HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIDNARY ORIGINAL CIVIL JURISDICTION

APPEAL No.306 OF 2006
IN
ARBITRATION PETITION NO.368 OF 2005

M/s.Jethmal Mulji Thakkar
having its office at Pimpalgaon
Baswant, District Nashik – 422 209. ... **Appellant**

V/s.

Maharashtra State Co-operative
Marketing Federation Ltd.,
a Co-operative Society having its
Registered Office at Kanmoor House,
Narsi Natha Street, Mumbai – 400 009. ... **Respondent**

.....

Mr.Milind Sathe, Senior Advocate with Mr.Kunal Kumbhat i/b. Mrs.Sunanda R.Kumbhat, Advocate for the Appellant.

....

CORAM : ANOOP V. MOHTA J.
A.M.BADAR J.

DATED :8th FEBRUARY 2017.

ORAL JUDGMENT : (PER ANOOP V. MOHTA J.)

1 Called out from final hearing board.

2 The appellant has challenged the impugned order

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dated 07/03/2006 passed in Arbitration Petition No.368 of 2005 filed by respondent under Section 34 of the Arbitration and Conciliation Act, 1996 (For Short, "the Arbitration Act") whereby challenge was to the award made by the sole Arbitrator dated 20/06/2005 thereby the respondent (the original petitioner) directed to pay an amount of Rs.27,07,883/- being the amount of brokerage on the sale effected by the claimant (appellant) as per clause 13 of the Agreement. The learned Judge has set aside the said Award by observing as under :

> "9. It is thus clear that the cause of action had accrued to the Respondent, on the Respondent own showing, on 1-8-2000 and the reference was made on 27-8-2003. Therefore, the reference was barred by the law of limitation. The finding recorded by the arbitrator that the claim is not barred by the law of limitation, therefore, is patently erroneous and is liable to be set aside.
>
> 10. As I find that the award is liable to be set aside as it is barred by the law of limitation, I do not propose to consider other grounds raised by the Petitioner.
>
> 11. In the result, therefore, the petition succeeds and is allowed. The award impugned in the petition is set

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aside. The respondent to pay costs of this petition, as incurred by the Petitioner, to the Petitioner."

Therefore, this Appeal under Section 37 of the Arbitration Act.

3 The basic events and factual background are as under :-

(a) On 12/01/2000, agreement was executed between the Appellant and the Respondent whereby the Appellant was appointed as agent called "Guarantee Broker" to sell onion on behalf of the Respondent. Clause 13 provides for payment of commission. Clause 10 provides for arbitration. Clause 17 provides for accounts to be settled and, inter alia provided that net sale proceeds will be arrived at after deducting all expenses as per prevailing market practices such as commission, freight, labour charges, market fees and other expenses related to respective consignment."

(b) During the month of January and February 2000, appellant sold 1107 wagons of onions amounting to Rs.4,24,960.80 Quintals. On 02/05/2000, appellant requested the Respondent to finalise the accounts and demanded commission of Rs.27,07,873/- on 10/05/2000. On 15/05/2000, the Respondent-Federation Officer informed the Head Office that the sale price of onion sold has been received. On 14/07/2000, the Divisional Officer of Respondent informed the Head

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Office that entire sale price of onion sold by the Appellant has been received, and gave his NOC for payment of commission to the Appellant. On 01/08/2000, the Divisional Officer of Respondent wrote to Head Office of Respondent that there was no objection for making payment of commission to the Appellant. On 07/08/2000, the Appellant demanded Rs.1,55,958/- for delayed return of bank guarantee / security deposit. The appellant sent reminder dated 18/08/2000 for interest of Rs.1.55 lakhs. On 29/09/2000, Respondent demanded interest from the Appellant. On 03/10/2000, appellant was informed that the post dated cheques of Rs.2 crores may be collected and the Appellant agreed to pay interest on Rs.1,23,503/-. Respondent sent letter dated 24/11/2000 to Appellant stating that Appellant's account was debited for Rs.1,75,076.40 towards shortfall in onion quantity. Respondent sent another letter dated 29/11/2000 to Appellant debiting the Appellant's account for Rs.53,00,416/- stating that the said amount was recoverable towards shortage of bags. This amount was debited to appellant's account. The same would be recovered from the brokerage payable to appellant. On 09/12/2000, a clarification to the bag shortage given by the Appellant.

(c) Appellant requested to the Mananaging Director of the Respondent on 14/11/2002 to refer the dispute to arbitration. On 27/08/2003, appellant again requested Managing Director of the Respondent to refer the dispute to arbitration. Thereafter, on 18/09/2003, the appellant consented for the name of Arbitrator. In the year 2003, Arbitration notice was given and on 20/02/2004, appellant

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filed Statement of Claim. In 2004, respondent filed its reply and counter-claim and the Appellant filed its written argument. On 20/06/2005, learned Arbitrator had awarded the Appellant's claim. On 19/09/2005, Arbitration Petition No. 368/2005 was filed by the Respondent. On 07/03/2006, Arbitration Petition was allowed by the learned Single Judge.

(d) The learned Judge has, inter alia, held that the cause of action arose on 1/8/2000 as the reconciliation report was made on that day. The arbitration notice was given on 27/8/2003. The arbitration proceedings are deemed to have commenced on 27/8/2003 and hence the claim was barred by limitation. Hence the present Appeal.

4 In view of Clause 10 of the agreement dated 12/01/2002 in case of dispute, matter had to be referred to arbitration. After reconciliation on 01/08/2000 pursuant to the submissions of bills on 10/05/2000, the amount so claimed by the appellant was accepted by the respondent, to be due and payable. It was acknowledged and not denied in letter dated 29/11/2000.

5 The clarification so sought was also given by the appellant. There was no payment received from the respondent, therefore, on 14/11/2002, the appellant requested to the respondent Managing Director to make the payment and/or refer the dispute to arbitration. There was no response even after the correspondences/communications and as there was no even denial

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to the amount claimed. On 27/08/2003, the appellant again requested the respondent Managing Director to refer the dispute to arbitration. From the facts of background so referred above, if there is no dispute and the denial to the amount so claimed and demand is made from time to time, but has delayed the payment, therefore, the request of 14/11/2002, in our view, should have been treated as first communication to refer the dispute to arbitration as contemplated under Section 21 of the Arbitration Act. Merely because the appellant invoked at second time, by communication dated 27/08/2003, that in no way be treated and/or interpreted to mean that the earlier invocation of arbitration clause was superseded and/or required to be overlooked. Once the arbitration clause is invoked, the mandate of Arbitration Act needs to be followed and noted by all the concerned. Mere sending another notice in no way should have been taken as foundation to deny the undisputed claims of the appellant.

6 The learned Arbitrator, as appointed on 12/09/2003, after considering the claim and counter claim and the material placed on record including the written submissions filed, by reasoned order dated 20/06/2005, specifically dealing with the issue of limitation, has rightly recorded and granted the amount in following terms :-

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"1. The claim of the Claimants is partly allowed. The Respondent Federation is directed to pay the interest @ 12% p.a. on the Earnest Money deposit of Rs.25,00,000/- for delayed period of 138 days to the Claimants.

2. The Respondent Federation is also directed to pay Rs.27,07,883.00 being the amount of brokerage on the sale effected by the Claimants as provided in Clause 13 of the Agreement.

3. As the aforesaid amount of brokerage to the tune of Rs.27,07,883.00 has not been paid since 1.8.2000, the Respondents are directed to pay the interest @ 12% p.a. on the said amount of brokerage from 1.8.2000 till the date of payment.

4. In view of Clause 7 of the Agreement, the Claimants are directed to pay the Federation interest of Rs.1,23,503.00 as claimed by the Divisional Onion Officer, Nasik towards delayed sale proceeds.

5. After adjusting the amount mentioned in Clause 4 above from the award, the Respondent Federation shall pay balance amount of award as ordered

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forthwith."

7 The learned Single Judge, however, reversed the same mainly on the ground of delay, basically on the foundation that the claim so filed is beyond limitation as the appellant invoked the arbitration only on 27/08/2003, and overlooked the notice dated 14/01/2002. We have gone through the reasons so given by the learned Arbitrator and the documents placed on record by the appellant. The learned Judge has, though referred communication dated 14/11/2002, whereby the appellant requested to make the payment and/or to invoke arbitration clause but not consider it. Therefore, it is difficult to accept that case and the reasons to dismiss the claims so awarded by the learned Arbitrator. It is contrary to record and/or by overlooking the documents on record. The order, therefore, so passed, in our view, is contrary to record and not within the scope and power of the Court under Section 34 of the Arbitration Act, as there was no perversity to interfere with the reasoned Award.

8 The learned Senior Counsel appearing for the appellant has placed on record a Supreme Court Judgment in ***Shapoor Fredoom Mazda v. Durga Prosad Chamaria & Ors.*** reported in **AIR 1961 Supreme Court 1236 (V 48 C 221),** whereby the Apex Court has reiterated the basic principles of "acknowledgment" and the aspect of *jural* relationship of debtor

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and creditor and the effect of “admission” and importance of surrounding circumstances to consider the documents of acknowledgment and/or admission. We have gone even through the documents placed on record. The learned Single Judge has interfered with the findings of the facts so arrived at by the Arbitrator by re-appreciating the evidence and the ground of limitation without giving no specific finding on the merits of the matter. The reasons so given by the learned Arbitrator, while passing the award on merits, therefore, in Appeal under Section 37 of the Arbitration Act, we have to re-appreciate. We have noted the correspondences and the evidence so placed on record, whereby it is clear that the respondent, at no point of time, denies specifically the liability/amount, so claimed toward the commission. Non-payment was the reason which compels the petitioner to invoke the arbitration clause. The first invocation, in our view, is well within the terms and conditions of the agreement between the parties. Therefore, once the arbitration clause was invoked, there was no reason for the learned Court to overlook the same and to reject the claim based upon the second invocation.

9 Considering the totality of the matter, including the material placed before the Arbitrator, specifically letters dated 01/08/2000, 24/11/2000 and 29/11/2000 and the reasons so given by the learned Arbitrator, we are inclined to interfere with the order passed by the learned Single Judge of dismissal of the

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claim solely on the ground of limitation.

10 Therefore, for the reasons recorded above and as the Order passed by the learned Single Judge is contrary to record and illegal, we are inclined to set aside the same. The order passed by the learned Arbitrator need to be restored accordingly.

11 Therefore, the order :

(i) The Appeal is allowed.

(ii) The impugned order passed by the learned Single Judge dated 07/03/2000 is quashed and set aside.

(iii) The Award passed by the learned Arbitrator dated 20/06/2005 is restored.

(iv) The appellant's appeal is allowed.

(v) Arbitration Petition No.368 of 2005 is dismissed.

(vi) No costs.

(A.M.BADAR J.) **(ANOOP V. MOHTA J.)**

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