Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 189 OF 2020

Tsur Ben David ...Petitioner
Versus
CQM Cooling Quality Management Ltd & Ors ...Respondents

Mr Karl Tamboly, *with Ms Anagha Mhatre, i/b VIS Legis Law Practice, for the Petitioner.*
Mr Kevic Setalvad, Senior Advocate, *with Cyrus Bharucha, Tushad Kakalia, Ms Bhakti Popat, for the Respondent No.1.*

CORAM: G.S. PATEL, J.
DATED: 17th February 2020

PC:-

1. The Petition is under Section 37 of the Arbitration and Conciliation Act 1996. It assails an order of 2nd January 2020, though it says it does so "read with an order of 10th August 2019". Mr Setalvad for the Respondents urges that in fact the challenge is to the previous order and not so much the later order.

2. The controversy before me is over an order of disclosure made by the learned sole Arbitrator. Without getting into the details of the nature of the disputes between the parties, it is sufficient to note that there are claims and cross-claims in relation to a contract vested in a joint venture for the production, distribution and sales of cleaning management systems for cooling towers and other cooling machines or systems such as automatic tube cleaning systems. There is a second question of licensing of certain know-how and technology. There are questions under Section 16 of the Arbitration and Conciliation Act 1996 that are even now pending decision before the learned sole Arbitrator and, in particular, whether the principal agreement in question would encompass disputes arising from the Licensing Agreement or whether disputes under the Licensing Agreement are beyond arbitral competence. I am returning no finding on that aspect of the matter. All contentions are expressly kept open.

3. The application before the Arbitrator was for "better particulars". The present Petitioner (the Claimant in the arbitration) was resisting the application filed by the 1st Respondent. In other words it was the 1st Respondent that sought better particulars as against the Claimant in the arbitration.

4. I have no doubt that in any such dispute one of the questions the tribunal will have to address is a claim for damages and in the course of that will have to look at the question of proof of damages. On the application for disclosure, paragraphs 14 to 22 of the impugned order of 2nd January 2020 are relevant:

> "14. **The Tribunal by the earlier Order dated 10th August 2019 had in paragraph 66 proceeded on the footing that if CQM i.e. Respondent No.1 was a 25%**

shareholder at the relevant time it would have been entitled to broad details regarding the sales made so as to quantify its claim for damages and prove that any products sold were made issuing the Respondent no 1's technology. This will be one of the disputed questions which I will have to determine especially if I find I have jurisdiction to decide the licensing issues. **Even otherwise to come to a definitive conclusion about breach I would have to also consider this question.**

15. **The entire issue regarding whether the claim for license fee/damages for sales made using the intellectual property of the Respondent No.1 is an issue which is at large.** It is one of the allegations I would have to consider in arriving at a final determination. This would be determined by the Tribunal only finally. It was intended that the Tribunal (though prima facie concluding that the disputes arising out of the License Agreement are not referred to it) will not grant all the relief based on the right to claim royalty/compensation which arises directly from the terms of the License Agreement **but only grant a limited disclosure sufficient to enable the Respondent no 1 to quantify its claim for damages and prove that any products sold were made using the Respondent no 1's technology.**

16. **The Tribunal intended that it should have some basis for its determination in case it is decided at the final hearing that the Tribunal has jurisdiction even in respect of licensing issues. It is necessary that some details and particulars about the sales be disclosed. This is having regard to the controversy which arises in the present case viz. whether there is a sale of products of a type using the intellectual property of the Respondent No.1 without their permission within and outside India. The Respondent no 1 has also argued that they harbour**

a doubt as to the genuineness of the particulars of the disclosure.

17. It is also apparent that there is necessary pleading in the Counter Claim where Respondent no 1 in paragraphs 29 to 45 have spelt out the requirement for the disclosures of particulars of sales inside and outside India at the interim stage itself., since they have been out of management and control and therefore obviously details would not be available to them. It is no doubt true that there is no final relief sought however, the Respondent sought leave to seek the disclosure and make a necessary prayer based on the disclosure being made once directed. This is the normal manner in which such relief is to be claimed when a party is kept out of control.

18. In my view having regard to all the above in the circumstances of the case and **since the Tribunal has to come to a conclusion finally regarding the issue about whether there is any reference at all under the License Agreement and which of the claims fall for consideration under the License Agreement at the final hearing and in order to save time in the event the Tribunal comes to the conclusion that it has jurisdiction in respect of licensing issues, it would be appropriate to direct disclosure at this stage so that at the final hearing a decision can be rendered with the benefit of all material.** <u>**This would shorten the entire process in the trial rather than the Tribunal deciding at the fag end it has jurisdiction and then directing disclosure and then permitting amendment and then deciding on the quantum of damages and license fee etc.**</u>

19. **I also do not find any prejudice would be caused to the Claimants if this course is adopted with**

safeguards that the information disclosed would not be misused by the Respondent no 1.

20. **I am, however, restricting the disclosure to the grant of the relief only in respect of providing invoices for sales within India and outside India with the names of the parties redacted** so a to prevent the Respondent No. 1 from approaching such parties considering the hostility between the parties.

21. In terms of the Annexure-3 to the License Agreement at Page 152 of the Statement of Claim (SOC Compilation) **since the quantum of license fee would be based on different rate for different products therefore also it would be appropriate if the invoices are disclosed as above. The description of the products in the invoice which is to be disclosed would be material and enable the Tribunal to arrive at a proper conclusion in the event if it finds that it has jurisdiction regarding licensing issues and claims which arise out of the License Agreement rather than go through the entire process at a later stage**.

22. In view of the same, the Claimants are directed to disclose and furnish copies of invoices alone of the joint venture company Respondent no 2 for the period 13th September 2016 till the date of disclosure with the names of purchasers redacted for products of the Joint Venture Company sold within and outside India within 2 weeks form the date of receipt of the order."

(*Emphasis added*)

5. Before me, the dispute is in regard to the directions in paragraph 20. Mr Tamboly for the Petitioner assailing the order (the Claimant in arbitration resisting the disclosure application by the 1st

Respondent) says that the redaction ordered by the Arbitrator is insufficient and that on his invoices far more ought to have been allowed to be redacted; in particular, the unit rate of supply and the quantity of units i.e. the rate per unit and the total volume of units sold. He has no objection to further identifying particulars such as the date of the invoice, the aggregate invoice value or even the description of goods as stated in the invoice. This is in fact in consonance with paragraph 21 where the arbitrator has specifically asked for disclosure of the description of the products in the invoice.

6. There are two considerations to be balanced here. The 1st Respondent ought not to be permitted to go on some kind of a roving enquiry to further establish its case but it is certainly entitled to such information as the arbitral tribunal feels is necessary. Little purpose is achieved in pursuing this course of deciding whether the document itself i.e. the invoice, should be disclosed and if so with what portion redacted and what portion left un-redacted. This will only lead to more controversy. I note that the learned Sole Arbitrator has prima facie opined that the question of license fees would depend on the different rates for different products. But that information can certainly be ordered later. The 1st Respondent to the arbitration still has to cross a threshold question of establishing a legally enforceable right before it can seek to quantify it.

7. I am therefore, disposing of the Appeal by requiring the Petitioner to tabulate rather than produce the invoices. The tabulation is to include the date of the invoice, the total invoice value, the description of the goods and is to exclude only the name/s of the customer(s)/consignee(s), the number of units sold under each invoice, and, for the present, the rate per unit.

8. It is also clarified that these further particulars as to the rate per unit and the number of units sold are not by virtue of this order held to be denied to the 1st Respondent. They may well be the subject matter of cross examination at the final hearing of the arbitration or the subject matter of a separate substantive application for additional disclosure at a later stage. This right will however have no impact whatsoever on any question being addressed under Section 16 of the Arbitration and Conciliation Act.

9. I also note the objection by Mr Tamboly that the information as to the quantity of units and the rate per unit is confidential to the Petitioner and is not information to which the 1st Respondent is entitled. Those rival contentions are expressly kept open and may be canvassed at the appropriate time in arbitration.

10. The tabulation will have to be on Affidavit with the following accompanying statements:

(a) that the information in tabulation is derived from the actual invoices that are currently in the possession of the Petitioner; and

(b) that the statements in the tabulation are correct to the knowledge of the Petitioner and have been verified by him personally.

As a final requirement, every page of the tabulation is to be counter-signed and dated by the Petitioner himself.

11. The Commercial Arbitration Petition is disposed of in these terms. No costs.

(G. S. PATEL, J)