



Bombay High Court clarifies that liquidated damages are not payable in the absence of proof¹

Brief Facts

Jackie Shroff (“**Petitioner**”), a shareholder of Atlas Equipfin Pvt. Ltd. (“**Atlas**”), received a notice of placement instruction for sale of shares of Atlas to a third party (“**Placement Instruction**”). The Placement Instruction bore the Petitioner’s signature, which the Petitioner claimed was not his. The Petitioner filed a complaint alleging forgery with the Economic Offences Wings (“**EOW**”) against Ratnam Iyer (“**Respondent**”), another shareholder of Atlas. Subsequently, a settlement deed (“**Deed**”) was drawn and executed between the parties. Clause 3 of the Deed forbade the Petitioner from writing any letter or communication to any authority or person complaining about the subject matter of the Deed. The Deed also provided for keeping an amount in an escrow to be released to the Petitioner in two tranches upon closure/withdrawal of the EOW complaint and upon receipt of sale proceeds from Atlas.

The Petitioner received only the first tranche of the amount after unconditionally withdrawing the EOW complaint. With regard to release of the

second tranche, the Respondent claimed that the Petitioner had committed a breach of Clause 3 of the Deed as the Petitioner’s wife had sent emails calling the Respondent a ‘forger’.

The Bombay High Court at Mumbai (“**High Court**”) referred the dispute to a sole arbitrator (“**Tribunal**”). During the pendency of the arbitration proceedings, the sale of shares held by Atlas was completed followed by receipt of full sale consideration by Atlas.

The Tribunal passed the award (“**Award**”) holding that the Petitioner had committed a breach of Clause 3 of the Deed. The Tribunal awarded liquidated damages in favour of the Respondent and declared that the Petitioner was not entitled to the amount lying in the escrow. The Tribunal treated the Petitioner’s wife as his agent and the emails as having been sent with the knowledge, consent, authority, and on behalf, of the Petitioner. Consequently, the Petitioner challenged the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) before the High Court.

In this Issue

Brief Facts

Issues

Judgment

Analysis





Issues

Issue (i): Did the Petitioner breach Clause 3 of the Deed with the Petitioner's wife acting as an agent of the Petitioner?

Issue (ii): Could the Tribunal award pre-estimated damages/liquidated damages when the same were not contemplated in the Deed and when one of the parties completed its reciprocal obligation?

Judgment

The High Court set aside the Award under Section 34 on the following grounds:

Issue (i): The emails sent by the Petitioner's wife complained about the Respondent's subsequent conduct in the matter of the sale of shares. The subject matter of the Deed referred to in Clause 3 could only mean the complaint made by the Petitioner to the EOW regarding the alleged forgery by the Respondent. Moreover, the High Court observed that there was nothing on record before the Tribunal to show that the Petitioner had authorised his wife to make any complaint of forgery against the Respondent or that the emails were sent with consent of the Petitioner. Therefore, the High Court held that the Petitioner did not breach Clause 3 of the Deed.

Issue (ii): The High Court observed that it was undisputed that the Petitioner had fulfilled his reciprocal obligations under the Deed. Only in the case that the contract remained unexecuted and the Respondent suffered actual loss could the Respondent seek liquidated damages. The High Court also noted that the damages sought by Respondent

under the garb of value of his reputation were not defined as such in the Deed. They were neither liquidated damages nor a pre-determined estimate of the loss of reputation of the Respondent as held by the Tribunal. The Deed only entailed refund of the amounts in the escrow and the same was the only remedy available to the Respondent.

Setting aside the Award, the High Court observed that the Award was completely unreasonable, impossible and perverse. The Award was based on no evidence, and suffered from non-application of mind and misapplication of law.

Analysis

The High Court has given adequate reasoning as to why the Award "*shocked its conscience*", justifying its interference under Section 34 of the Act. The judgment passes the test of limited judicial intervention as laid down in **Associate Builders v. DDA**,² which was recently affirmed in **Ssanyong Engg. & Construction Co. Ltd. v. National Highways Authority of India**.³ The High Court rightly observed that the Tribunal travelled beyond the terms of the Deed and awarded liquidated damages to the Respondent without any proof of loss or damages suffered by the Respondent. The Respondent sought damages by way of an unexplained figure for alleged loss of reputation. Since the Petitioner had performed his reciprocal obligations, the Tribunal could neither exceed its jurisdiction nor the terms of the Deed to award liquidated damages that were not contemplated in the Deed. Having observed that the Petitioner did not breach the terms of the Deed, the High

In this Issue

Brief Facts

Issues

Judgment

Analysis





Court rightly set aside the Award. The judgment definitely cautions against the wide and fluid interpretation of contracts, especially by arbitrators,

who have been held to be creatures of contracts in various recent precedents.

In this Issue

Brief Facts

Issues

Judgment

Analysis

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Coram: S.C. Gupte, J.

2 (2015) 3 SCC 49.

3 (2019) 15 SCC 131.

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