
(1992) 02 BOM CK 0026

Bombay High Court

Case No: Arbitration Petition No. 9 of 1992, in Arbitration Suit No. 3375 of 1987

Eurrestra Industries
Ltd.

APPELLANT

Vs

Karnataka Soaps and
Detergents Ltd.

RESPONDENT

Date of Decision: Feb. 11, 1992

Acts Referred:

- Arbitration Act, 1940 - Section 20

Citation: AIR 1992 Bom 352 : (1992) 1 BomCR 543

Hon'ble Judges: D.R. Dhanuka, J

Bench: Single Bench

Advocate: D.R. Zaiwala and P.N. Mody, instructed by Bachubhai Mumim and Co, for the Appellant; M.H. Shah, B. Anand and B.N. Vaidya, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. By this petition, Eurrestra Industries Limited has sought a declaration that the learned Umpire Shri Y. V. Chandra-chud, the retired Chief Justice of India, has entered upon the reference and that Shri K. Balasubramanyam and Dr. S. H. Kanga have become functus officio and for other directions.

2. This petition involves consideration of the following questions :--

I. a) Whether the Arbitrators have allowed time to expire without making Award as a result of any neglect or inaction or any other fault attributable to them?

b) Whether a case is made out for extension of time to make the Award by the Arbitrators?

II. a) Whether the arbitrators have disagreed in making on the Award or in respect of a matter concerning the arbitration and notified their alleged disagreement to the parties or to the Umpire? If so, whether the Arbitrators are divested of their jurisdiction to proceed further with the arbitration proceedings and make an Award?

b) Whether the Umpire has jurisdiction to enter upon the reference at this stage?

c) Whether the Arbitrators have issued any notice in writing of their alleged disagreement to the parties or to the Umpire?

Para 4 of the First Schedule to the Arbitration Act, 1940 reads as under :--

"4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they can not agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators."

3. I must state right at the outset that there is no merit in this petition. I shall discuss the details in the later part of this judgment.

4. This petition presents a peculiar situation where the petitioner contends that the Arbitrators have disagreed amongst themselves so as to attract jurisdiction of the Umpire, but the Arbitrators in terms contend that they have not disagreed on any aspect of the matter. The Arbitrators are ready and willing to complete the arbitration proceedings and make the award. It is well settled that an Umpire has no jurisdiction to enter upon the reference unless one of the two contingencies specified in para 4 of the First Schedule to the Act arises.

5. It is necessary to set out the material facts in detail. The relevant facts are as under :--

(a) On 12th August 1980, the petitioner and the predecessor-in-title of the respondent entered into a contract. Under the said contract, the petitioner agreed to supply a plant on turnkey basis to the predecessor-in-title of the respondent.

(b) It is the petitioner's case that the petitioner could supply the said plant only in March 1984. The petitioner contends that the respondent committed breach of several of their obligations under the said contract. It was provided by the said contract that the plant in question would have capacity of manufacturing 20,000 tonnes per annum and recovery of glycerine as bye-product thereof etc.

(c) Disputes and differences arose between the parties concerning the performance of rights and obligations under the above referred contract. Both parties made claims against each other and raised several disputes. It is not necessary to set out details of disputes and claims for purpose of disposal of this petition.

(d) By their Advocate's letter dated 26th October 1987, the respondent made claims against the petitioner on the grounds set out therein. By the said letter, the respondent called upon the petitioner to pay a sum of Rs. 2,013.82 lacs. In default, the respondent threatened to adopt legal proceedings against the petitioner. The said claim was subsequently increased by the respondent to Rs. 30 crores and odd.

(e) Soon thereafter, the petitioner invoked the arbitration clause contained in the said contract dated 12th August 1980. The petitioner appointed Dr. Sarosh H. Kanga as an Arbitrator. The petitioner addressed a letter dated 14th November 1987 to the respondent in this behalf. The petitioner quickly filed Arbitration Suit No. 3375 of 1987 in this Court on 19th November 1987 and obtained leave of this Court under Clause XII of Letters Patent on the same day. The petitioner contended in the plaint in the said arbitration suit that a material part of the cause of action had arisen in Bombay and this court has jurisdiction to entertain the said petition u/S. 20 of the Arbitration Act, 1940. On 27th November 1987, the respondent appointed Shri K. Balasubramanyam as an Arbitrator to decide the disputes. The learned Arbitrators appointed Shri Y. V. Chandra-chud, retired Chief Justice of India, as an Umpire.

(f) By an order dated 19th August 1988. Pendse, J. granted extension of time for the above referred Arbitrators to make the Award. The said order was a consent order. The arbitration proceeded smoothly till 29th August 1991. Later on, by two orders passed by Variava, J. time was further extended for the Arbitrators to make the Award. By last of such order, time was extended to make the Award upon 31st December 1990. On 28th December 1990, chamber summons was taken out by the petitioner, being Chamber, summons No. 1373 of 1990, for further extension of time to make the award up to end of June 1991 or such further time as the Court deems fit. I have just now disposed of the said chamber summons and granted extension of time to the learned Arbitrators to make the Award by 31st December 1992. It was stated in paragraph 26 of the affidavit in support of the said Chamber summons that the said application was made with consent of parties as parties were desirous of proceeding further with the said arbitration. During pendency of the said chamber summons, arbitration meetings were held with consent of parties and the parties willingly participated in the arbitration proceedings till very recently.

(g) Disputes and differences between the parties can be characterised as "technical disputes" concerning the actual capacity of the plant supplied as well as commercial disputes. The respondent examined 9 witnesses before the Arbitrators. The said witnesses were thoroughly cross-examined on behalf of the petitioner, consuming considerable time i.e. about 100 meetings. Having regard to the stakes and the issues involved, the learned Arbitrators appear to have granted reasonable latitude to the parties to place their respective cases before the Arbitrators. Both parties were represented by senior counsel before the Arbitrators. No grievance of any nature whatsoever was made before the learned Arbitrators concerning lack of reasonable despatch or otherwise, till 28th August 1991. Sometime back the Arbitrators increased duration of their sittings in order to speed up the arbitration.

(b) On 28th August 1991, the petitioner contended before the learned Arbitrators for the first time that the arbitration proceedings were going on at an extremely slow speed. It has been averred in paragraph 11 of the petition that at this meeting the petitioner's counsel requested the Arbitrators to control the cross-examination of their witness Shri Arun Malvi as the cross-examination of the said witness was being prolonged by the respondent. After hearing the learned counsel at some length, I am satisfied that the learned Arbitrators did not waste any time. I am unable to persuade myself to take the view that the Arbitrators were at fault or can be said to be guilty of inaction or neglect in this behalf. If the learned Arbitrators were misbehaving and wasting time as now alleged, the petitioner would not have made the protest in respect of length of cross-examination of witness Arun Malvi for the first time on 28th August 1991 only. Witness Malvi has deposed on technical aspect of the plant also. The parties have already spent a sum of Rs. 18,16,288.77 on the fees and other expenditure of the learned Arbitrators as averred in the petition. It appears that witness Arun Malvi, the first witness of the petitioner, is deposing to technical and various other aspects concerning the supply of plant and having regard to the material brought on record in the cross-examination of mine witnesses of the respondent, the cross-examination of witness Malvi examined by the petitioner has also taken quite some time. I will assume that part of cross-examination of witness Malvi was perhaps unnecessary. The Arbitrators cannot be blamed on this court, merely because the Arbitrators granted some latitude to cross-examining counsel.

6. Shri Zaiwala, the learned counsel for the petitioner, has invited my attention to the judgment of High Court of Calcutta in the case of *Robindra Deb Manna v. Jogendra Deb Manna*. AIR 1923 Cal 410. In this case it was held by Rankin, J. that the Arbitrators should not be allowed to Continue with the proceeding ad infinitum and the Court was bound to intervene after the Arbitrators themselves were proved incorrigible. There can be no dispute about the principles laid down in this case. However the said ratio has no application to the facts of this case. The Court must have respect for the dignity of the domestic forum i.e. the Arbitrators and for the delicate task which the Arbitrators are called upon to perform. Unless the Court can judicially reach a conclusion that the Arbitrators are guilty of deliberate inaction or are prolonging the matter with ulterior motive or are unable to conduct the arbitration proceedings as expected of them or guilty of gross negligence, the Court cannot intervene so as to deprive the arbitrators of their jurisdiction to complete the arbitration proceedings and make the Award. It must be stated with all firmness as a matter of principle that the continuance or discontinuance of the arbitration cannot be made to depend upon the unilateral wish or mood or whim of a party. A party cannot be relieved from his obligation to participate in the arbitration proceedings and abide by the Award merely by making some sort of allegation against the Arbitrators. I have no hesitation in rejecting the insinuations made in the petition against the learned Arbitrators. I hold that the petitioner has failed to substantiate these allegations. I am not prepared to hold that the Arbitrators have permitted frivolous cross-examination to go on and the Arbitrators are directly or indirectly guilty of any misconduct. There is no reliable material in support of these wild allegations. As a matter

of fact, the Advocate for the petitioner had approached Shri Y. V. Chandrachud, the learned Umpire, only on the ground that the learned Arbitrators could not agree upon certain matters at the meeting held on 25th October 1991 as recorded in the notes of evidence of witness Arun Malvi. Now as a matter of flourish, it is also argued that the arbitrators have allowed their time to expire. Time fixed for the arbitrators to make the Award had already expired on 31st December 1989. Very large number of arbitration meetings were thereafter held with consent of parties. Parties proceeded with the arbitration voluntarily and willingly in anticipation of obtaining consent order of extension from this Court. Can it be therefore said that the arbitrators have allowed their time to expire as a result of any inaction or neglect on their part or otherwise? The answer obviously is in negative. At any rate, this court has ample jurisdiction to extend the time for proceeding further with the arbitration and making of the award. After taking an overall view of the matter, I have already extended time for the Arbitrators to make the Award up to 31st December 1992.

7. On 25th October 1991, a meeting of the above referred arbitration took place. At this meeting, the learned cross-examiner representing the respondent asked certain questions to witness Arun Malvi. Relevant extracts from notes of evidence recorded on 25th October 1991 indicate that Shri Kanga had then expressed an opinion to the effect that certain question may not be allowed and the cross-examination should be streamlined. Dr. Kanga made some such observation. The relevant notes of evidence (Ex. F to the petition) indicate that thereupon the learned counsel for the respondent Shri Shanta Raju explained the relevance of the question to the learned arbitrator. Thereupon Shri Balasubramanyam, another learned arbitrator, observed that he did not agree with the view expressed by his co-Arbitrator that some of the questions put to witness Malvi in cross-examination were unnecessary. In view of differing observations made at the said meeting, the learned counsel for the petitioner applied to the Arbitrators for time to consider the line of action to be adopted by the petitioner. The learned Arbitrators did not take a final view on the subject. The petitioner had already made up its mind to back out of the arbitration and was in haste to abandon the arbitration midstream. The petitioner had already made some protest over the length of cross-examination of witness Malvi at the meeting held on 28th August 1991. Minutes were prepared in respect of the 146th meeting held on 25th October 1991. Copy of the said minutes are Exhibit "C" to the petition. It was recorded in the said minutes that the cross-examination of Shri Arun Malvi was postponed in view of the request made by the learned counsel for the petitioner that he should be allowed time to consider the implication of the differing views expressed by the Arbitrators on admissibility of certain questions. (The underlining is done to supply emphasis). It was decided by the Arbitrators at the said meeting that the proceedings be adjourned to 20th November 1991. It was also recorded in the minutes of the said meeting that the proceedings were adjourned to 20th November 1991 without prejudice to such action as counsel for the petitioner may consider necessary in light of differing opinion expressed by the two Arbitrators. To my mind, it is clear that the Arbitrators had not made up their mind as to whether the relevant questions should be allowed or not and

the matter was merely at the stage of "loud thinking" or making of tentative observations. The learned Arbitrators formulated questions for being answered by counsel. The learned Arbitrators were even entitled to resolve their co-called difference of opinion by debate or discussion at the next meeting i.e. before issuing a notice in writing to the parties or to the Umpire that there was a disagreement between them. Unfortunately the petitioner decided not to attend the meeting fixed by the Arbitrators on 20th November 1991. The petitioners decided to boycott the arbitration proceedings on the assumption that the petitioner could unilaterally approach the learned Umpire to enter upon the reference. The petitioners addressed a letter to Shri T. Y. Chandrachud, retired Chief Justice of India, learned Umpire in the case, requesting him to enter upon the reference as, according to the petitioner's interpretation of the minutes of 146th meeting, the Arbitrators had already differed on certain points. The learned Umpire rightly took the view that he could not enter upon the reference until the Arbitrators give a notice in writing regarding their alleged disagreement, to the Umpire or to the parties. No arrangements were made for the travel of Dr. Kanga to travel from Bombay to Bangalore as done heretofore. Dr. Kanga may have been appointed as an Arbitrator by the petitioner, but owed loyalty "to the cause" and not to the appointing party. Dr. Kanga did travel to Bangalore and the arbitration meeting was held on 20th November 1991. Minutes of 147th meeting of the arbitration are available to this Court. The petitioner decided to boycott the meeting. It was most unfortunate. The Arbitrators forwarded a copy of the minutes of the meeting held on 20th Nov. 1991 to the parties. The Arbitrators addressed a letter to the Umpire, copy whereof is annexed at Exhibit "I" to the petition. By their letter dated 20th November 1991, both the Arbitrators informed the learned Umpire that the observations made by Dr. Kanga on the question of admissibility or inadmissibility of certain questions were not a decision upon an issue but merely a proposition put forth to elucidate a reply from the claimant's counsel. Both the learned Arbitrators informed the Umpire that they had not differed at all on any issue and as such the conditions stipulated under para 4 of Schedule I to the Arbitration Act, 1940 have not been satisfied. The learned Arbitrators took a correct view of the matter. The learned Arbitrators dissolved their tentative difference of opinion, if any. The learned Arbitrators were entitled to do so. The learned Arbitrators had never issued any notice in writing to the parties or to the Umpire regarding their alleged disagreement, if any. The petitioner approached the learned Umpire at the premature stage i.e., at the stage when the Umpire had no jurisdiction to enter upon the reference.

8. The petitioner has made a grievance in the petition that Dr. Kanga ought not to have travelled to Bangalore on his own when arrangements were not made for the same by the petitioner. The petitioner has also made a grievance against Dr. Kanga to the effect that Dr. Kanga tried to contact witness Arun Malvi to find out whether the meeting dated 20th November 1991 was going to be held or not. The petitioner ought to have appeared before the Arbitrators and then asked for an adjournment. Instead of adopting this course, the petitioner boycotted the meeting held by the Arbitrators on 20th November 1991. I do not see anything wrong on the part of Dr. Kanga in travelling to Bangalore on his own for the purpose of conducting the arbitration proceedings as already announced in the 146th

meeting. In my opinion, Dr. Kanga adopted reasonable course of action.

9. It is impossible to agree that the Arbitrators misconducted themselves or the arbitration proceedings at any time.

10. Further question which may arise for consideration of the Court in a given case is as to what is "disagreement" within meaning of second part of para 4 of Schedule I to the Act. The Arbitrators must disagree on an important or essential point in dispute before the second part of para 4 of Schedule I can be attracted. If one of the Arbitrators refuses to permit certain evidence which the other Arbitrator thinks is essential, it is undoubtedly a disagreement. The different view taken by the Arbitrators must be a definite and final view. It is imperative that the Arbitrators must serve a notice in writing on the Umpire or on the parties that they cannot agree. The notice to be issued by the arbitrators must be clear and specific. No such notice has been issued in this case. Merely furnishing copy of the notes of evidence reflecting making of different observations by the arbitrators in respect of question asked to a witness in cross-examination coupled with an adjournment of the meeting for further consideration does not amount to notice in writing by the Arbitrators. In [Keshavsinh Dwarkadas Kapadia, etc. Vs. Indian Engineering Company](#), it was held by the Apex Court as under (at p. 1544 of AIR) :--

"As to what constitutes disagreement cannot be laid down in abstract or inflexible propositions. It will depend upon the facts of the case as to whether there was a disagreement."

11. Both the learned counsel have invited my attention to passages from well known work of Russell on Arbitration, 20th Edition, at page 241, for the purpose of elucidating the point as to what constitutes a disagreement between the Arbitrators so as to attract jurisdiction of umpire. It has been observed by the learned author that the non-agreement between the arbitrators must be on important points and must be equivalent to disagreement. Illustration 2, out of 6 illustrations given by Russell based on decided cases is of some significance. It reads as under :--

"2. One of the two arbitrators insisted on the production of further evidence and the other refused to allow it. Held a sufficient disagreement between the arbitrators to authorise the inference of the umpire : Cudliff v. Walters (1839) 2 MR 232."

12. In the result, I hold that there was no disagreement between the Arbitrators. Whether there was disagreement between the Arbitrators or not is for the Arbitrators to state. The Arbitrators state that they have never disagreed. The petitioner applies for judicial imprimatur of this Court on the unilateral view taken by the petitioner that the Arbitrators have differed. Even if there was some difference of opinion between the learned Arbitrators at some stage, the Arbitrators were entitled to resolve the difference of opinion by debate and discussion amongst themselves with the help of the learned counsel or otherwise and a party to the reference could not deprive the arbitrators of their jurisdiction

by unilateral approach to the learned Umpire at a premature stage. I am inclined to accept the version of the learned Arbitrators set out in their letter dated 20th November 1991 addressed to the Umpire.

13. In my opinion, the second part of contingencies specified in para 4 of Schedule I to the Arbitration Act is not attracted until the Arbitrators issue notice in writing to the Umpire or to the parties in respect of their disagreement in respect of making of Award or any other important matter concerning the arbitration. The expression "notice in writing" must also be construed in the formal and technical sense of that term. Issue of notice in writing by the Arbitrators is a condition precedent to the invocation of jurisdiction of Umpire under latter part of para 4 of Schedule I to the Act. No such notice can be spelt out by implication or inference. It is a juridical condition and must be strictly complied with.

14. In order to avoid controversies in future, I must refer to one of the contentions raised on behalf of the respondent in the affidavit filed though not pressed at the Bar during the course of arguments. The respondent contends that this Court has no jurisdiction to entertain this petition. The petitioner contends in its pleadings from time to time that a material part of the cause of action has arisen in Bombay and on leave being granted under Clause XII of the Letters Patent, this Court would have jurisdiction. Several orders for extension of time to make the Award have been obtained by the parties from this Court virtually by consent and acted upon. In all probability, the learned counsel for the respondent must not have pressed the question of jurisdiction in view of the above facts. At any rate, there is no merit in this contention. This Court has jurisdiction to entertain the proceedings in view of the leave granted under clause XII of the Letters Patent and in view of the averments made in paragraph 18 of the plaint that a material part of the cause of action has arisen in Bombay. It is necessary to decide this point in order that this contention is not raised again and again.

15. In the result, the petition fails. The petition is dismissed. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

16. The learned Arbitrators shall proceed with the arbitration expeditiously on the basis of ordinary copy of this order duly authenticated as true copy by the Chamber Registrar of this Court. Issue of certified copy is expedited.

17. Learned Advocate for the petitioner applies for stay of operation of this order. Having regard to facts of this case, the application is refused. It is in interest of justice to expedite the arbitration proceedings. The Arbitrators are requested to expedite the proceedings.

18. Petition dismissed.