doubt about his independence or impartiality. The learned Senior Advocate would submit that by virtue of the amendment, the Legislature has only come out with elaborate circumstances under which such a doubt could arise by enlisting the circumstances in Schedule V.

8] The learned Senior Advocate then submitted that by virtue of the specific understanding in Clause No.9.01 of the M.O.U. one Arbitrator was to be nominated by each of the parties that is the petitioner and the respondent but the petitioner's nomination was expected to be with the consultation of the respondent. Meaning thereby that the petitioner was not at a free will to appoint the Arbitrator without consulting the respondent. Such objection having been raised at the inception is a ground available to the respondent to challenge the award under Section 34 of the Act.

9] Lastly, the learned Senior Advocate submitted that admittedly the Arbitrator who was nominated by the respondent viz. Mr.Banhatti had died even before the impugned award was passed and consequently by virtue of Section 31, the arbitral proceeding could not have been proceeded further

unless somebody was replaced in place of Mr.Banhatti. Thus there is no error or illegality committed by the learned District Judge in granting stay to the execution and operation of the award under challenge.

10] I have carefully perused the papers and the impugned order. It is necessary to recapitulate the legislative history. The Act has undergone several amendments in the year 2015 which came into effect from 23/10/2015. As far as application of the amended provisions to the arbitral proceedings and the proceeding under the Act before the Courts, the Supreme Court in the case of **Board of Control for Cricket in India V/s Kochi Cricket Private Limited and others; 2018(2) Arb. LR 170 (SC)** has now set at rest the conflict and it has been laid down that scheme of Section 26 of the Amendment Act makes it prospective in nature and will apply to those arbitral proceedings which would commence on or after 23/10/2015 and to Court proceedings which would commence on or after the Amendment Act came into force i.e. 23/10/2015. It is thus now well settled that the amended provisions, so far as arbitral proceedings are concerned would be applicable to such proceedings which have commenced after 23/10/2015 and to the Court proceedings which have commenced after that date. Since in the matter in hand admittedly, the arbitral proceeding had commenced prior to coming into force such amendment, the procedure prescribed under the unamended statute would be applicable. However since, admittedly, the Court proceeding in the form of the present Application under Section 34 of the Act having commenced after such amendment, it would be governed by the amended provisions of the Act.

11] True it is that Section 12 which provides for grounds for challenge has

also undergone extensive amendment w.e.f. 23/10/2015. However, since in the matter in hand the arbitral proceeding had commenced prior to such amendment, one will have to resort to the unamended Section 12. Apparently the learned District Judge does not seem to have applied his mind to this aspect. However, as has been submitted by the learned Senior Advocate Mr.Hon, even under the unamended Section 12, an Arbitrator was expected to disclose the parties in writing the circumstances which could have given rise to justifiable doubt about his independence or impartiality. But then, Mr.Devbhakta does not seem to have made any such disclosure inspite of the respondent having conveyed by sending the letter dated 1/8/2005. It is indeed a circumstance which provides a ground under Section 34 to challenge the award.

12] Again, as can be seen, by virtue of Clause 9.01 of M.O.U. each party has to nominate an Arbitrator but such choice to be exercised by the petitioner was circumscribed by a rider to the effect that it would appoint the Arbitrator in consultation with the respondent and not otherwise. Even it was communicated by letter dated 1/8/2005 that it was not agreeable with the proposal to appoint Mr.Devbhakta. Again it is also a ground available to be raised in a proceeding under Section 34 of the Act.

13] True it is that by virtue of the provisions of Section 31, in case of arbitral proceeding with more than one Arbitrator, signatures of the majority of the Arbitrators is sufficient. It has been specifically mentioned in the arbitral award about demise of Mr.Banhatti who was nominated by the respondent after the hearing was concluded and the award was published. Therefore it is doubtful if the arbitral award can be challenged under that

provision.

14] It is necessary to emphasize that in the normal course this Court would not have gone into and discussed these factual aspects in this proceeding under the writ jurisdiction. However, there is a reason which prompts such deviation. As has been rightly pointed out by the learned Senior Advocate Mr.Dixit, by virtue of the amended provision of Section 36, the award in the nature of a money decree, could not have been stayed by the impugned order ignoring provisions and the limitations of challenging a money decree under the provisions of the Civil Procedure Code. He would point out that the learned District Judge has not borne in mind such legal position and has granted blanket stay to the execution and operation of the impugned award.

15] As is mentioned above since the present Court proceeding has commenced after coming into force of the amendment in the Act w.e.f. 23/10/2005, the amended provision of Section 36 of the Act would be applicable which *inter alia* provides that while considering stay to the operation of an arbitral award in a proceeding under Section 34, the Courts are expected to have due regard to the provisions of grant of stay to a money decree contained in the Civil Procedure Code. This is precisely where the learned District Judge seems to have committed an error.

16] Needless to state that Rule 1 of Order XLI of C.P.C. (Bombay High Court Amendment) provides that where the Appeal is against a decree for payment of money the appellant is under an obligation to deposit the amount disputed in the Appeal or furnish security as may be directed by the appellate Court. However, as can be seen, this provision admits of an exception where the

Court may dispense with such deposit or security where it deems fit to do so for sufficient cause. It is therefore quite clear that in case of arbitral awards in the nature of money decrees, the Court in a proceeding under Section 34 of the Act has a discretion to insist for deposit of the money or a part thereof and/or security to its satisfaction. However, it may dispense with such deposit of money or furnishing of the security for justifiable reason. Since the learned District Judge by the impugned order has granted blanket stay to the execution, it was imperative for him to have specifically mentioned the grounds for not directing the respondent to make any deposit or furnish any security. This is precisely where the learned District Judge has committed a gross error.

17] In the normal course this Court would not have exercised the discretion which the learned District Judge ought to have and would have remanded the matter for passing appropriate order in accordance with law as discussed hereinabove. However, since a long standing dispute between the parties is yet to reach finality which is not likely in the near future, any direction to the District Judge by remanding the matter may result in causing further delay which can certainly be avoided if the error is rectified in this proceeding.

18] In view of such state of affairs, it would be just and proper to modify the impugned order to the extent of directing the respondent to deposit some money and furnish security to the satisfaction of the District Judge.

19] The Writ Petition is therefore, partly allowed. The impugned order is modified. As a condition precedent to the stay to the execution of the impugned award the respondent shall deposit an amount of Rs.25 lakhs in the

District Court, Ahmednagar and shall furnish security to the tune of Rs.75 lakhs to the satisfaction of the learned District Judge.

20] The learned Senior Advocate Mr.Dixit for the petitioner had also made a request that the petitioner may be permitted to withdraw the amount if it was to be deposited by the respondent pursuant to any order to be passed by this Court.

21] In my considered view it would be appropriate to make such a request to the Court where the proceeding under Section 34 of the Act is pending which may pass appropriate orders in accordance with law. Therefore, the request cannot be accepted.

22] The Rule is accordingly made absolute in above terms.

23] The learned District Judge shall expedite the hearing.

[MANGESH S. PATIL, J.]

24] After pronouncement of the judgment, Mr.V.D.Hon, learned Senior Advocate for the respondent, requests to stay the operation of the order being passed to enable the respondent to challenge it before the Supreme Court. At his request, the operation of the order being passed in this Writ Petition shall stand stayed for a period of four weeks.

[MANGESH S. PATIL, J.]