

Eskay Engineers Vs. Bharat Sanchar Nigam Limited, Raigad Telecom Division

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Court : Mumbai

Decided On : Jun-30-2009

Reported in : 2009(6)BomCR176

Judge : D.Y. Chandrachud, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 2(1), 31(4), 31(7), 34, 34(2), 34(3), 36 and 42; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 10

Appeal No. : Chamber Summons No. 510 of 2009 in Chamber Order No. 1620 of 2008 in Execution Application No. 158 o

Appellant : Eskay Engineers

Respondent : Bharat Sanchar Nigam Limited, Raigad Telecom Division

Advocate for Def. : Viral D. Shukla and ;Sumit D. Shukla, Advs., i/b., Shukla and Associates

Advocate for Pet/Ap. : Devvrat Dhankar, Adv., i/b., S.S. Phadke, Adv.

Judgement :

D.Y. Chandrachud, J.

1. This Judgment would govern three chamber summons; one taken out by the decree holder and the other two by the judgment debtor. Since all the three chamber summons arise out of an arbitral award under the [Arbitration and Conciliation Act, 1996](#) and the execution proceedings initiated consequent upon the award having attained finality, arguments have been heard together in all the three cases by consent.

2. Disputes and differences between the decree holder and the judgment debtor came to be referred to arbitration under the provisions of the [Arbitration and Conciliation Act, 1996](#). The arbitral award was made on 7th July, 2005 and in the operative part of the award, the sole arbitrator issued the following directions:

1. The cases where 100% payment has already been made are not to be reopened.

2. The cases where recovery has been resorted to based on surprise checks will be not opened.

3. The cases where 60% payment or no payment has been made, complete payment should be made by September 2005.

4. No cost to the parties.

3. A petition was instituted by Bharat Sanchar Nigam Limited in order to challenge the arbitral award under Section 34. The petition came to be dismissed by a learned single Judge of this Court on 9th January, 2006. A Division Bench of this Court dismissed the Appeal on 26th June, 2006. The Supreme Court dismissed the Special Leave Petition on 1st December, 2006. The arbitral award has attained finality and is capable of being enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. This would be in terms of the provisions of Section 36 of the [Arbitration and Conciliation Act, 1996](#). On 18th March, 2006 an Execution Application No. 158 of 2006 was filed by the original claimant-decree holder before this Court in which a claim was made for the total sum of Rs. 97,58,084/- comprising of a principal amount of Rs. 83.34 lakhs and the security deposit of Rs. 14.23 lakhs. A warrant of attachment

came to be issued under Order XXI, Rule 46 in respect of a current account of the judgment debtor with the State Bank of India, after which a further warrant of attachment came to be levied in respect of the movable and immovable properties. An amount of Rs. 97,58,084/- was deposited by the judgment debtor with the Sheriff of Mumbai which came to be withdrawn by the decree holder.

4. On 4th July, 2006 the judgment debtor moved Chamber Summons No. 818 of 2006 principally contending that the calculations of the decree holder were not correct and that an amount in excess of what was lawfully due had been claimed. The following prayer came to be incorporated in the chamber summons:

(b.i.) The Claimants are entitled to recover an amount of Rs. 76,26,569.00 as per Arbitration Award dated 07.07.2005 plus Rs. 60.00 being the costs of Execution, aggregating to Rs. 76,26,629.00. The Claimants may be directed to refund sum of Rs. 21,31,515.00 to the Respondents/Judgment Debtor, being the excess amount claimed and withdrawn by the Claimants from the amount deposited by the Respondents/Judgment Debtor with Sheriff of Mumbai in the Execution Application No. 158 of 2006 as per Arbitration Award dated 07.07.2005.

The contention of the judgment debtor, therefore, was that as against an amount of Rs. 97.58 lakhs, that had been deposited with the Sheriff, the decree holder was entitled to an amount of Rs. 76.26 lakhs, as a result of which the judgment debtor was entitled to a refund of Rs. 21.31 lakhs. The chamber summons was disposed of by a Judgment dated 30th September, 2008 of the Hon ble Mr. Justice S.C. Dharmadhikari. The Learned Single Judge negated the contention of the judgment debtor that the arbitral award did not include a direction in regard to the refund of the security deposit. The Learned Single Judge was also of the view that under the arbitral award, the decree holder was entitled to recover interest from the date of the award until payment. The Learned Single Judge held thus:

There is much substance in the contention of Shri Kamdar that Claim No. 2 and Claim No. 3 before the learned Arbitrator would include the payment as directed under the operative part of the award. In other words, the direction was to make payment in cases where part payment is made or no payment is made would include return of security deposit in full. It also means that the claim for interest

has been adjudicated upon and the claimants would be entitled to recover the said sum.

In so far as the question of interest, however, was concerned, the contention of the decree holder was that though there was no specific direction in regard to the payment of interest in the arbitral award, the amount could be claimed and executed under Section 31(7) of the Act. The Learned Single Judge held that it was not necessary to enter into that issue since the decree holder was yet to make a claim in that respect under Section 31(7). In so far as the issue of calculation error was concerned, a concession was made on behalf of the decree holder that certain amounts had been claimed twice over in the execution application in which a recalculation would be necessary. The Learned Single Judge observed that even if recalculation was to be done, it would not mean that the claimant was required to refund any amount straightaway, particularly since an opportunity was being granted to the claimant to apply for the payment of interest on the award by instituting appropriate proceedings. The Court observed that as and when a claim is lodged, it would be open for the claimant to point out the calculation errors, and at that stage the Court would consider making appropriate orders and directions and if need be, for the payment by the judgment debtor of any sum. The chamber summons was dismissed, keeping open all the contentions of the parties.

5. An Appeal was filed before the Division Bench against the Judgment of the Learned Single Judge. In paragraph 13 in the Memo of Appeal before the Division Bench, one of the grounds of challenge was that the arbitral award was passed at Khamgaon (wrongly referred to as Jalgaon) in the District of Buldana and that consequently the award ought to have been executed before the Civil Judge, Senior Division in the District of Buldana and not before this Court. When the Appeal came up before the Division Bench, this contention, as the order of the Division Bench shows, was not canvassed. The Division Bench dismissed the Appeal holding that both in regard to the question of interest and the recalculations of the amounts due, the Learned Single Judge had granted liberty to the parties to apply for appropriate orders and all contentions had been kept open. The Appeal was accordingly dismissed.

6. After the dismissal of the Appeal, the decree holder took out a Chamber Order Chamber Order No. 1619 of 2008 for amendment of the execution application. By the proposed amendment, the amount shown as due in the execution application was sought to be corrected by giving credit of an amount of Rs. 4,33,979/- claimed in excess by the decree holder and deposited by the judgment debtor. The application for amendment was allowed by the Master & Assistant Prothonotary (ADM) on 27th February, 2009. The Order of the Master & Assistant Prothonotary (ADM) has been challenged in Chamber Summons No. 597 of 2009 by the respondent.

7. On 15th October, 2008 another Chamber Order Chamber Order No. 1620 of 2008 was initiated by the decree holder for extension of the warrant of attachment. The Chamber Order came to be dismissed by the Registrar (Finance & Budget) on 21st January, 2009. The order of dismissal has been challenged in Chamber Summons No. 510 of 2009 by the decree holder. The third chamber summons before the Court (Chamber Summons No. 771 of 2009) has been taken out by the judgment debtor in order to question the jurisdiction of this Court as an executing Court.

Chamber Summons No. 771 OF 2009

8. For convenience of exposition, it would be appropriate to deal with Chamber Summons No. 771 of 2009, taken out by the judgment debtor in order to question the jurisdiction of this Court. The submission that has been urged on behalf of the judgment debtor is that the award in the present case was made at Khamgaon in the District of Buldana. Section 31(7) of the Act requires the award to state the place where it was made. Section 2(1)(e) defines the Court as the principal Civil Court of original jurisdiction in a District having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit. The submission is that under Section 36, an award is to be enforced under the Code of Civil Procedure, 1908 in the same manner as if it was a decree of the Court. The expression Court can in the present case only mean the principal Civil Court of original jurisdiction to decide the questions forming the subject-matter of arbitration, which would be the District Court at Buldana. On the

other hand, it has been submitted on behalf of the decree holder that the judgment debtor had addressed a challenge to the arbitral award under Section 34 before this Court. It was urged that it was not the contention of the judgment debtor that this Court did not have jurisdiction to entertain the challenge to the arbitral award initiated by the judgment debtor and as a matter of fact the Judgment of this Court was carried to its logical conclusion in appeal before the Division Bench and eventually before the Supreme Court. Secondly, it was submitted that the expression Court for the purposes of Section 34 cannot be read in a manner which would be different from the meaning of the same expression in Section 36 and since a challenge to the arbitral award was preferred before this Court, an application for enforcement of the award or the decree could legitimately be entertained before this Court. Thirdly, it was submitted that Section 42 provides that once an application under Part-I has been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings.

9. Section 34 provides for recourse to a Court against an arbitral award, by an application for setting aside the award in accordance with the provisions of Sub-section (2) and Sub-section (3). Sub-section (2) of Section 34 specifies the grounds on which an arbitral award may be set aside by the Court. Section 36 provides that where the time for making such an application to set aside the arbitral award under Section 34 has expired or such an application having been made, it is refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. Section 36 creates a legal fiction under which an award is capable of being enforced as if it were a decree of the Court. The enforceability of the award comes into being either when no application challenging the award is preferred under Section 34 within the time stipulated or upon an application being refused. What is enforceable under Section 36 is the arbitral award. The manner of enforcement is provided in the Code of Civil Procedure, 1908. The legal fiction that is created is for treating an arbitral award for all intents and purposes as a decree of the Court. Order XXI, Rule 10 of the Code of Civil Procedure, 1908 provides that where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent to another Court, then to such other

Court for execution.

10. In the present case, the judgment debtor moved an application for setting aside the arbitral award before this Court under Section 34. Neither in the pleadings nor, for that matter, in the course of the submissions is it the contention of the judgment debtor that this Court did not have jurisdiction to entertain the challenge to the arbitral award under Section 34. Indeed, as already noted earlier, the validity of the arbitral award was decided all the way upto the Supreme Court and the award attained finality by the rejection of the challenge. Thereupon the arbitral award becomes enforceable as if it were a decree of the Court under Section 36. The expression the Court cannot for the purposes of Section 36 be read at variance with the meaning of the expression under Section 34. To do so would do violence to the use of the same expression, namely, the Court, in Sub-section (2) of Section 34 and in Section 36 of the Act. That would also do violence to the underlying legislative object of the enactment of the [Arbitration and Conciliation Act, 1996](#). The main object of the Bill which was based on the uncitral model law was to provide for a procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimise the supervisory role of Courts in the arbitral process. Section 42 of the Act provides as follows:

42. Jurisdiction Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

The effect of Section 42 is that where an application under Part-I has been made in a Court with respect to an arbitration agreement, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings. The Legislature has affirmatively stated that such a Court alone would have jurisdiction and has placed the matter beyond doubt by stipulating that no other Court would have jurisdiction. The expression all subsequent applications arising out of the arbitral proceedings

must be read in a comprehensive manner to include recourse to execution proceedings. The submission which was urged on behalf of the judgment debtor is that the application of the [Arbitration and Conciliation Act, 1996](#) concludes with the delivery of the arbitral award and the forum for initiating proceedings for execution cannot be traced to any provision of the Act. That would not be an accurate reading of the language and the provisions of the Act. Section 36 specifically speaks of enforceability and Section 42 of jurisdiction. The expression all subsequent applications arising out of arbitral proceedings has been used in a comprehensive sense by the Legislature and must be given full width in interpretation. The judgment debtor sought a recourse to its remedies before this Court in order to challenge the arbitral award. Once that was done, this Court alone would have jurisdiction to entertain all subsequent applications arising out of the arbitral proceedings including applications in the execution of the award as a decree of the Court to the exclusion of any other Court.

11. The view which I have taken as a matter of first principle is consistent with a judgment of a Learned Single Judge of the Karnataka High Court in the matter of I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd. and Ors. AIR 2001 Kar 364 where the Learned Single Judge held thus:

A right to enforce the award arises only after the period for setting aside the arbitral award under Section 34 has expired or such an application having been made is rejected. That is to say, the Court executing the decree has to satisfy itself, before entertaining the application for execution that, the period for setting aside the award has expired or such an application having been made has been refused. If that be so, inferentially, the Court that can exercise the power under Section 34 of the Act can alone entertain the steps to enforce the arbitral award. It means the Court as understood in Section 34 has alone the jurisdiction to entertain the enforcement of the arbitral award.

1st July, 2009

Chamber Summons No. 771 of 2009 shall accordingly stand dismissed.

Chamber Summons No.597 of 2009 and

Chamber Summons No. 510 of 2009

12. By his Judgment dated 30th September, 2009, the Hon'ble Mr. Justice S.C. Dharmadhikari permitted the decree holder to make an application for the payment of interest on the award under Section 31(7) by instituting appropriate proceedings. The Court also permitted the decree holder to point out the error in the calculations that had occurred in the amount as computed in the application for execution. The Learned Single Judge observed that the Court would consider making appropriate orders and directions. Liberty was expressly reserved and all the contentions of both the sides were kept open. The order of the Learned Single Judge was confirmed by the Division Bench on 31st March, 2009.

13. The decree holder took out a Chamber Order for amending the execution application in order to correct the error of calculations and to claim interest under Section 31(7) of the [Arbitration and Conciliation Act, 1996](#). The amended schedule reads as follows:

Schedule

1. Replace the amount shown in figure in Column G with the following:Rs. 83,34,939.00 Principal amount.Rs. 14,23,145.00 Security Deposit.Rs. 60.00 Cost of Execution Application.-----Rs. 97,58,144.00 Total claim made by Claimant.Rs. 4,33,979.00 Less excess claim made by the Claimant-----Rs. 93,24,165.00 Claim under the award of the Claimant as on 07.07.2005.Rs. 14,48,429.00 Interest @ 18% p.a. from 07.07.2005(date of award) till 18.05.2006(date of deposit by respondents.)-----Rs. 1,07,72,594.00Rs. 97,58,144.00 Less amount deposited by respondents on 18.05.2006.Rs. 10,14,450.00 Claim of the claimant as on 18.05.2006.Rs. 4,27,236.31 Interest @ 18% p.a. from 18.05.2006till 14.10.2008.-----Rs. 14,41,686.30 With further interest @ 18% p.a.=====from 15.10.2008 till payment and/orrealization.

Now in so far as the question of interest is concerned, Clause (b) of Sub-section (7) of Section 31 of the [Arbitration and Conciliation Act, 1996](#) provides that the sum directed to be paid by an arbitral award shall, unless the award otherwise

directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment. In the present case, admittedly, the award is silent in regard to the payment of interest. The contention of the judgment debtor is that what the award does not grant must be deemed to have been rejected by the Arbitral Tribunal since the claim for interest had been made before the arbitrator.

14. In *Smt. Santa Sila Devi and Anr. v. Dhirendra Nath Sen and Ors.* : AIR 1963 SC 1677, the Supreme Court applied the principle set out in a Judgment of Parke, B. in *Harrison v. Creswick* (1853) 138 ER 1254 : 13 CB 399 that the silence of the arbitrator upon the subject placed before him means that the arbitrator has negatived such plea. The award before the Supreme Court expressly stated that it was made of and concerning all the matters in dispute referred to the arbitrator. Hence the principle of construction enunciated in the English Judgment would cover the case of the silence of the award, as regards the claim for accounting and was, therefore, taken to be intended as a decision rejecting the claim to that relief.

15. What must be noted is that the principle which has been expounded in *Harrison* (supra) is a principle of construction. A principle of construction may be displaced when there are clear words in a statute which would indicate to the contrary. Clause (b) of Sub-section (7) of Section 31(7) contains an express provision that unless an award has otherwise directed, a sum directed to be paid by an arbitral award shall carry interest at the rate of 18% per annum from the date of the award to the date of payment. In view of the clear statutory stipulation, the payment of interest from the date of the award to the date of payment is mandated, unless there is a direction to the contrary in the arbitral award. The arbitral award not having made any specific stipulation in regard to interest, the statutory prescription in Clause (b) of Sub-section (7) of Section 31 would apply.

16. In so far as the question of calculations is concerned, the decree holder stated before the Learned Single Judge during the course of the hearing of Chamber Summons No. 818 of 2006 that there were certain errors in the computation which had to be rectified. Such an exercise was permissibly carried out in view of the liberty granted by the Learned Single Judge for amending the execution application. The Advocate appearing on behalf of the judgment debtor submitted

that according to the judgment debtor, an amount of Rs. 8,02,564/- is due and payable and not an amount of Rs. 14,41,686.30, as claimed in the execution application, as amended. A comparison of the statement which has been submitted on behalf of the judgment debtor during the course of the hearing and the statement which has been submitted on behalf of the decree holder would show that the parties are in agreement on the following figures:

- (i) An amount of Rs. 97,58,144/- as per the warrant of attachment; and
- (ii) An excess amount therein of Rs. 4,33,000/-.

17. In other words, the claim under the award as on 7th July, 2005, which is the date of the award, was Rs. 93,24,165/-. The claimant was entitled to interest at the rate of 18% thereon from the date of the award until the date of deposit by the respondent. The interest liability works out to Rs. 14,48,429/-. The total amount due to the claimant-decree holder was, therefore, Rs. 1,07,72,594/-. Deducting the amount that was actually deposited by the judgment debtor, the balance amount due and payable as on 18th May, 2006 was Rs. 10,14,450/- on which the decree holder would be entitled to interest at the rate of 18% per annum until 14th October, 2008 and thereafter until payment. The error in computation has, therefore, been duly corrected by the decree holder.

18. The application filed by the decree holder for amendment of the execution application was hence in order and was correctly allowed by the Master & Assistant Prothonotary (ADM). Chamber Summons No. 597 of 2009 shall have to be rejected and is accordingly rejected. The chamber summons taken out by the decree holder for extension of the warrant of attachment was consequently liable to be allowed. Chamber Summons No. 510 of 2009 taken out by the decree holder is accordingly made absolute in terms of prayer Clauses (a), (b) and (c). Chamber Summons No. 771 of 2009 filed by the Judgment Debtor is dismissed.