



Bombay High Court sets aside the multi-billion arbitration award against BCCI and delves into the concepts of Perversity and Patent Illegality under section 34

Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd

Citation	Comm Arbitration Petition (L) No. 4466 OF 2020
Date	16th June 2021
Court	High Court of Judicature at Bombay
Coram	Hon'ble Shri Justice G.S. Patel

1. BACKGROUND

- 1.1. In 2012, DCHL¹ (“**Respondent**”) was named the winning bidder for the Deccan Chargers franchise from Hyderabad and they signed a ten-year contract with BCCI² (“**Petitioner**”). However, due to contractual defaults on account of non-payment to the players and others, creating charges on the assets and of the insolvency event, disputes arose between the Parties. Since none of these defaults were cured, the Petitioner issued a notice of termination in August 2012, and the contract was subsequently terminated. On a petition filed by the Respondent, the Bombay High Court designated former Supreme Court Judge Justice (Retd) C K Thakker as the sole arbitrator (“**Arbitrator**”) to resolve the dispute.
- 1.2. In July, the Arbitrator issued an award in favor of the Respondent, ordering the Petitioner to pay the Respondent a total compensation of Rs 4,814.67 crores, plus 10% interest and legal fees.
- 1.3. The Arbitrator ruled that the Petitioner had illegally terminated its contract with the Respondent, the Hyderabad franchisee's owners. The Petitioner filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) which was allowed by the single bench of Justice Gautam Patel who set aside the Arbitrator's Award.

2. PROCEDURAL HISTORY

- 2.1. On the Respondent's first Section 9 petition in September 2012, the parties agreed on the name of the learned Sole Arbitrator. On 1st October 2012, the court held that the Respondent had made out a prima facie case and made a conditional order of stay, directing the Respondent to furnish an unconditional bank guarantee of Rs. 100 crores to the Petitioner before 9th October 2012, valid for 1 year. Thereof, against the bank guarantee, the Petitioner was to deposit in Court the amounts due to the Respondent.
- 2.2. On 9th October 2012, the Respondent did not furnish the bank guarantee ordered by the court and sought an extension and which was granted. The Petitioner appealed against the 1st October 2012 order. On 12th October 2012, the Respondent made an oral application before the Bombay High Court seeking a further extension of time. That application was rejected.
- 2.3. Resultantly, on 12th October 2012, the Petitioner's attorneys wrote to the Respondent's attorneys stating that there was no stay of the Petitioner's termination of the Franchise Agreement given the Respondent's failure to furnish a bank guarantee.
- 2.4. On failure to pursue a bank guarantee, the Respondent placed an application on 12th October before the Sole Arbitrator under Section 17 of the Act for an extension of the stay on termination or continuance of status quo order. The Arbitrator ordered a status-quo and meanwhile the Petitioner challenged the order under Section 37 of the Act. On 14th October 2012, BCCI issued a tender notice inviting bids for a new IPL franchise.
- 2.5. On 16th October 2012, the Respondent filed a second Section 9 petition for stay of the termination and was refused an ad-interim relief. Also, on 18th October 2012, by a

¹ Deccan Chronicle Holdings Ltd.

² Board of Cricket Control of India

separate order, the High Court allowed the Petitioner's Arbitration Appeal against the Section 17 ad-interim arbitral order of 12th October 2012. It was held that the Arbitrator had acted without jurisdiction. A Special Leave Petition by the Respondent to the Supreme Court against the 18th October 2012 order in the Petitioner's arbitration appeal failed on 19th October 2012.

- 2.6. Thereafter, the pleadings were completed before the Arbitrator. The Arbitrator drew up 16 issues for consideration and published the Arbitral Award on 17th July 2020 ("Award").

3. CONTENTIONS OF THE PETITIONER BEFORE THE HIGH COURT

- 3.1. The Petitioner argued that the Award considers completely irrelevant information, including information that is not on record and that it directed steps to alter contract provisions, which is impermissible.
- 3.2. It was pointed by the Petitioner that the Award purports to do what the Act specifies no arbitral tribunal can do in Section 28(2) of the Act, namely, decide *ex aequo et bono* or *amiable compositeur*, unless the agreement expressly stipulates the same.
- 3.3. It was submitted by the Petitioner that the Award inappropriately imports public law elements, particularly Article 14 principles of non-arbitrariness and that these claims are completely outside the purview of any private law arbitral tribunal. The underlying policy of Indian law prohibits an arbitral tribunal from applying these public law concepts to private commercial issues governed by contracts.
- 3.4. It was argued that the Award's findings and conclusions at various stages satisfy the legal definition of "perversity" as a component of "patent illegality" – it was and continues to be impossible for anybody to reach such findings. Also, that some findings in the Award are completely devoid of reasons – yet another level of patent infringement.
- 3.5. It was also submitted that the Award imposes damages for no apparent cause. The Award grants damages ostensibly in lieu of specific performance, although this relief was given up and not pressed during the hearing. The Respondent had no prayer for damages in lieu of specific performance, but only for (i) damages in addition to specific performance and (ii) damages if the specific performance relief was rejected. The Award impermissibly reads these as prayers for damages in lieu of specific performance. The Award returns no finding at all of the Respondent being proved to be entitled to specific performance. It grants compensatory damages – without reasons – and in doing so it rewards the Respondent for its inability to perform. This is argued to be against the fundamental policy of Indian law regarding damages.

4. CONTENTIONS OF THE RESPONDENT BEFORE THE HIGH COURT

- 4.1. The Respondent argued that there is no room for meddling with the Award, especially given the current status of the law. That the Arbitrator was allowed to use his discretion when it was necessary, asserted by facts and the results were not only possible but also completely reasonable.
- 4.2. It was also argued that the Petitioner had acted in an overbearing, capricious, and arbitrary manner throughout. The Petitioner's goals were always malicious, with the

goal of ousting the Deccan Chargers squad and the Respondent's franchise on some pretext or another. Thereof, the Respondent was forced into bankruptcy. Also, that the Petitioner acted unfairly in singling out the Respondent for punitive action and denial of necessary finance. It was submitted by the Respondent that when performance was required, it obliged, at least in part; yet, the Petitioner terminated the Franchise Agreement.

- 4.3. Further, it was also submitted that the policy of arbitration law is to minimize curial interference. A Section 34 court is not a court of appeal, or first appeal and the Court's remit is exceedingly narrow and that the awards are not to be set aside lightly. Moreover, the Award was argued to be fair, balanced, and fully considered the rival submissions and all the material on record.

5. ISSUE

- 5.1. Whether the award is liable to be set aside under Section 34 of the Act on the grounds of perversity and patent illegality?

6. JUDGEMENT

- 6.1. The High Court agreed with the submissions of the Petitioner and delved into the ambit of Section 34 of the Act, providing its reasons as to why the Award must be set aside.

6.2. PATENT ILLEGALITY & PERVERSITY UNDER SECTION 34, ARBITRATION & CONCILIATION ACT, 1996

- 6.2.1. The Court explored the narrow scope of Section 34,³ as settled by the Supreme Court in *Ssangyong*⁴ and in *Recon*.⁵ The Court observed that a challenge under Section 34(2A) of the Act may lie if the Award is impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc.) or in its result (returning a finding that is not even possible). Some of the major heads under which the Court considered the submissions of the party along with the reasons provided by the Court are mentioned below.

6.3. NECESSITY OF A SHOW-CAUSE NOTICE

- 6.3.1. The Court digging into clause 11 of the Agreement ascertained that the clause is two-fold i.e. (i) curable & remediable breaches, (ii) incurable or irremediable breaches. The first fold requires a show-cause notice calling upon the franchise to cure the default and the second fold required a termination notice. The 'Insolvency Event' as per the contract fell in the second fold and hence did not require a cure period and provide for immediate termination after notice.

³ Incorporating the amendments introduced by Act 3 of 2016, with effect from 23rd October 2015.

⁴ (2019) 15 SCC 131

⁵ 2020 SCC OnLine Bom 2278; (2021) 1 Bom CR 167 (Bom); (2020) 6 Mah LJ 509

6.3.2. The Court held that the failure of the Arbitrator to make the distinction and come to a finding of what breaches can be remedied and what cannot, is a fatal defect which goes to the root of the matter and would attract a challenge under patent illegality.

6.4. **PREMATURE TERMINATION**

6.4.1. The Arbitrator had accepted the submission of the Respondent that the Petitioner's termination was premature as it came a day before the 30-day cure period. The Court found that the finding of the Arbitrator omitted vital evidence, two letters in which the Respondent had stated that it 'substantially cured' all the defaults.

6.4.2. The Court remarked that if the Respondent had cured all default then it cannot sustain its claim for the reason of termination being premature i.e., carried a day before it could comply. Moreover, the Arbitrator overlooked the evidence that Petitioner had allowed the Respondent an additional day, keeping the termination in abeyance to allow the Respondent to demonstrate that it cured all breaches. The findings of the Arbitrator were therefore vitiated by the non-consideration of vital evidence.

6.5. **SUBSTANTIAL COMPLIANCE**

6.5.1. The Court found that the Award proceeds on the assumption that exact compliance of the contract is not a crucial element, 'substantial compliance' is enough. This was discussed under two aspects (1) the players' fees and (2) the bank charges.

6.5.2. Players' Fees: The Court held that the moment the Arbitrator found that the players' payments had not been made, it was not possible for it to arrive at a finding that 'substantial compliance' was achieved. Mere delivery of demand drafts could not meet the contractual requirement. The Arbitrator failed to consider that the contract required a fully 'ensured' payment. There was no scope for a finding that a 'substantial compliance' was made.

6.5.3. Bank Charges: The Arbitrator noted that the Respondent had no charges at the time Petitioner terminated its contract, and he accepted the Respondent's statements that (a) all charges existed prior to the Franchise Agreement and (b) were on the newspaper division.

6.5.4. If the Respondent's contention was that all charges and claims by various banks had been dropped or cleared, the Court concluded that the Respondent was responsible for establishing this. The Court further established that the Award did not mention any documents or evidence that would lead to such a determination.

6.5.5. The Court observed that, the Arbitrator not relying on the contractual provisions and even not providing *raison d'être*, concluded that charge was created on receivables and not on franchise. It was held by the Court that mere acceptance of a submission by a party does not amount to 'reasons' in an Award. 'Reasons' must take into rival considerations and provide as to why one party's submission prevails over the other in light of the evidentiary material available, which the Arbitrator failed to do.

6.5.6. The Court on the concept of 'substantial compliance' observed that there is no authority under private law in India which allows for such a view of substantial compliance. Though it may have significance under public law, it would not fall within the confines of a contract based arbitration. The Court held that no principle of

‘substantial compliance’ exists in private law, unless it is provided within the contract itself.

6.6. **INSOLVENCY EVENT**

6.6.1. The Respondent claimed that no winding-up order had been issued against them since the IFCI issue had been effectively ‘compromised.’ As a result, when Petitioner terminated the contract on September 14, 2012, the Arbitrator determined that the event of ‘insolvency’ was no longer in ‘existence.’

6.6.2. The Court however held that the finding of fact was reached without examining how and on what terms the matter was ‘settled’. The compromise agreement was clear that the winding-up petition was not disposed and was only in abeyance. Therefore, the finding of the Arbitrator that the Insolvency Event was ‘no more in existence’ was neither sustainable nor possible and hence is both perverse and patently illegal.

6.7. **UNFAIR DISCRIMINATION**

6.7.1. The Arbitrator held that the Petitioner, BCCI, is a body which performs ‘public functions’ and was required to demonstrate to the Arbitrator that the similar treatment was shown to all franchisees without any discrimination. The Arbitrator held that the Petitioner had treated the Respondent unfairly, particularly in relation to other franchisees and their owners. Despite the misconduct of other franchises, the Petitioner took no action against other franchises, but cancelled the contract with the Respondent.

6.7.2. However, the Respondent’s pleading was necessary to the effect of unfair discrimination and had to be proved, without which no findings could have been made against the Petitioner. Moreover, the Court held that the discussion in the Award of Article 14 and public law was neither a possible view nor within the scope of a commercial arbitration dispute confined by a contract. An arbitrator must act within the boundaries of the contract, and dragging of other franchisees is out of the purview of contract. The Court observed that public law doctrines of fairness and reasonableness cannot be imported to an arbitral tribunal to impose additional contractual obligations upon a party.

6.7.3. Further, the Arbitrator had held that the Petitioner was ‘bound’ to pay off the Respondent’s players’ dues. The finding in the Award that ‘may’ had to be read as ‘shall’ had the effect of re-writing the contract and such interpretation would arrive at a view which is not even possible.

6.8. **‘AMIABLE COMPOSITEUR’: (DECISION EX AEQUO ET BONO)**

6.8.1. It was pointed to the Court that under Section 28 of the Act, the phrases *ex aequo et bono* means ‘according to what is equitable (or just) and good’ and amiable compositeur as to how the arbitrator may follow equitable principles and need not be bound by legal rules. The Court observed that the arbitral tribunal is required under Section 28(3) of the Act to examine the contract conditions while determining and deciding the Award. Section 28 applies to the arbitral tribunal’s proceedings at all stages, not only the award-making stage.

6.8.2. Only if the parties expressly authorise the tribunal to determine *ex aequo et bono* or as amiable compositeur under Section 28 is it obligated to decide the dispute on the basis of what is 'equitable and good'. The Court held that it was not possible for the Arbitrator to hold a particular rule or regulation as 'bad in law'. Unless the contract allowed for it, the Arbitrator cannot decide the dispute based upon his notions of equity or fairness.

6.9. DAMAGES AWARDED

6.9.1. The Court held that it was an impossible view that despite the Respondent giving up and not pressing its claim for specific performance, it was nonetheless entitled to damages in addition to or in lieu of specific performance.

6.9.2. Damages 'in lieu of' specific performance could only have been awarded if the claim for specific performance had been made. Furthermore, damages could only be granted, if specific performance was found to be a capable of being granted. The Court also observed that the Respondent never amended its prayers to seek damages in lieu of specific performance.

6.10. THE RESPONDENT'S ATTEMPT TO FURNISH REASONS FOR THE AWARD WAS IMPERMISSIBLE

6.10.1. The Court observed that the Award is to speak for itself. It is therefore impermissible for a party to supply reasons which an Award does not have. It cannot be that the Court be asked by a party to accept that the particular evidence and material were considered by the Arbitrator if the Award itself is silent.

6.10.2. Though a Section 34 court cannot assess the 'reasonableness of reasons' provided in the Award but it must examine whether reasons exist at all.

7. CONCLUSION

7.1. It may be concluded from the High Court's observations as follows:

7.2. **Defaults:** There were three defaults at the most basic level: not paying players and others, putting charges on assets, and the insolvency event (the IFCI winding-up petition). The first two were supposed to be curable, but if it were not, the contract specified they would be terminated. The third may result in instant termination (leaving aside the fact that the Petitioner gave time to the Respondent to have this resolved as well). None of the three can be proven to have been cured or to no longer exist. All three continued. The Award proceeded without reason in some cases, ignoring evidence in others, straying far from the contract in still others, and taking positions that were not possible.

7.3. **Interest:** If seen as a recovery claim, the amount of Rs 36 crores less Rs.1.83 crores must include interest. There was no contractual provision that prohibits pendent lite interest. The Court therefore held that the provisions of Section 31(7)(a) of the Act will apply.⁶

⁶ As interpreted in *Jaiprakash Associates Ltd v Tehri Hydro Development Corporation Ltd*, (2019) 17 SCC 786.

7.4. **Final Orders:** The Petition was found to have elicited no convincing response. The Award was set aside except for the limited extent of the Award in favour of the Respondent for Rs 36 crores less Rs.1.83 crores and interest on that amount. Also, the arbitral award of Rs 50 lakhs in costs was set aside.

8. PSL OPINION AND ANALYSIS

- 8.1 The Court meticulously delved into the scope of challenge under Section 34(2A) of the Act. The judgment affirms that the ground of ‘perversity’ acts as a dimension under the ambit of ‘patent illegality’. It reiterates the settled legal position that arbitral awards can be set aside on the ground of ‘perversity’ for, inter alia, ignoring vital piece of evidence and by arriving at findings that were impossible. Further, the judgment is significant in its clarification that the role of an arbitrator is restricted within the strict confines of the contractual provisions and no transgression is allowed.
- 8.2 The judgment also serves as a treatise on calculation of damages in arbitration. It reaffirms the principle that an arbitrator is not required to provide minute calculations as a lumpsum award is permissible under Indian law, however the arbitrator must disclose reasons for accepting or rejecting each head of the claim. Assessment of causality remains a sine qua non for grant of compensation under section 73 of the Indian Contract Act, 1872, failing which an award becomes susceptible to a challenge under section 34 of the Act.