IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION NO. 1 OF 2020, WRIT PETITION NO.174 OF 2021, CIVIL APPLICATION NOS. 20 OF 21 AND 5 OF 2020 AND MISC. CIVIL APPLICATION NO. 58 OF 2020.

APPEAL UNDER ARBITRATION NO. 1 OF 2020.
WITH
WRIT PETITION NO.174 OF 2021
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CIVIL APPLICATION NO. 20 OF 2021
IN
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APPEAL UNDER ARBITRATION NO. 1 OF 2020.
WITH
MISC. CIVIL APPLICATION NO 58 OF 2020.
IN
APPEAL UNDER ARBITRATION NO. 1 OF 2020.

VISHAL INSFRASRUCTURE LTD., REP.
BY ITS MANAGER MAYIL VAGANAN …. Applicant.

VS

LAXMIKANT D. NAIK KARMALI. …. Respondent.

Shri S. Gaonkar, Advocate for the petitioner.

Shri P. A. Kholkar, Advocate for the respondent.

Coram: DAMA SESHADRI NAIDU, J.

Date: 30th March 2021.

ORAL ORDER:

Introduction:

A person, though not a lawyer, is well-versed in conducting arbitration proceedings. Let us call him 'prosecutor'. A company contracts with him; under that contract, he leads the proceedings for the Company before the sole arbitrator. His fee is linked to the Company's success. The quantum of the fee depends on whether the Company succeeds or its rival succeeds in the counterclaim. In each instance, the percentage of the fee differs. The prosecutor has no role to play in the proceedings once the award is passed. The Company succeeded.

2. The prosecutor has claims his fee when the award attains finality; that is after this Court's judgment under section 37 of the Arbitration and Conciliation Act, 1996. But the Company counters the prosecutor's claim. It argues that the claim is barred by limitation. According to it, the prosecutor ought to have demanded the fee in three years from the initial arbitration award. Is it so?

Facts:

3. The appellant is a company. It carries on construction activity. In July 2001, the Marmugao Port Trust contracted with the appellant. Through that contract, the Company was asked to construct a 100 bedded hospital for the Port Trust.

4. In the execution of that construction contract, disputes arose. Then, the Company invoked the arbitration clause. To prosecute that arbitration, it appointed respondent Laxmikant D. Naik as its consultant. That appointment was in July 2006. Executing the task assigned to him, Laxmikant prepared the necessary claim, presented it before the Arbitrator, and pursued the proceedings.

Eventually, through an award dated 17.1.2009, the learned Arbitrator ruled against the Port Trust and awarded monetary compensation to the Company.

5. Aggrieved, the Port Trust applied to the Principal District Judge, South Goa, Margao, under section 34 of the Arbitration and Conciliation Act. But it was to no avail; on 10.10.2010, the District Judge dismissed the application. Further aggrieved, the Port Trust invoked section 37 of the Act and appealed to this Court. Through its judgment dated 14.2.2017, this Court partially modified that order; that modified award has become final.

6. As this Court disposed of the appeal in February 2017, Laxmikant demanded from the Company 12.5.% of the award as his "total fees". It was on 21.7.2017. But the Company raised various objections to Laxmikant's claim for the fees. By the time the matter reached this Court, all other objections, such as the non-execution of the appointment letter, have fallen on the wayside. But the Company has persisted with one plea: limitation.

7. Even in its reply dated 20.12.2017, the Company contended that Laxmikant's claim for fees had been barred by limitation. According to it, the appointment letter, dated 10.7.2006, provided for arbitration of any dispute regarding the fees. Laxmikant invoked that clause and had a sole arbitrator appointed. Put on notice by the learned arbitrator, the Company filed its objections. In that objection, too, it raised the plea of limitation. That said, it has not participated in the arbitration proceedings. Eventually, through an award dated 1.2.2018, the learned sole arbitrator ruled in Laxmikant's favour. He

directed the Company to pay to Laxmikant the fees at 12.5% of the award amount with interest at 9%. The total amount comes to Rs.22,13,199/-.

8. After suffering an ex parte award, the Company applied to the Principal District Judge, South Goa, under section 34 of the Act. Through judgment dated 17.12.2019, the District Judge refused to interfere. So, the Company is before us under section 34 of the Act.

Submissions:

Appellant:

9. Shri Shivraj Gaonkar, the learned counsel for the appellant-Company, has first taken me through the letter of appointment the Company gave to Laxmikant on 10.7.2006. According to him, Laxmikant's role is limited; he is required to prosecute the proceedings only before the Arbitrator. Once the award is passed, his role ends. In this context, he has drawn my attention to the unnumbered paragraph 4, which declares that if the dispute between the Port Trust and the Company reaches this Court, the Company will engage a lawyer.

10. In other words, Shri Gaonkar points out that Laxmikant had his cause of action arising as soon as the Arbitrator passed the award. But he did not the fees in the next three years—which is the prescribed period of limitation under Article 18 of Schedule I to the Limitation Act.

11. Then, I queried Shri Gaonkar about the scope of adjudication by the District Court under section 34 of the Act and by

this Court under section 37 of the Act. In reply, the learned counsel has pointed out that under Section 34(2) (b)(ii) if the arbitral award conflicts with any public policy of India, the District Court must interfere under section 34. If he fails to do so, this Court, according to him, will exercise its appellate powers under Section 37 of the Act and interfere. Shri Gaonkar also stresses that the Courts have often held that limitation is a matter of public policy. To support his contentions, Shri Gaonkar has relied on *Hindustan Petroleum Corporation Ltd., Mumbai v. Batliboi Environmental Engineers Ltd.*,[1]; *Jagmohan Singh Gujral of Indian v. Satish Ashok Sabnis*[2]; *Chaudhary Transport, Mumbai v. Hindustan Petroleum Corporation Ltd.*[3] and *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai*[4].

12. Eventually, Shri Gaonkar has also taken me through the impugned judgment. According to him, the District Judge has erroneously observed that the award attained finality only before this Court and only then did Laxmikant had his cause of action to demand the fees. In this context, the learned counsel has once again taken me through the letter of appointment and strenuously contended that the terms of appointment never contemplated that respondent could demand his fees only when the entire proceedings attained finality. As is evident from Article 18 of the Limitation Act, once Laxmikant has performed the work assigned to him—that of

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1 2008(2) MH. L. J. 542

2 (2004)1 Bom C. R. 307

3 2012 (2) Mh. L. J. 646

4 2012 (5) SCC 157

prosecuting the proceedings before the Arbitrator—the cause of action arose. It was on 17.1.2009. That means, Laxmikant's right to recover the fees stood extinguished by 18.1.2012. To conclude, Shri Gaonkar points out that Laxmikant's claim has been hopelessly barred by limitation. And both the sole arbitrator and the learned District Judge have missed this substantive point of law. Therefore, he wants this Court to interfere under section 37 of the Act.

Respondent:

13. Shri Premanand A. Kholkar, the learned counsel for the respondent, has submitted Laxmikant's claim is well within the limitation. Then, he has adopted the reasoning found in the impugned order to support his contention. According to him, this appeal under section 37 of the Act is without any merit. As to the scope of adjudication and judicial interference under section 34 of the Act, Shri Kholkar has relied on *M/s Navodaya Mass Entertainment Ltd v. M/s J. M. Combines.*[5]

Discussion:

Discussion:

14. Indeed, the facts are not in dispute. That said, the bone of contention is the limitation. And the limitation is a mixed question of law and fact. As contented by the Company, the fulcrum is the letter of appointment the Company gave to Laxmikant on 10.7.2006. As much depends on the terms of this appointment, it pays to extract the letter in its entirety, as it only runs into a couple of paragraphs:

5(2015) 5 SCC 698

> "We hereby appoint you as our Consultant for the Arbitration Proceedings of our case for the work of "Construction of 100 bedded Hospital at Sada".
>
> The total fees payable to you by us will be 12.5% of *the amount of the Arbitration Award, including interest in our favour as calculated on the date of settlement of your fees*, or 5% of the amount of the counterclaim of the other party against us as rejected by the Arbitration Award, whichever is higher.
>
> Your work will be restricted to the preparation of the Claims letter, preparation of the statement of facts and claims before the Arbitrator, and arguing the case before the Arbitrator till finalisation.
>
> Your work will not include appearance before the Court, for which we will engage the services of another lawyer. All expenses in connection with the arbitration case such as typing, Xeroxing, traveling, postage, arbitrator's fees etc will be borne by us.
>
> Part-payment of the fees to the extent of Rs.1,00,000/- (Rupees One Lakh only) as desired by you will be made by us as advance payment, and the same will adjusted against the total fees payable to you calculated as stated hereinabove.
>
> I/we hereby agree that any dispute pertaining to this Agreement will be resolved through arbitration of a Sole Arbitrator to be appointed by you."

15. Before appreciating the terms of appointment, we may have to address a technical question: Can limitation be treated as an adjudicatory aspect under section 34 of the Act. A corollary to this question is whether the law of limitation is a facet of public policy.

16. For our purpose, section 34(2)(b) (ii) of the Act matters and it reads thus: "(ii) The arbitration award is in conflict with the public policy of India". Now, let us examine whether limitation stands covered in the sweep of public policy. In *Batliboi Environmental Engineers*, a Division Bench of this Court, per J. H. Bhatia J, has held that an arbitrator is a creation of the contract between the parties,

and he gets jurisdiction under the terms of the contract. He is expected to interpret and apply provisions of the contract and pass an award accordingly. While passing the award, he has to bear in mind section 28 of the Act. If domestic arbitration occurs, the Arbitral Tribunal shall decide the dispute under the substantive law in force. If the Arbitrator ignores the substantive law and passes an award, it is bound to cause injustice and is liable to be set aside.

17. After stating the law as above, *Batliboi Environmental Engineers* exemplifies that proposition: if the law requires the claim to be within limitation, but the arbitrator ignores and passes an award in a stale claim, that will be against the law. The award cannot be sustained. On the facts of the case, *Batliboi Environmental Engineers* records the appellant's contention that the Arbitrator ignored the terms of the contract, relevant documents, as well as section 55 of the Contract Act. And, therefore, the award is liable to be set aside. Indeed, persuasive is the proposition, but the limitation is not in the issue in *Batliboi Environmental Engineers.* So the observations are obiter.

18. Unlike *Batliboi Environmental Engineers*, in *Jagmohan Singh Gujral*, the limitation is directly in issue. One of the issues in the appeal was this: (i) Has the claim by the petitioner been barred by limitation, and if so, is it open for this Court to interfere under section 34 with the Award? Another issue relates to public policy: From the Award, can it be said that the findings are perverse; if so, would that perversity attract the ground of public policy on the premise that the award is an unreasoned Award?

19. In *Jagmohan Singh Gujral*, this Court, per Rebello F.I., J, holds that a plea that the suit is barred by law of limitation does not *ex facie* constitute a ground under section 34 of the Act "unless read into the expression 'public policy'". Under section 43 of the Act, the Limitation Act, 1963, shall apply to arbitrations as it applies to proceedings in Court. In other words, the claims which are barred by limitation before the courts cannot be entertained by Arbitral Tribunal. "It is now settled law that the law of limitation is grounded on the plea of public policy"—a stale claim cannot be entertained. Thus, *Jagmohan Singh Gujral* is more on the point.

20. In *Chaudhary Transport*, this Court, per Anoop V. Mohta J, has held that the Arbitrator under the Arbitration Act is bound to consider the aspect of limitation. Against the plea of limitation, neither party to the arbitration can raise the defence of "waiver" and/or "no interference by the Court" as contemplated under section 4 and/or 5 of the Arbitration Act. The Arbitrator is bound to pass the award within the framework of substantive as well as procedural laws.

21. In *Maniben Devraj Shah*, the Supreme Court, per G. S. Singhvi J, has held that the law of limitation is founded on public policy. The Limitation Act, 1963, has not been enacted to destroy the rights of the parties but to ensure that they approach the court for the vindication of their rights without unreasonable delay.

22. That said, if we examine the authorities Laxmikant has cited, the first one is *Navodaya Mass Entertainment Ltd.* In that case, the Supreme Court, per P. C. Ghose J, has set the decisional bounds

under sections 34 and 37 of the Act. According to it, the scope of interference of the court is very limited. The court would not be justified in reappraising the material on record and substituting the arbitrator's view with its own. If "there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only", the court would be justified in interfering with the arbitration award. If two views are possible, the view taken by the arbitrator will prevail.

23. From the above extracts, the proposition of law is unmistakable. That is, the law of limitation is an aspect of public policy. Besides that, the arbitrator's failure to consider the substantive law of the land vitiates the award. But I hasten to add that once the arbitrator considers the substantive law—say that of limitation—and rules on it, the arbitrator's view on the merits prevails. Either the District Court under section 34 or this Court under section 37 holding an alternative view on the point gives it no scope for interference as if it were an appeal.

24. As pointed out by Laxmikant, in *Navodaya Mass Entertainment*, the Supreme Court has been emphatic in its enunciation of law: once the arbitrator has applied its mind to the matter before him, the Court cannot reappraise the matter as if it were sitting over an appeal. Even if two views are possible, the view taken by the arbitrator will prevail.

25. Now, the issue boils down to whether Laxmikant should have demanded the fees soon after the award was passed—that is, in three years from 17.01.2009. Indeed, the letter of appointment does

not in so many words say that the respondent should demand his fees either when the award is passed or only after the award has attained finality. The expression used in the letter of appointment is "on the date of settlement of your fees"; it must be 12.5% of the “award amount, including interest”.

26. The appointment letter also provides for a contingency. The Port Trust had a counterclaim. If the Port Trust succeeds, it should be 5% of that award in the counterclaim. Both counsel agree that the Port Trust failed; the Company did. Therefore, the fee must be 12.5% of the award amount, including interest.

27. Let us see when the limitation has begun to run; it must be "from the date of the settlement of fees'. When it comes to fees, either the person to whom it is due may demand it, or the person who has to pay may settle it. It is not the Company's case that as soon as the award was passed, it offered to settle the fees, but Laxmikant tarried. In fact, the Company set up its defence denying the very appointment letter—Annexure A2. In the alternative, it has contended that the person who gave that letter of appointment on the Company's behalf had no valid delegation.

28. Yet again, the Company has taken another plea: the plea of limitation. Soon after the award was passed, the Company offered to settle Laxmikant's fee at no stage. It has never triggered the cause of action on its own. Let us look at the issue from another perspective.

29. The quantum of fees depended on the quantum of the award. The quantum of the award gets crystalised when the

proceedings become final. Until then, Laxmikant's entitlement remained fluid, even uncertain. First, the award was appealed against. In the appeal, the award could have been reversed. Worse still, the counterclaim could have been allowed. In either event, the fee payable to Laxmikant could have varied. Even otherwise, once a judicial proceeding is initiated, all the subsequent steps in that litigious process, including at appellate stage and revisional stage, will stand subsumed under the title of the doctrine of merger. What emerges finally must be taken as the outcome for all purposes. So, the letter of appointment must be read in tune with that settled principles of law.

30. In other words, Laxmikant had his cause of action to recover his fee only when the arbitration award became final. The lack of a role for the respondent at the stage beyond the initial arbitration does not affect Laxmikant's right to claim the fees on the culmination of the proceedings. In fact, this Court, under section 37 of the Act, modified the award, and that affected the quantum. And based on this quantum alone, could Laxmikant stake his claim for a fee. He did only that.

31. Under these circumstances, I find no merits in the Appeal Under Arbitration and accordingly dismiss it.

WP No.174 of 2021.

32. In the light of the judgment rendered in AUA 1 of 2020, this Writ Petition does not survive, and it is accordingly closed.

33. Now, it is brought to my notice that 50% of the amount deposited by the Company lies with this Court. The respondent is permitted to withdraw that amount with accrued interest.

No order on costs.

DAMA SESHADRI NAIDU, J.

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