

(2012) 02 BOM CK 0206

Bombay High Court

Case No: Arbitration Petition No. 110 of 2012

Board of Control for Cricket in
India

APPELLANT

Vs

KPH Dream Cricket Pvt. Ltd.

RESPONDENT

Date of Decision: Feb. 24, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 17, 9

Citation: (2012) 5 BomCR 317

Hon'ble Judges: Anoop V. Mohta, J

Bench: Single Bench

Advocate: T.N. Subramaniam, assisted with Mr. Nikhil Sakhardande assisted with Mr. Indranil Deshmukh assisted with Mr. Rahul Mascarnhes assisted with Mr. Adarsh Saxena instructed by Amarchand and Mangaldas and Suresh A. Shroff and Co, for the Appellant; Shyam Mehta a/w Mr. A.S. Doctor with Mr. R. Daulat with Mr. A.R. Borkar instructed by Doijode and Associates, for the Respondent

Judgement

Anoop V. Mohta, J.

The petitioner has invoked section 9 of the Arbitration and Conciliation Act, 1996 and prayed as under:-

(a) that pending the hearing and final disposal of the arbitration proceedings and the implementation of the Award therein, this Hon"ble Court be pleased to direct the Respondent to furnish a unconditional guarantee of a Nationalised Bank to the satisfaction of the Prothonotary and Senior Master in a sum of US \$ 5,480,000/- (United States Dollars Five Million Four Hundred and Eighty Thousand only) or in the event of the necessary permissions not being available at present, the rupee equivalent thereof to secure the loss of interest for the year 2012.

2. The Petitioner and the respondent had entered into franchise agreement dated 10th April, 2008 whereby the respondent has awarded Punjab franchise in the

Indian Premier League (IPL). The petitioner vide letter dated 10th October, 2010 terminated the agreements on various counts. The Respondents, therefore, filed Arbitration Petition (Lodging) No. 1303 of 2010 and vide order dated 8th December, 2010 by the reasoned order, the petition was disposed of. The same order was confirmed by a Division Bench of this Court in Appeal No. 16 of 2010 on 15th December, 2010. The Respondent provided an unconditional bank guarantee of US \$ 3.5 millions in compliance of the order.

3. The parties for various reasons, unable to nominate and/or appoint an arbitrator though agreed and recorded in the orders, in the result, the parties could not settle their dispute before 31st December, 2011 as reflected in the order dated 8th December, 2010. By order dated 1st December, 2011, by consent of the parties, the respondent was permitted to substitute its earlier bank guarantee for US \$ 2.74 million, on account of set off of the franchise fees paid by the Respondents to the Petitioner.

4. As there was no appointment of the arbitrator, therefore, there was no question of final adjudication of the dispute between the parties till this date. The proceedings are pending for appointment of the arbitrator. The Petitioner, therefore, has invoked section 9 and made the following averments:-

6. As a condition for staying the Termination Notice, this Hon'ble Court thought it fit inter alia to secure that the interest of the Petitioner by directing the Respondent to put in place an unconditional bank guarantee in order to secure the Petitioner's loss of interest on the franchise fee, that the Petitioner would have received from a fresh auction which the Petitioner would have been entitled to conduct immediately after the Termination Notice, had the Termination Letter not been stayed. It is apparent from the Order that this Hon'ble Court proceeded on the premise that the only parameter or yardstick available for quantifying the franchise fee that the Petitioner would have earned in the said auction is the average of the winning bid amounts in the auction conducted by the Petitioner for the Kochi and Pune franchise immediately prior to the Termination Notice. The said average as recorded in the Order was about US \$ 345 million. Since the said franchise fee would be payable in 10 equal installments annually, this Hon'ble Court quantified the loss of interest (for the year 2011) on the basis that the Petitioner would have received only the first installment of the franchise fee (i.e. US \$ 35 million) in the first year and the loss of interest was calculated at the annual rate of ten per cent thereon to arrive at the figure of US \$ 3.5 million. The reduction made vide the aforementioned order dated 1st December, 2011 in Arbitration Petition No. 958 of 2011 is on the basis that the annual installment of the franchise fee (i.e. US \$ 7.6 million) paid to the Petitioner by the Respondent should be deducted from the principal amount of US \$ 35 million. Thus, the principal amount on which loss of interest for the first year is calculated is US \$ 27.4 million and hence the said figure in the bank guarantee has now been reduced to US \$ 2.74 million. It is important to note that the said bank guarantee is

only for the purpose of securing the Petitioner's loss of interest for the year 2011. This Hon"ble Court has in its Order given a specific liberty to the Petitioner to apply for further security for loss of interest in case the arbitration is not concluded before 31st December, 2011.

7. It is submitted that the Petitioner's loss of interest for the subsequent years including 2012 has to be computed on the same basis/yardstick/parameter i.e. 2.74 million per year and any alleged depreciation/reduction in the value of the franchise subsequently (i.e. after the Order) is completely irrelevant and ought to be ignored for this purpose.

8. Applying the same yardstick, for the purpose of computation of the Petitioner's loss of interest for the second year (2012), in addition to the franchise fee for the first year i.e. US \$ 27.4 million, the Petitioner would also have received the second installment of the franchise fee (i.e. a further US \$ 27.4 million). Thus, the Petitioner's loss of interest for the second year ought to be computed on US \$ 54.8 million (viz. the principal amount of US \$ 27.4 million representing the first installment of the franchise fee plus (+) principal amount of US \$ 27.4 million representing the second installment of the franchise fee) at the annual rate of 10%. As a result, the Petitioner is entitled to be secured by a further unconditional bank guarantee in the amount of US \$ 5.48 million towards loss of interest for the year 2012. The said computations is apparent from the table below:

2.74	
2.74	
5.48	Total
	(in US \$)

9. In the circumstances, the Petitioner states and submits that it is entitled to order directing the Respondent to furnish a further unconditional guarantee of a Nationalised Bank to the satisfaction of the Prothonotary and Senior Master in a sum of US \$ 5,480,000/- (United States Dollars Five Million Four Hundred and Eighty Thousand Only) or in the event of the necessary permissions not being available at present, the rupee equivalent thereof to secure the loss of interest for the year 2012. It is only through inadvertence that the Petitioner had requested for a bank guarantee for the loss of interest for the year 2012 for a lesser amount. It is submitted that in case the Petitioner's application for further security of 5,480,000/- (United States Dollars Five Million Four Hundred and Eighty Thousand only) is not considered and/or rejected only on this ground the same will result in manifest and irreparable loss to the Petitioner.

5. It is relevant to note certain conditions as imposed while granting conditional stay to the termination of franchise agreement and certain liberty to the petitioner in the

following terms :-

57. Mr. Sundaram submitted that if an injunction is to be granted, the Petitioner must at least furnish some security towards interest that the Respondent would earn if it were to auction the franchise today. He stated that two franchises were auctioned recently for an average price of about 345 million US \$. He, however, did not categorically assert that the Respondent would auction a franchise in the event of the Petitioner not being granted an injunction.

58. Mr. Khambatta submitted that as a result of the injunction, the Petitioner would, in any event, have to pay an amount of 7.6 million US \$ per annum to the Respondent under the franchise agreement. Mr. Khambatta further submitted that, in fact, more matches would be played which would generate further income for the Respondent. Mr. Sundaram did not deny the same.

59. The question then is the determination of the security to be provided by the Petitioner on account of the possibility and, I use the word consciously, as the Respondent has not made a categorical statement that it would auction a franchise in the event of the Petitioner going out of the league.

60. Keeping these factors in mind, according to me, it is necessary in the present petition to secure the loss of interest only for the first year with liberty to the Respondent to approach the learned arbitrator for further orders in this regard in the event of the award not being made by 31st December, 2011. Mr. Sundaram fairly admitted that 345 million US \$ is not payable upfront, but in ten annual installments. The installments are payable in January and April. I would, therefore, adopt an ad-hoc rate of interest of ten per cent i.e. 3.45 million US \$ for this year.

The Operative Order dated 8.12.2010 reads thus:

(A) Pending the Award, order in terms of prayers a-(i) to a-(viii) of the petition.

(B) The above order shall be subject to

(i) The Petitioner furnishing security in the form of an unconditional bank guarantee of a Nationalised Bank to the satisfaction of the Prothonotary and Senior Master, for payment of the players' dues, initially in the sum of US \$ 18 million or in the event of the necessary permissions not being available at present, the rupee equivalent thereof, calculated at Rs. 46/- per dollar on or before 3rd January, 2011.

Liberty to the Respondent to apply u/s 9 or 17 for similar security with respect to the players' dues for the period commencing December, 2012, if the arbitration proceedings are not concluded by then.

Liberty to the Petitioners to apply u/s 9 or u/s 17 for reduction of the above amounts, in the event of the amounts due under the players' contracts being less or as and when payments are made under the IPL Players Contracts with the players.

(ii) The Petitioner furnishing in the first instance and on or before 3rd January, 2011, an unconditional guarantee of a Nationalised Bank to the satisfaction of the Prothonotary & Senior Master in a sum of US \$ 3.5 million or in the event of the necessary permissions not being available at present, the rupee equivalent thereof.

Liberty to the Petitioner to apply to substitute this guarantee alone, with security to the satisfaction of the arbitral tribunal or to the satisfaction of the Prothonotary & Senior Master.

Liberty to the Respondent to apply for further security in this regard in the event of the arbitration not concluding before 31st December, 2011.

(iii) The above guarantee and/or security, as the case may be, shall be valid for a period of twelve weeks after the Award is made and served on the Respondents.

(iv) Ms. Zinta, Ness Wadia, Mohit Burman, Windy Investments Pvt. Ltd. and MB Finmart Pvt. Ltd. filing on affidavit in this court, a personal unconditional undertaking to guarantee the payment of any amounts that may be found due and payable by any court, tribunal or authority as a result of this injunction and in the event of the termination being upheld.

(C) Ms. Zinta, Ness Wadia, Karan Paul and Mohit Burman shall not, without the leave of the court or the arbitral tribunal, dispose of, alienate, encumber, part with possession of, or create any third party right, title or interest in, to, upon or in respect of the shares, including the shares to be transferred to Mohit Burman by Windy Investments Corporation Ltd. and MB Finmart Pvt. Ltd., as stated above.

(D) Liberty to the Petitioners to apply to the court or to the arbitral tribunal in respect of the shares held by them, including the shares to be transferred by Windy Investments Corporation Ltd and MB Finmart Pvt. Ltd., as aforesaid. Liberty also to so apply for the purpose of issuing further shares of the Petitioner to any party.

(E) The above order is subject to the award and any further orders that may be passed during the course of the proceedings.

6. The Appellate Court, has also while dismissing the appeal of the petitioner, has observed as under:-

31. The learned Single Judge while granting any interlocutory injunction, carefully, weighed the equities and has made the final relief subject to stringent conditions. These conditions include the requirement that the Respondent furnish a bank guarantee of US \$ 18 million to secure the payment of players' dues and another bank guarantee in the amount of US \$ 3.5 million, both of nationalised banks. In addition, the learned Single Judge has recorded a personal undertaking to guarantee the payment of any amounts that may be found due and payable by any court, tribunal or by any other authority.

7. Both these orders have attained finality. Therefore, liberty as well as conditions so imposed are binding to both the parties.

8. Importantly, the learned Single Judge while granting the injunction and/or stay to the termination of franchising agreement imposed various conditions as recorded above. Liberty is also granted to both the parties to apply for appropriate order before the arbitrator during the pendency of arbitration and/or thereafter also. The conditions so imposed have been for furnishing bank guarantee Pending the award. Liberty also granted to the Petitioners (original respondents) to apply for further security in the event of arbitration not concluding before 31st December, 2011. Liberty is also granted to the petitioner to apply u/s 9 or section 17 for similar security with respect to the players" due for the period commencing December 2011, if the arbitration not concluded by then. Liberty was also granted to the petitioner to apply u/s 9 or u/s 17 for reduction of the above amounts, in the event of the amount due under players" contracts being less or as and when payments are made under IPL Players Contract with the Players. It is relevant to note that above guarantees and security directed to be valid for a period of 12 weeks after the award is made and served on the respondents. Further, injunctive orders were also passed against the respondents. It was again made clear that directions/conditions and orders are subject to the award and/or any further order that may be passed during the course of the proceedings.

9. Admittedly, but for the above orders passed by learned Single Judge the Petitioners could not terminate and/or able to take further steps though contract was terminated for the various reasons. The Respondents based upon the conditional order able to continue with the contract and has been enjoying since then, all the benefits and actively participating in the IPL game in every aspect till this date. Therefore, both the parties have accepted this liberties and conditions so imposed and specially the Respondents.

10. Therefore, taking overall view of the matter including the contract between the parties and even for a survival of the contract, in my view, there is no question of keeping any vacuum till the award is passed. If the conditions imposed goes and/or not complied with, the protection so provided by the order should also go. To make the order effective and purposeful and taking into consideration the nature of contract and commercial interest of both the parties, it is necessary that the respondent need to furnish further security as directed till the award is passed.

11. To say that the condition to furnish security was for the respective year is incorrect. It is settled that we have to read the judgment as a whole read with the circumstances specifically dealt and for the fact that the judgments are final and binding between the parties.

12. It is relevant to read now the averments made in the petition with regard valuation, purpose and object for asking any further security of the amounts so

mentioned, basically in paragraph 6 to 8. This, also justifies the amount of security so claimed, as the present petition is nothing but prayer for direction to implement and to continue with the earlier order passed between the parties arising out of the same contract. The court has ordered that the interim order and the conditions so imposed should be continued till the award is passed. It is also observed that the respondent to furnish further security in this regard in the event the arbitration does not conclude before 31st December, 2011. In my view, it is necessary even for survival of the contract and as the respondent has been enjoying the terms and conditions of the contract and all other benefits because of the conditional stay granted by this court.

13. The petitioner, therefore, has made out the case as contemplated u/s 9 of the Arbitration Act for further protection and the security as prayed.

14. Further submission that the petitioner is not taking or insisting for such security or never intended to auction the franchise to other parties and/or even otherwise, is also irrelevant for the purpose of deciding the present petition finally, when the contract as well as the orders speaks for itself as recorded above.

15. The commercial contract needs to be considered from the commercial point of view between the parties. In the present case, apart from the contract to give purpose and effect to the binding judgment between the parties and the averments so made in the paragraph 6 to 8, which according to me, also needs to be accepted for the purpose of granting the prayers so made. The security of the amounts based upon the valuation referred, in my view, at this stage cannot be stated to be exorbitant or arbitrary. The averments so made has foundation of the binding judgments apart from the contract between the parties.

16. It is made clear that the parties are always at liberty by consent, to change the terms and conditions also, but at this stage in view of above I am inclined to grant prayer clause (a) as prayed.

17. The petition is, accordingly, allowed in terms of prayer clause (a). No order as to costs.

18. The learned counsel for the Petitioner requested that some time limit may be provided to furnish the security. The Respondents, therefore, is granted eight weeks time to furnish the security.