

Bombay High Court Sahyadri Earthmovers vs L & T Finance Limited & Anr
on 28 March, 2011 Bench: Anoop V.Mohta 1 arbp-1283-10.sxw

dgm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1283 OF 2010

Sahyadri Earthmovers Petitioners
vs

L & T Finance Limited & anr. Respondents

Mr. U. S. Samudrala for the petitioners.

Ms. S.I. Joshi i/by M/s.S.I.Joshi & Co. for respondent no.1.

CORAM: ANOOP V. MOHTA, J.

DATE : March 28, 2011 ORAL JUDGMENT: Heard finally by consent of the parties. 2 The Petitioners have invoked Section 9 read with Section 19 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act), basically against the communication dated 17.08.2010, of the Arbitrator. The prayers of the Petitioners are as under : (a) This Hon'ble Court be pleased to direct Respondent No.2, the learned sole Arbitrator to formulate and prescribe the

appropriate legal procedure for adjudicating the arbitration proceedings and convening the arbitration meetings and more particularly to record the 2 arbp-1283-10.sxw evidence as per the Indian Evidence Act; (b) This Hon'ble Court be pleased to direct Respondent No.2, the learned sole Arbitrator to give consideration for all the Acts applicable so that the proceedings cannot be in conflict with the Public Policy of India; (c) Pending the hearing and final disposal of the present Petition, the above arbitration proceedings before Respondent No.2 may please be stayed; 3 The first and foremost thing is that Section 9 or Section 19 or any other Section under the Arbitration Act, nowhere permit a party to challenge such order passed by the Arbitrator pending the arbitration proceedings. It is neither final award and/or interim award. Therefore, there is no question of invoking even Section 34 of the Arbitration Act. The Arbitration Act permits or provides the power of Court to entertain or interfere with the order passed by the Arbitrator, only if it is prescribed and not otherwise. Section 5 of the Arbitration Act is very clear which is reproduced as under : 5 Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." 4 Therefore, the present Petition as filed itself is not maintainable. 3 arbp-1283-10.sxw

5 The basic of the Petitioner appears to know the procedure which

the Arbitrator is required to follow in conducting its affairs. There

are no prescribed Rules, Regulations and/or guidelines provided under the Arbitration Act and, therefore, the Petitioner moved an application before the Arbitrator dated 4.08.2009 for deciding the procedure to be adopted by the Tribunal for conducting the arbitration proceedings. Admittedly, the parties have not agreed on the procedure to be followed by the Arbitral Tribunal. Therefore, all are bound by the provisions of the Arbitration Act for conducting the arbitration proceedings. 19 Determination of rules of procedure. - (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872). (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. (3) Failing any agreement referred to in sub- section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. (4) The power of the arbitral tribunal under sub- section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence." 4 arbp-1283-10.sxw

6 Section 19 of the Arbitration Act, which is reproduced

contemplates when the parties agree on a particular procedure to be followed by the Arbitral Tribunal, all are bound to follow the same, but in its absence, the Arbitral Tribunal is bound to conduct the proceeding in the manner it considers appropriate. It also means that the Arbitrator has power to determine the admissibility, relevance, materiality and weight in evidence though the provisions of the Code of Civil Procedure and/or Indian Evidence Act, are not binding upon the Tribunal. 7 The principles of natural justice, fair play, equal opportunity to both the parties and to pass order, interim or final, based upon the material/evidence placed by the parties on the record and after due analysis and/or appreciation of the same by giving proper and correct interpretation to the terms of the contract, subject to the provisions of law, just cannot be overlooked. 8 The arbitration is basically a creature of a consent contract. (I) The role of an arbitrator is to resolve the issues efficiently and effectively by according fair and equal treatment to the parties and to pass effective and executable award. 5 arbp-1283-10.sxw (II) "An Arbitration is nothing but a mini-trial before a private Judge" or Arbitral Tribunal appointed by the parties in view of their Arbitration agreement, to resolve their dispute, conflicts, honestly and judicially within the frame work of law and the record. 9 The parties by consent may adopt their own procedure for conducting arbitration. An Arbitral Tribunal is not a Court. Any lacuna in procedure do not vitiate the Award, unless it is in breach of principle of natural justice, equity, fair play by the aggrieved parties. 10 As various doubts are raised for want of guidelines, specially in view of Section 89 of Code of Civil Procedure, where arbitration is also an Alternate Dispute Resolution (ADR) method, I am inclined to observe the basic parameters as under. THE BASIC PARAMETERS: Disclosure- Impartial - independent-unbiased Arbitrator and acceptance. (i) The Arbitrator must disclose his personal or pecuniary interest as contemplated in Sections 12, 13 of the Arbitration and 6 arbp-1283-10.sxw Conciliation Act, 1996 (for short, the Act) immediately after and/or before giving consent to be appointed as an Arbitrator (and/or any stage before the matter proceeds further) i.e. at the earliest opportunity for honest, judicial and binding decision. The Arbitrator must communicate and inform its acceptance to both the parties. Choice of Law and fees and schedule to speed up the arbitration . (ii)The Arbitrator and the Parties must decide the fees of the Arbitrator and/or cost of the proceed if any. (iii)The Arbitrator/Parties must decide the venue, place and necessary staff/steno and regulate the course of hearing to complete the proceedings within reasonable time and without delay and the burdensome cost. (iv)The Arbitrator is bound by the agreed procedure and governing laws and the venue. Valid Notices and Service (v)The Arbitrator is bound to serve the notice of arbitration proceeding on Respondent or other side. The service acknowledgment and/or affidavit of service may be asked for record. If parties appear voluntarily then there is no question of 7 arbp-1283-10.sxw sending notice of commencement of the arbitration proceedings. Pleading - Claim-defence- counter claim- inspection documents (vi)The Petitioner/claimant to file claim petition with details particulars and supporting documents, if any. The Respondents be permitted to file reply/defence/rejoinder/counter claim/ set off and supporting documents,

if any. The Arbitrator may direct the parties to file a list/ compilation of documents and call for more informations or details. The parties may admit or deny the documents, after due inspection of the documents. Interim order or protective order (vii) The Arbitration Act (S/17) empowers the Arbitrator to pass just and equitable, appropriate interim or protective order, pending the arbitration proceedings before him, relates to the “subject matter of the dispute for and against the parties unless agreed otherwise. This power operates during the existence of the tribunal. Binding Procedural Rules to conduct Arbitration- (viii) Once all the parties appear, the Arbitrator must decide and/or discuss the procedure to be followed in conducting the 8 arbp-1283-10.sxw proceedings, if not already decided or agreed, including the governing law. Binding terms and the reference- (ix) The Arbitral Tribunal needs to proceed in accordance with the terms of the agreement and or the reference, taking into consideration the choice of law or governing law. The issues- for proper trial (x) The Arbitrator may direct the parties to file their respective issues though it is not mandatory. The issues are helpful for the proper and effective trial. (xi) The Arbitrator, after hearing the parties, may finalise the issues. List of the witnesses-Call for the witness (xii) The parties, if they want to examine witness, may file a list of witnesses. If necessary, seek order from the Court under Section 27 of the Arbitration Act, to call necessary witness with or without documents. The evidence in chief - through affidavits-inspection- cross examination- re-examination, if necessary, including Video 9 arbp-1283-10.sxw conference/process. (xiii) The Arbitrator, if decided by the parties, direct the claimant to file affidavit in support of the claims and permit the Respondents to cross-examine and also permit the Respondent to file affidavit in chief in support of their defence; and permit cross examination to the other side and/or follow such other procedure. This can be done, if agreed, through video conferences. Expert report/witness (xiv) The Arbitrator may permit the parties to call an expert witness and/or report or by consent call for expert evidence/report. Mediation and conciliation (xv) The Arbitrator by consent of the parties, may refer the matter for mediation/conciliation. Arbitrator’s power to dismiss for default or pass exparte award. (xvi) The Arbitrator is entitled to dismiss the Arbitration Petition in default if the Petitioner/claimant is absent. The Arbitrator is also empowered to pass an exparte award, if the Respondent or his Advocate is absent. But still must act fairly and honestly. 10 arbp-1283-10.sxw

Equal and fair treatment

(xvii)The Arbitrator must give equal opportunity to both the parties and, therefore, bound to follow the principles of natural justice, fair play and equity. CPC & Evidence Act (xviii) Though Code of Civil Procedure and the Evidence Act are not applicable strictly, (Section 19), but the settled principles do apply. The power of Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence just cannot be overlooked. To decide jurisdiction : (xix)The Arbitrator is empowered to decide his own jurisdiction if objected

and even the issue of existence of arbitration agreement (S/16). It should be decided as early as possible by passing reasoned order, as this could be additional ground of challenge u/Section 34 of the Arbitration Act. Substantial laws- customs-commercial usages and practice (xx)The Arbitrator is bound by the substantive laws of the land as well as procedural laws and practice and principle apart from the custom and usage of the trade referring the business and commerce between the parties, in all respects. 11 arbp-1283-10.sxw To Analyse the evidence and the record (xxi)The Arbitrator is required to consider all the material and evidence/documents placed by the parties on record read with the evidence led by the parties. The Arbitrator is, therefore, bound to analyse and appreciate the same by giving proper and correct interpretation of terms of the contract subject to provisions of law, before passing reasoned interim or final award. The Arbitrator to pass reasoned interim and/or final award, unless agreed otherwise. To award interest-pre-post-future interest- as agreed if not as per the law (xxii) The Arbitrator is required to consider/grant pre/post, pending and future interest as contemplated under Section 31 of the Arbitration Act. The Doctrines to be followed (xxiii)The Arbitrator cannot disregard the substantive and procedural law. The Arbitrator is therefore bound to take note of law; of interpretation, precedent, obiter dicta, ratio decidendi, Estoppel, acquiescence, waiver and res judicata, public policy, natural justice, fair-play and equity. 12 arbp-1283-10.sxw The communication/service of the award/interim or final. (xxiv)The Arbitrator, if other side is absent, needs to send/serve a copy of the signed arbitral award as per the law so that the aggrieved party may take appropriate steps to challenge the same within limitation and as it is also enforceable, executable like decree. (xxv) The Arbitrator, if application is moved, may correct an error or clarify the award, as contemplated under Section 33 of the Arbitration Act. 11 These are only basic parameters. The Arbitrator and the parties can agree for their own terms and the procedure for the Arbitration. I am not dealing with international/commercial arbitration practice & procedure, though above parameters are normally followed even in such Arbitration proceedings. Above basic elements in no way should affect or override the rules or regulations as contemplated under Section 82 of the Arbitration Act. 12 I have already observed referring to Section 34 of the Arbitration

Act in Jigar Vikamsey vs. Bombay Stock Exchange Limited, 2010 (1) Bom. C.R. 908 in para 11 as follows: “11 The Petition is under Section 34 of the Act. The Apex Court recently in G. Ramchandra Reddy & Company v. Union of India & anr., (2009) 6 SCC 414 and in Madhya Pradesh Housing Board v. Progressive Writers and Publishers, (2009) 5 SCC 678, while dealing with both the Arbitration Acts and considering the principles to challenge the Arbitral Award has re-iterated the following points : (a) The re-appraisal of the evidence by the Court is not permissible (Ispat Engineer Foundary Works vs. Steel Authority of India, (2001) 6 SCC 347). An Award of an Arbitrator need to be

read as a whole to find out the implication and meaning thereof of the reasons. The Court, however, does not sit in Appeal over the Award. (b) The interference, where reasons are given would still be less, unless there exists a total perversity and/or the Award is based on a wrong proposition of law. (c) Even if two views are possible on an interpretation of central clause, that would not be justification in interfering with the Award specially when the view so taken is possible/plausible one (Sudarshan Trading v. Allied Construction (2003) 7 SCC 396). [G. Ramchandran (Supra)] But the interpretation of the clause which is wholly contrary to law should not be upheld by the Court. [Numaligarh Refinery Ltd v. Daehim Industrial Co. Ltd., 2007(10) SCALE 577/(2007) 8 SCC 466] (d) The jurisdiction of the Court to interfere with an Award made by an Arbitrator is limited, unless there is an error apparent on the face of the Award and/or jurisdictional error and/or legal mis-conduct. [Numaligarh Refinery Ltd (supra). (e) The wrong point of law and apparent, improper and incorrect findings of facts which are demonstratable on the face of the material on record, may be treated as grave error and/or legal misconduct. (g)"From the above decisions, the following principles emerge: (a) An award, which is

14

arbp-1283-10.sxv

- (i) contrary to substantive provisions of law; or (ii) the provisions of the Arbitration and Conciliation Act, 1996; or or (iii) against the terms of the respective contract; or
- (ii) patently illegal; or
- (iii) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.
- (b) The award could be set aside if it is contrary to : (a) fundamental policy of Indian law; or (b) the interest of India; or
- (c) justice or morality.
- (c) The award could also be set aside if it is so unfair

and unreasonable that it shocks the conscience of the court.

- (c) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India." [Delhi Development Authority vs. R.S.Sharma & Co.- (2008) 13 SCC 80]. 13 The Code of Civil Procedure also provides for invocation of Arbitration Act in view of Section 89. Therefore, if the parties agree for appointment of the Arbitrator to settle their dispute, it is necessary to follow the provisions of the Arbitration Act. But in case like this, where the parties knowing fully the contents of the commercial document including the arbitration clause in question, agreed and permitted the Respondent to invoke the arbitration

clause in case of default, that goes to the root of the matter as both the parties by 15 arbp-1283-10.sxw consent agreed to proceed to settle their disputes by invocation of the Arbitration Act. 14 In the present case, the Arbitrator on application filed by the Petitioner has observed as under : "In the above matter, Respondents have made application dated 4.08.2009 for deciding the procedure to be adopted by the Tribunal for conducting the Arbitral Proceedings. This is to inform the parties to dispute that after filing respective reply and rejoined by the parties based upon the said proceedings, issues will be framed and the matter will be taken up for hearing. Parties to dispute are directed to note that hearing of the dispute shall be based upon the documentary evidences and as such as soon as the parties to dispute have filed their respective reply and rejoinder, they are directed to file their respective compilation of documents. The above proceedings shall be conducted subject to the provisions of the Arbitration & Conciliation Act, 1996. However, at the time of hearing of the dispute parties are at liberty rely upon any Act and judgments in support of their respective contentions to enable the Tribunal to decide the above dispute on merits. I, therefore, direct the parties to dispute as under :

1. M/s. Sahyadri Earthmovers and Mr.Kailash K. Kamthe to file their reply within 3 weeks from today and serve copy thereof upon L & T Finance Ltd.
2. Rejoinder, if any within 2 weeks thereafter.
3. Parties to dispute are directed to file their respective compilation of documents within two weeks thereafter. 16 arbp-1283-10.sxw
4. Parties to dispute are directed to file their respective issues within a weeks time thereafter. Based upon the proceedings filed and draft issues submitted by the parties, the Tribunal shall proceed to finalise the issues. Parties to dispute are directed to comply with the above directions and remain present on the next adjourned date, time and place. Next meeting in the above dispute for hearing will be fixed by my separate notice." 15 The above reading of the order/communication of the Arbitrator shows that he has applied the procedure and given full opportunity to the Petitioner as required to conduct the arbitration proceedings in accordance with law. At this stage, therefore, no fault can be found with this procedure so adopted and expressly mentioned. 16 The Petitioner and/or such other person are at liberty to move such appropriate application and request for opportunities which are available within the frame work of law and considering the scope and purpose of the Arbitration Act. However, at the same stroke, it is necessary to observe that the parties just cannot be permitted to file frivolous or such applications just to proceed to delay the arbitration proceedings. The Arbitration Act itself provides and permit the Arbitrator to handle and to tackle such situation in view of Sections 18 to 33. It is the duty and obligation of the Arbitrator to conduct the 17 arbp-1283-10.sxw proceedings within the frame work of law without delay.

17 In view of the above, the present Petition is disposed off accordingly.
There shall be no order as to costs. (ANOOP V. MOHTA, J.)