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**SooperKanoon Citation :** [sooperkanoon.com/902210](http://sooperkanoon.com/902210)

**Court :** Mumbai

**Decided On :** Jul-29-2010

**Judge :** S.J.Vazifdar, J.

**Acts :** [Arbitration and Conciliation Act,1996](#) - Section 11,

**Appeal No. :** ARBITRATION APPLICATION NO.18 OF 2007

**Appellant :** M/S. Associated Constructions.

**Respondent :** Mormugoa Port Trust.

**Advocate for Def. :** Mr.Umesh Shetty,;Ms Geeta Channe,;M/s.Mulla and Mulla and C.B.and C.,Advs.

**Advocate for Pet/Ap. :** Mr.Shraddhanand Bhutada,;Mr.Parineet Saratkar,;M/s.SSP Legal,Advs.

**Judgement :**

1 This is an application under section 11 of the [Arbitration and Conciliation Act,1996](#) for the appointment of an Arbitrator.

2 There is no dispute that the parties had entered into an agreement which contains an arbitration clause and that the disputes raised by the Applicant fall within the purview thereof.

3 The only contention raised on behalf of the Respondents is that the arbitration clause ceased to have any effect as pursuant to an earlier invocation thereof an award had been made but was set aside. It is necessary therefore to state only a few facts.

4 The parties had entered into a construction contract dated 8th October 1996. An Arbitral Tribunal, consisting of three learned Arbitrators, was appointed by the parties in accordance with the arbitration clause contained therein read with the said Act. The Arbitral Tribunal made and published an Award dated 24th September 2004. The award grants four claims, two of which pertain to interest. One is in the nature of damages and the other is towards the final bill. The amount in respect of the final bill in turn comprises of various items. The Arbitral Tribunal awarded an aggregate sum of Rs.42,86,135/- to be payable by the Respondents to the Applicant after adjusting the amount paid. The Respondents challenged the Award by filing Arbitration Petition no.197 of 2005. By a judgment and order dated 11th October 2005, the Award was set aside.

5 It is important to note that in the judgment dated 11/10/2005 only three items in the Award were referred to. The learned Judge held that the amount in respect of these three items are contrary to law. The learned Judge however set aside the entire Award.

6 The claim in respect of damages in the sum of Rs.1,50,000/- was set aside on the ground that the Arbitral Tribunal failed to state the reasons upon which the Award was passed and was therefore violative of the mandatory statutory requirement of the said Act.

7 Thus, the Award in this respect was not set aside on merits.

8 The learned Judge also set aside the Award insofar as it awarded an amount of Rs.4,62,485/- for the construction of 452 sq meter of extra built up area. This part of the Award was set aside on the ground of non- application of mind and, as being violative of the principles of natural justice. In the claim the Applicant took into consideration 132 sq. ft. as extra built up area, whereas the Award, relying upon the Commissioner's report took into consideration the actual constructed

area of 452 sq. feet. The learned Judge, therefore, set aside the Award in respect of the entire claim in this regard although it could have been bifurcated. This, presumably, was on the basis of the law as it then stood in view of the judgments of this Court in various cases including the judgment of a Division Bench of this court in Pushpa Mulchandani v. Admiral Radhakrishnan Tahliani reported in 2008 (7) L.J.Soft 161, where it was held that an Award cannot be modified even by segregating that part which can be upheld once it is found that even a part of the award is liable to be set aside. Those judgments are now overruled by the judgment of a Full Bench of this Court in the case of R.S.Jiwani vs. Ircon International Ltd. 2010 (1) Bom. C.R. 529. Thus, this part of the Award was also not set aside on merits.

9 The Arbitral Tribunal awarded the claim for the refund of liquidated damages and for delay. The learned Judge, however, held the Award in this regard to be totally unfounded on merits. The learned Judge came to the conclusion inter alia on the basis of the judgment of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[2003] 5 SCC 705.

10 In the result, on the basis of the finding that the award in respect of the three items was liable to be set aside, the entire award was set aside. This again was obviously on the basis of the judgments of this Court which held that under the said Act an award cannot be modified and can only be either upheld in its entirety or set aside if found to be bad even in part.

11 The question, therefore, is whether in view of the said award having been set aside, except as to one claim on grounds other than on merit, the present application under section 11 of the said Act is maintainable.

12 The learned counsel appearing on behalf of the applicant relied upon following observations of the Supreme Court in Mc Dermott International Inc. v. Burn Standard Co. Ltd. and others [JT 2006 (11) SC 376].

"55. The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness, intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the

Arbitrators, violation of natural justice, etc. The Court cannot correct errors of the Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it." (emphasis supplied)

13 The learned counsel appearing on behalf of the Applicant also relied upon the following observations in the said judgment of the Division Bench of this Court in Appeal no.981 of 2001 decided on 4th October 2007 in the case of Pushpa Mulchandani Vs. Admiral Radhakishan Tahliani (Retd.) and others 2008 (7) L J SOFT 161:-

26. It is, thus, clear that if the court finds that the award is vitiated because of violation of principles of natural justice or such other reasons, which cannot be called as "adjudication" on merits, the court can set aside the Award and if the Award is set aside for such reasons, it is open to the parties to invoke the arbitration clause again and initiate arbitration proceedings. In our opinion, in this regard reference can be made to the provisions of sub-section (4) of section 43. They read as under:-

43(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted. When the award is set aside for the reasons other than merits, then it is open to the parties to the arbitration agreement, if arbitration agreement survives, to invoke the arbitration agreement and to have the matter referred to arbitration. In other contingencies they can adopt other remedy that may be available to them and in that situation, either for adopting any other remedy or in initiating arbitration, the period spent during the earlier arbitration is liable to be excluded while computing the period of limitation."

These observations have not been set aside by the Full Bench. In fact, this aspect did not fall for consideration in the reference to the Full Bench.

14 The judgments support the submission on behalf of the Applicant that a fresh arbitration is permissible at least in the event of an award being set aside for reasons other than on merits. In the present case the entire award except as to one claim, was set aside for reasons other than on merits. This is clear from the fact that although the award in respect of only three items/claims was set aside, the entire award was set aside. The claims, other than those referred to in the judgment, were not considered or even referred to. In any event, as noted earlier, at least the claim in respect of a sum of Rs.1,50,000/- was set aside, not on merits but on the ground that no reasons were furnished. This was obviously in view of the Judgments which held that under the 1996 Act an award cannot be segregated and therefore even if a part thereof is liable to be set aside the entire award must be set aside. The Applicants are therefore entitled to begin the arbitration again.

15 Mr.Shetty then submitted that it is only the court setting aside an award that can permit a fresh arbitration under the same arbitration agreement. He based his submission upon the observation of the Supreme Court extracted above: "It can only quash the award leaving the parties free to begin the arbitration again if it is desired." He submitted that the term "It" implies that it is only the court that sets aside the award that can leave the parties free to begin the arbitration again.

16 There is nothing in the judgment of the Supreme Court that even remotely suggests the same. In fact the Supreme Court did not consider this aspect. The Supreme Court has not specified as to the manner in or the stage at which the parties are free to begin the arbitration again. Having held that the parties are free to begin arbitration again there is nothing in the Act, the judgment or in principle that warrants restricting the enforcement of this right to any particular stage, point of time or proceeding.

17 Mr.Shetty also submitted that the observations of the Supreme Court and the Division Bench of this court in the case of Pushpa Mulchandani (supra) indicate that after an Award is set aside a fresh arbitration can begin again only with the consent of both the parties.

18 The submission is based on the erroneous presumption that the exercise of the right to begin the arbitration again is dependent upon a fresh arbitration agreement. An arbitration agreement, can be entered into only with the consent of the parties. Once an arbitration agreement is entered into it may be invoked by any of the parties unilaterally. If one of the parties refuses to abide by the arbitration agreement, the other party is entitled to invoke or enforce it under the said Act. Where an award is set aside as in the above case, the commencement of the arbitration again is pursuant to and under the existing arbitration clause. The same is neither based on nor dependent upon a fresh arbitration agreement between the parties.

19 It is not necessary to decide whether this Court has the discretion whether or not to allow the arbitration to begin again for I am clearly of the view that in the present case it must be exercised in the Applicants favour. A rejection of this application would be a travesty of justice. The entire award has been set aside only because a part of it was found to be contrary to law. Thus, even that part of the award which was found to be sustainable or at least was not held to be unsustainable is set aside. This as noted above was in view of the judgments of this court prior to their being overruled by the judgment of the Full Bench.

20 It is clarified that in the event of the Applicant filing an appeal against the order and judgment dated 11-10-2005 and in the event of the award being upheld in appeal in respect of any of the claims in the reference pursuant to this order, the Arbitral Tribunal shall not be entitled to deal with such claims. Nor will the Arbitral Tribunal be entitled to deal with the claim for refund of liquidated damages for the award granting that claim was set aside by the judgment dated 11-10-2005 on merits. The Applicant must pursue any other remedy regarding this claim. With these clarifications the Arbitration Application must be allowed.

21 The learned Counsel for the Respondents whilst opposing the prayer for referring the matter to arbitration de novo, without prejudice to the rights and contentions of the Respondents, submits that if the Court decides to refer the matter back for arbitration, then in that event, it should be only to a Sole Arbitrator and not three Arbitrators. This submission should not be construed as to prevent

the Respondents from challenging the judgment referring the matter back to arbitration. The Applicants agree to the same.

22 With the above clarification the application is allowed. However, Mr. Justice S.S. Parkar (Retd.) is appointed as the Sole Arbitrator.

23 This order is stayed upto and including 30th September, 2010 to enable the Respondents to challenge the same.

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