THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
22~09~2021	07~10~2021

CORAM:
THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P. No.554 of 2016 and

Cross Objection O.P. No.1 of 2017

O.P.No.554 of 2016

Hindustan UniverLimitmed.,
Unilever House,
B.D.Sawant Marg
Chakala, Andheri East,
Mumbai 400099. ... Petitioner / Respondent

-Vs-

N. Balasubramanian
S/o T.S. Narasimhan
No.4, Bhavan Flats
Puzhal Murugesan Street,
Perambur, Chennai 600011. ... Respondent / Claimant

Cross Objection O.P. No.1 of 2017

N. Balasubramanian
S/o T.S. Narasimhan
No.4, Bhavan Flats
Puzhal Murugesan Street,
Perambur, Chennai 600011. ... Cross Objetor / Claimant

-vs-

Hindustan UniverLimitmed.,
Unilever House,
B.D.Sawant Marg
Chakala, Andheri East,
Mumbai 400099. ... Respondent / Respondent

Prayer in O.P.No.554 of 2016: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 26.04.2016 to O.P.No.1 of 2014 passed by the Arbitral Tribunal.

Prayer in Cross Objection O.P.No. 1 of 2017: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to dismiss the O.P.No.554 of 2016 with costs and allow Arbitration O.P.No.1 of 2014.

For Petitioner in O.P.554/2016 and Respondent in Cross.objection O.P.No.1/2017	: Ms.L. Maithili for M/s. Maithili Associates
For Respondent in O.P.554/2016 and Petitioner in Cross objection O.P. No.1/2017	: Mr. B. Harikrishnan

COMMON ORDER

1.a. Aggrieved over the Award passed by the Arbitral Tribunal dated 25.07.2016, directing the Respondent to pay a sum of Rs.20,58,500/- as damages and interest at the rate of 12% from the date of termination of the Claimant till the date of payment, the Original Petition is filed by the Petitioner/Respondent before the Tribunal.

1.b. Cross Objection O.P. has been filed by the Claimant/Cross Objector herein to dismiss the above Original Petition and confirm the Award passed by the learned Arbitrator dated 25.07.2016.

1.c. The parties are arrayed as per their own rankings before the Arbitral Tribunal.

1.d. Since the Original Petition and Cross objection O.Ps. are arising out of the same Award, the same are disposed by way of this Common Order.

2. The brief facts leading to file these Original Petitions are as follows:

2.a. The Claimant jointed the services of Lakme India Limited on 05.05.1993. He was gradually promoted on the said Lakme India lImited and he was obsorbed into the rolls of the Respsondent pursuant to reorganisation of M/s. Lakme Lever Limited. Thereafter the Claimant was promoted as Sales Officer in the year 2001 and Senior Sales Executive in 2008 and as a Field Sales and Customere Manager in July 2011 by the Respondent. Pursuant to the promotion as Field Sales and Customer Manager, the Claimant was required to exeute an Employment Agreement dated 24.02.2011. In the year 2012, when the Claimant was working in Andhra Pradesh, the business was dull due to the policy decision of the Respondent. However, the Respondent had rated the Claimant's performance not good. It is further contention of the claimant that he was confined to the conference room and was induced to submit his resignation and as the Claimant had declined, he was put in a Performance Improvement Plan (PIP). It is the further contention of the Claimant that he was put into continuous harassment and that he was not consulted on any policy decision. Due to the constant humiliation and harassment the Claimant was forced to submit his resignation by email dated 13.02.2013. However, business head of the Respondent pursuaded the Claimant to withdraw his resignation and assured that the Claimant will be transferred to Chennai in July 2013.

2.b. Even after posting at Chennai, he was always put into fear of termination and compelled to resign. Thereafter, taking advantage of the Clause 14 of the Employment Agreement, the Respondent issued termination notice without any reasons. The Claimant already put in 21 years of serive. If he was allowed to leave on voluntary retirement upon completion of 21 years, he would have been entitled to one month's last drawn gross salary for each completed year of service amounting to Rs.20,66,967/-. However, he restricted his claim to Rs.20,58,500/-. In addition he has also claimed Rs.5,00,000/- towards damages for loss and suffering. Besides he has also sought declaration of Clause 14 of the Employment Agreement dated 24.02.2011 is opposed to public policy and in contravention of Section 41 of the Tamil Nadu Shop and Establishment Act.

3. The Respondent has admitted the contention of the Claimant that he was joined service int year 1993. It is the contention of the Respondent that the Claimant has not achieved his target for the year 2012 and he was given rating of

the lowest rank in performance. He was also informed of the rating and in January 2013 he was placed on Performance Improvement Plan (PIP) which required him to deliver exceptional results in the following quarter. Though he was resigned voluntarily on 13.02.2013, the Respondent's Official had personal discussions regarding his resignation, pursuant to which, the claimant showed interest in staying back in the organisation. The Respondent had issued a notice of termination vide letter dated 05.03.2014 by giving three (3)months notice by invoking Claue 14 of the agreement. As the said agreement did not contemplate specifying any reasons, no reasons were communicated to the agreement. It is further contended that the Tamil Nadu Shops and Establishment Act is a special enactment providing an appeal against the order of termination. Without filing an appeal the dispute cannot be arbitrated . It is furnter contended that at the time of termination the Claimant was paid a sum of Rs.7,19,000/- towards full and fina settlement of all dues. Hence their contention is that Clause 14 of the Agreement provides right to the management to terminate the employee by giving 3 months notice. Hence, it is the contention of the Respondent that since it is a contract of personnel service there cannot be any declaration. Consequently no damages can be awarded. Hence prayed for dismissal.

4. Based on the pleadings, the following issues were framed.

"(i) Whether Clause 14 of the Employement Agreement dated 24.02.2011 between the Respondent and the Claimant is opposed to public policy and whether Clause 14 of the Employment Agreement is in contravention of Section 41 of the Tamil Nadu Shops & Establishments Act?

(ii) Whether the Respondent letter dated 05.03.2014 purporting to terminat the Claimant's employment by invoking Clause 14 of the employment Agreement dated 24.02.2011 is legal and valid?

(iii) Whether the Claimant is entitled to Rs.25,58,500/- as compensation /damages for loss and suffering consequent to the termination of employment by the Respondent?

(iv) Whether the dispute raised by the Claimant is arbitrable?

(v) Whether the Claimant has any cause of action

to file a claim in view of the amounts paid to him in full and final settlement?

(vi) Whether the parties are entitled to costs?"

5. The learned Three Members Arbitral Tribunal unanimously granted compensation. Whereas the majority member has held that Class 14 of the Agreement is not opposed to the public policy. Whereas the minority decision of the Arbitral Tribunal is that Clause 14 of the Employment Agreement is violated the provision of Section 41 of the Shops and Establishment Act, 1947. Be that as it may. However, the Majority Award passed compensation.

6. The main contention of the learned counsel for the Petitioner herein is that the Arbitral Tribunal having held that Clause 14 of the Agreement and Termination letter dated 05.03.2014 valid, ought not to have awarded compensation. Otherwise her contention that in the absence of any breach of contract by the Petitioner the award of damages does not arise at all. Besides the damages also awarded without any evidence on record. Her further contention is that the malafides cannot be attributed to the institution. At the most can be alleged only against an individual.

Therefore awarding the compensation on the ground of malafides in termination is not maintainable in law. The further contention of the learned counsel is that the findings of the malafides has been rendered without any evidence on record. Further the dispute itself is not arbitrable which has not taken note of by the learned Arbitrators. Further the Respondent has not challenged the finding of the Arbitral Tribunal as against the Issue No.1 and 2. The Respondent having accepted the full and final settlement (Ex.C.46) no claim /dispute survived for reference to arbitration. Hence submitted that the findings of the learned Arbitrators is perverse will go to the root of the matter. Hence submitted that the view of the Arbitral Tribunal is not even a possible view and the findings are not based on any evidence and the Award is suffered from inconsistency and perversity. Hence the same is liable to be set aside.

7. She placed reliance of the following judgments

1. SBI & Co –Vs- Patel Engineering Ltd. And Another ***[(2005) 8 SCC 618]***

2. Mahanagar Telephone Nigam Limited –Vs- Applied Electronics Ltd. & Another ***[FAO (OS) 138/2013 Ordered***

Date 28.07.2014]

3. Ms.X –Vs-Y Ltd. & Another ***[OP.No. 463 Of 2012 0rder Date: 2 Sep, 2014]***

4. Ssangyong Engineering & Constructions Co. Ltd vs. National Highways Authority of India (NHAI) ***[(2019) 15 SCC 131]***

8. Learned counsel appearing for the Respondent submitted that the learned Arbitral Tribunal took note of all the relevant facts and found that the termination was issued without any reasons and the same is attached with malafides which has been factually taken note of by the Arbitrators. Various documents analysed by the Arbitrators clearly proved the above fact. He further submitted that the dispute arose out of contract between the parties. Therefore it cannot be said that it is not arbitrable and the learned Arbitrator has found that the termination has been made without any reasons and no grounds have been made to interfere the Award. Hence prayed to allow the Cross Objection O.P.by dismissing the Original Petition.

9. In support of his contention he relied upon the following judgments:

1. *Booz Allen And Hamilton Inc –Vs- SBI Home Finance Limited And Others* ***[(2011) 5 SCC 532]***

2. *VimalKishoreshah And Others –Vs- Jayesh Dinesh Shah And Others* ***[(2016) 8 SCC 788]***

3. *A.Ayyasamy –Vs- A.Paramasivam And Others* ***[(2016) 10 SCC 386]***

4. *Himangni Enterprises –Vs- Kamaljeet Singh Ahluwalia* ***[(2017) 10 SCC 706]***

5. *Vidhya Drolia And Others –Vs- Dyrga Trading Corporation* ***[(2019) 20 SCC 406]***

6. *Suresh Shah –Vs- Hipad Technology India Private Limited* ***[(2021) 1 SCC 529]***

7. *N.N.GobalMercandilePvt. Ltd. –Vs- Indounique Flame Ltd. And Others* ***[(2021) SCC Online Sc 13]***

8. *Patel Engineering Limited –Vs- North Eastern Electric*

*Power Corporation Limited **[(2020) 7 SCC 167]***

*9. Lifestyle Equities CV PrinsBernhardplein, 1097 JB, Amsterdam, The Netherlands, Represented By Their Power Of Attorney Holder, Mr.AbhishekKotnala –Vs- QDSeatoman Designs Pvt. Ltd., 5th Floor, Status Quo, 38 Sterling Road, Nungambakkam, Chennai -34 Represented By Their Director And Others **[(2017) SCCOnlinne 7055]***

*10. Bharat Heavy Electrical Ltd. –Vs- Assam State Electricity Board **[CDJ 1989 Assam HC 158]***

10. The very dispute has been referred to the Arbitration in pursuance of the agreement entered between the parties. Clause 7 governing the parties. It is now well settled that when the parties of a contract agreed to settle the dispute, particularly in employer and employee relationship such dispute can be very well arbitrable. Therefore, merely because some statutory provisions applicable to the employer and employee that cannot be a ground to contend that the issue cannot be arbitrable. As the decision between the parties are personal in nature cannot be classified as the matter falls within the ambit of rights in rem. When the dispute mainly pertaining to the specific arbitration clause and binding on the parties alone

the rights in personam can be referred for the resolution in Arbitration. Though the special Act like the Tamil Nadu Shops and Establishments Act deal with the termination of the employee. It is to be noted it is not the case of the Petitioner/Respondent that the employee was terminated by exercising the power under the Shops and Establishemnts Act. Whereas very termination was issued pursuant to the Clause 14 of the contract by giving threemonth notice. Such view of the matter the contention regard to non-arbitrable has to fail. Therefore the contention of the learned counsel that the judgement of the larger Bench of the Ape Court in ***Vidya Drolia's case*** (supra) will apply to the facts of the case cannot be countenanced. The above judgment is with regard to the question of arbitrability between the landlord and tenant issue where the special statute protects the tenants. In the above judgment of the Apex Court held that the special protection governed by special law alone cannot be arbitrable whereas the landlord and tenant in general law could be arbitrable.

11. It is relevant to note that Clause 14 of the Employment Agreement is as follows:

"The engagement of the employee may be terminated

at any time by either party giving to the other three calendar months' notice provided that the company may if it shall so choose pay to the employee three months' salary in lieu of notice."

12. It is also relevant to note Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 is as follows:

41. Notice of dismissal—(1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one months notice or wages in lieu of such notice, provided however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

13. The conclusion of the Majority Award and Minority Award are as follows:

MAJORITY AWARD

"1. The clause 14 of the employment dated 24.02.2011 is not opposed to puplic policy and the provisions of TN Shops and Establishments Act being a Special Code which grants relief to the person employed, it would not be open to the Claimant to relief in the form of either a suit or in Arbitration proceedings in view of the provisions contained in Section 41(2) of The Shops Establishment Act.

2. The termination of the services of the Claimant being visited with malafides as there is no material to establish that the termination of services was done by a competent authority, the Claimant is entitled to compensation/ damages quantified at Rs. 20,58,500/- (Rupees Twenty Lakhs fifty eight thousand five hundred only)

3. The dispute raised by the Claimant is arbitrable.

4. The claim of the Respondent that the Claimant has received the sum of Rs. 7, 19,000/- in full and final settlement and therefore, there is no cause of action to *institute the arbitration proceedings, is rejected.*

5. Considering the facts of the present case, the parties shall bear the costs of the proceedings".

MINORITY AWARD

"The statutory requirement of providing reasons for termination must be read into Clause 14 of the Employment Agreement.

- *Clause 14 of the Employment Agreement is valid.*

- *The termination order dated 5.3.2014 is contrary to Clause 14 as no reasons have been provided for termination.*

- *The Claimant is entitled to claim damages.*

- *A sum of Rs. 220, 58,500/- is awarded to the Claimant as damages.*

- *Interest is award at the rate of 12% from the date of termination till date of payment."*

14. Though the learned Arbitral Tribunal has found that Clause 14 of the Agreement entered between the parties not opposed to public policy. The minority view of the Arbitral Tribunal is that Clause 14 of the contract empowering the employer to terminate without providing reasons, is contrary to Section 41 of the Tamil Nadu Shops and Establishments Act, 1947. However, Minority Decision it is held that merely because the termination clause is silent on the requirement of reasons for termination is not violative of Section 41 of the TN Shops and Establishments Act 1947 and observed that if there are two possible constructions – one rendering the clause invalid and the other preserving its validity – the construction which preserves the validity of the clause must be adopted and held that though Clause 14 of the Contract is assumed to be valid the requirement of providing for reason as set out in Section 41 of the Act must be imported into Clause 14. Therefore, the termination letter dated 05.03.2014 would be contrary to the terms of the Employment Agreement. But majority Award has held that the termination is valid under contract. But in entirety the Arbitral Tribunal factually found that the termination is attached with malafides.

15. The Majority Award has held that though the Clause provides for Termination, the termination is attached with serious malafides and Arbitral Tribunal has taken note of the fact that Ex.C.32 to 36 correspondence indicate that the employee was forced to resign and found that there was coercion on the part of the employer viz.,the petitioner herein. It is to be noted that the Respondent was originally joined as Salesman and finally he was promoted as Field Sales and Customer Manager in July 2011. At this stage agreement came into existence. It is specifically alleged by the Claimant that due to the harassment he was forced to resign in the year 2012, however, subsequently, at the intervention of the officials at Calcutta office he was persuaded to withdraw his resignation and he was again transferred to Chennai in 2013. In the Chennai Office he was put under constant threat and fear. The learned Arbitrators factually found that particularly from Exs.C.32 to 36 that employee was forced to tender his resignation as he did not heed for the petitioner. Therefore, Petitioner has simply invoked the Clause 14 of the contract taking advantage of the relevant clause. It is to be noted that Clause 14 as extracted above does not indicate the reasons to be given for termination. The clause in fact violates Section 41 of the TN Shops and Establishments Act, which require the reasons to be assigned while terminating the employee.

16. Be that as it may. At the time of termination invoking Clause 14 of the agreement no reasons whatsoever assigned. The learned Arbitrator in fact taken note of the various correspondences and come to the conclusion that termination is vitiated with malafides and termination letter was signed by the authority below the rank of appointing authority. It is also to be noted that various allegations raised by the Claimant in the chief examination not been controverted seriously. No evidence has been adduced by the Respondent. It is to be noted at the time of termination salary of the Claimant was Rs.98,427/-per month which has not been disputed. It is not denied by the Petitioner herein that the Claimant is eligible for Voluntary Retirement on completion of 21 years of service. The Claimant was only 50 years at the time of termination and his superannuation age is 60 years. Despite the fact that he was entitled for more amount if he was terminated. He has quantified the damages as Rs.20,58,500/- besides claiming another Rs.5,00,000/- towards loss suffered prior to his superannuation. Whereas the learned Arbitrators took note of the fact that the termination is not valid same is attached with malafides. Accordingly Tribunal awarded restricted amount with interest. This Court is of the view that the learned Arbitrators have taken note of all the factual

aspects and concluded that the Claimant is entitled for damages. But for termination he would have continued his service till his superannuation. Therefore, the amount Awarded by the learned Arbitrators is reasonable and much below the entitlement of the Claimant. Therefore, this Court do not find any infirmity to contend that the same falls within the ambit of perversity or any of the grounds set out in Section 34 of the Arbitration and Conciliation Act. Therefore the Original Petition is liable to be dismissed and the Cross Objection O.P.is disposed.

17. Accordingly, the Original Petition in O.P.No.554 of 2016 is dismissed and Cross Objection O.P.No.1 of 2017 is disposed. Award passed by Arbitral Tribunal is confirmed.

07.10.2021

Index : Yes
Internet : Yes
Speaking/Non-Speaking order
ggs

N. SATHISH KUMAR, J.
ggs

Common Order in:
O.P. No.554 of 2016 and
Cross Objection O.P. No.1 of 2017

07.10.2021