

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMM.ARBITRATION PETITION NO. 53 OF 2021**

Meenanath Fatarpekar. ..Petitioner
Vs.
MicroStrategy India Pvt.Ltd. ..Respondent

Mr.Meenanath Fatarpekar – Petitioner in person present.

Ms.Meena Venugopal with Mr.Santosh Mishra i/b. Kochar and Co., for
the Respondents.

CORAM : G.S. KULKARNI, J.
DATE : 22 July, 2022.

P.C.:

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act,1996 (for short '**the Act**') whereby an arbitral award dated 27 January 2020 passed by learned Sole Arbitrator Mr.Jehangir J. Jejeebhoy, is challenged.
2. I have heard Mr.Phatarpekar, petitioner appearing in person at length and Ms.Venugopal, learned Counsel for the respondent.
3. The disputes and differences between the parties have arisen under the Employment Agreement dated 24 May 2012. The petitioner was appointed by the respondent in the capacity as a 'Sales Director'. On 5 June 2012 the petitioner joined services of the respondent. It appears that on 31 October 2014 the petitioner had intended to resign. However, on the same day a letter of termination dated 31 October 2014 was issued by the respondent terminating the services of the petitioner. The respondent had offered resignation compensation of Rs.19,85,000/- to

the petitioner which is stated to have been received by the petitioner. The petitioner, however, was aggrieved by the termination. Thus, disputes and differences had arisen between the parties in regard to the contract in question. Accordingly, the petitioner issued a legal notice dated 3 February 2015 making his claims as also invoked the arbitration clause as contained in the employment agreement. Such notice was replied by the respondent. Ultimately, a sole Arbitrator came to be appointed who entered an arbitral reference.

4. It is not in dispute that the notice invoking the arbitration is dated 3 February 2015. In accordance with the provisions of Section 21 of the Act read with Section 26 of the Arbitration and Conciliation Amendment Act, 2015 (for short '**2015 Amendment Act**'), the amended provisions of the 2015 Amendment Act as incorporated under the said amendment Act, would not be applicable to the arbitration in question.

5. The petitioner filed his statement of claim on 8 June 2015. The petitioner has made several claims. A concise version of the nature of the claims as made by the petitioner, can be found in paragraph 16 (page 76 of the paper book) of the statement of claim, which reads thus:

“In summary, my Statement of Claim is as follows:

Description	Amount (INR)
A : Pending Salary Dues	
1. Miscalculation : 1 month notice pay calculated as Gross pay	4,65,208
2. Miscalculation : Oct 2014 Gross Salary	4,65,208
3. Miscalculation : 42 vacation balance (2 calendar months Gross Salary	9,30,416
4. 6 month Gross salary as compensation for wrongful termination	27,91,250
5. Compensation for forcing me to work out of home	15,00,000

B : Pending / Miscalculated Variable Pay	
6. Miscalculation : Missing credit for Mindtree transaction	1,70,646
7. Miscalculation : Correction for the 5 wrong entries recorded in MSTR portal	36,568
8. Miscalculation : Sales Commission for Q314	14,67,039
9. Miscalculation : Sales Plan Accelerators	1,79,140
10. Compensation in lieu of attending President's Club	9,00,000
11. Compensation for Reliance transaction	242,81,044
12. 2012 and 2013 Variable Pay Balance	23,17,268
C. Seeking Justice :	
13. Cost of Arbitration proceedings	As per actuals
14. Cost of Attorney and Other litigation expenses	As per actuals
15. Compensation for compromising and losing my personal confidential data	50,00,000
16. Loss of Reputation and Mental Trauma to Family and Self	10,00,000
17. Compensation for creation of an unnecessary and significant gap in my employment history jeopardizing and damaging my future career and growth prospects	50,00,000
Grand Total	Rs.465,03,787

In view of this, as on date I am entitled to claim and receive total amount of **INR 465,03,787** (Rupees Four Crore Sixty Five Lakhs Three Thousand Seven Hundred and Eighty Seven Only).

Of this MSTR has deposited only **Rs.787,917** (Post tax). Given the deliberate delays and grossly inadequate information provided by MSTR, I also seek charging of interest at 21% pa from the date of termination for the balance amount along with any legal and arbitration charges that I my incur in pursuance of this matter.

Without prejudice to the above, I also humbly pray that the learned Arbitrator may please immediately consider that I am an ordinary employee wrongfully terminated by a big multinational company which has inserted the Arbitration clause in the contract of my employment and this huge amount of fees quoted amounting to Rs.20,000/- per hour would be totally unaffordable by me and therefore my request would be that the learned Arbitrator should consider exempting me from paying this huge amount in

the interest of justice and fair play which can then be recovered from the employer.

I request that the issue of the fees may be decided before proceeding further with the matter.”

6. The respondent opposed the claims as made by the petitioner. The petitioner appeared in person before the arbitral tribunal. The arbitral tribunal provided sufficient opportunity to the petitioner to lead his evidence. Also the respondent was granted an opportunity to lead oral evidence of its witness Mr.Rajesh Kesarwani. Both the witnesses were cross examined at length. Thereafter, the arbitral tribunal proceeded to hear final arguments on behalf of the parties. It is appropriate to note the issues which were framed by the arbitral tribunal as contained in paragraph 58 of the impugned award, so as to appreciate the contours of the adjudication before the arbitral tribunal. The issues read thus:

“58. The following issues were framed on 29 January 2018.

- i. Whether the termination of the Claimant’s employment with the Respondent was wrongful ?
- ii. Whether the Claimant is entitled to the pending salary dues?
- iii. Whether the Respondent has wrongly calculated the Claimant’s gross salary?
- iv. Whether the Respondent has wrongly calculated the Claimant’s leave pay?
- v. Whether the Claimant is entitled to compensation of six months’ salary for wrongful termination?
- vi. Whether the Claimant is entitled to compensation for working from home at Rs.1 lakh per month for 15 months?
- vii. Whether the Claimant is entitled to any pending/ miscalculated variable pau as per the particulars at Sr.Nos.6 to 12 of the table found at page 12 of the Statement of Claim ?
- viii. Whether the Claimant is entitled to compensation for compromise and/or loss of personal confidential data ?

- ix. Whether the Claimant is entitled to compensation for loss of reputation and mental trauma ?
- x. Whether the Claimant is entitled to compensation for creation of a gap in his employment history, jeopardizing his future career and growth prospects?
- xi. Whether the Claimant is entitled to interest on any of the aforesaid claims ?
- xii. What order as to costs?"

7. The primary contention of the petitioner was in regard to the wrongful termination of the petitioner by the respondent. In paragraph 60 of the arbitral award, the learned sole arbitrator on appreciation of material on record has observed that the contention of the petitioner that the decision of the termination appeared to be without considering the petitioner's sales performance, and the petitioner's case that he had consistently met or exceeded his required targets, was not correct. In fact, it appeared to be not relevant to the termination. The learned arbitrator has observed that the petitioner has not been able to dislodge the respondent's case that his employment was terminated by the respondent as a part of a global business organization of Microstrategy. This was clear from the evidence of Mr.Kesarwani who had stated that the post/position the petitioner/claimant held as Sales Director, was itself terminated and the respondent had not hired any person after the termination of the petitioner's employment. It is observed by the learned Sole Arbitrator that e-mail dated 31 October 2014 of the respondent terminating the petitioner's employment also makes no mention of any deficiency in the petitioner's performance. Learned Counsel for the respondent has also submitted that hence, this is a case of discharge simplicitor. The termination notice also referred to the business reorganization being the cause of termination. Learned sole arbitrator has clearly observed that it is not appropriate for the arbitral tribunal to sit in judgment on the commercial wisdom of the reorganization of the

respondent's business.

8. Be that as it may the arbitral tribunal after considering the rival contentions did not find favour in the various claims as made by the petitioner, however, the learned arbitrator has accepted the petitioner's case in regard to missing credit in regard to Mindtree transaction as also sales commission for five transactions as stated to be incorrectly recorded by the respondent and in regard to amount as annual accelerated bonus. The arbitral tribunal in conclusion has made the following award:

“CONCLUSION

95. In view of what is set out hereinabove, the Claimant is entitled to the following sums:

- (a) Rs.1,70,646/- as missing credit for the Mindtree transaction;
- (b) Rs.36,568/- as sales commission for 5 transactions incorrectly recorded by the Respondent;
- (c) Rs.95,361/- as Annual Accelerator Bonus.

96. The Respondent shall pay interest at the rate of 9% per annum on each of the aforesaid amounts from the date of the claim until payment and/or realization.”

9. The petitioner appearing in person being aggrieved by the arbitral award, has made submissions. In the oral arguments as advanced by the petitioner, the impugned award is assailed limited to the following:

(i) The first contention of the petitioner is that the award is contrary to the fundamental policy of the Indian Law.

(ii) The second submission is that the award is pronounced after fourteen months from the date the final arguments were concluded. The arguments are stated to have been concluded on 27 November 2018 and the award came to be published on 27 January 2020. It is submitted that such a delay in pronouncement of award is contrary to Section 29A of the Act. Hence, the award is rendered illegal.

(iii) It is submitted that the arbitral award is contrary to the provisions of the Income Tax Act, 1961.

(v) The arbitral award is contrary to the Bombay Shops and Establishments Act, 1948.

(vi) The arbitral award is contrary to the Payment of Wages Act, 1936.

(vii) Lastly, it is submitted that the termination itself was illegal and hence, the observations of the learned arbitrator in that regard are perverse.

10. No other submissions are made by the petitioner in person in assailing the impugned award.

11. In so far as the petitioner's contention in regard to the award being contrary to the Income Tax Act, the Bombay Shops and Establishment Act and the Payment of Wages Act are concerned, on a query as made to the petitioner as to whether any plea in that regard was taken in the statement of claim, so that the respondent could deal with such plea, as also the arbitral tribunal could have framed issues in regard to such contentions of the petitioner, the petitioner has stated that there was no such contention as raised and/or taken in the statement of claim. It is his submission that such pleas were raised in the written submissions. If that be the case, in my opinion, such issues did not arise for consideration of the arbitral tribunal, as none of these pleas formed part of the statement of claim, and therefore, rightly, did not find any place in the issues as framed by the arbitral tribunal. Thus, the contention of the petitioner in regard to the respondent acting in breach of the provisions of such enactments may not be a relevant ground to assail the arbitral award. Needless to observe that it was necessary for the petitioner to urge specific pleas if they were arising under such enactments, and plead a case in that regard in the statement

of claim, pointing out the facts which would constitute a breach of any of these legislations. In the absence of any such plea forming part of the statement of claim, there was no occasion for the respondent to meet such case and consequently, there was no reason for the arbitral tribunal to delve on any such issue.

12. In so far as the petitioner's contention that the award is hit by the provisions of Section 29A of the Act, in my opinion, such plea also cannot be accepted for the reason that it is not in dispute that in accordance with Section 21 of the Act, the arbitral proceedings has commenced on 3 February 2015 when the notice invoking the arbitration was served on the respondent. Such a notice being issued prior to the coming into force the 2015 Amendment Act which came into force on 23 October 2015. Thus, considering the provisions of Section 26 of the 2015 Amendment Act, the amendment incorporated by the 2015 Act, inserting Section 29A certainly would not be applicable to the arbitral proceedings in question. The petitioner hence, cannot take recourse to the provisions of Section 29A to contend that the award rendered by the arbitral tribunal in the present case is illegal on such count. Thus, the petitioner's contention referring to Section 29A, is required to be rejected.

13. In so far as the petitioner's contention that the award is in breach of the fundamental policy of Indian law, in my opinion, no ground whatsoever is made out by the petitioner to make good such plea. Also it is on record that the learned sole arbitrator had given a fair opportunity to the petitioner and the respondent as per the requirements of the provisions of the Act and then rendered the arbitral award. The findings on each of the issues are based on materials on record, hence, in no manner they can be labelled as perverse.

14. In the above circumstances no case whatsoever is made out for interference in the impugned arbitral award in the limited jurisdiction available under Section 34 of the Act. The petition is devoid of any merit. It is accordingly rejected.

15. At this stage, Ms.Venugopal, learned Counsel for the respondent states that the respondent is ready to offer the award amount to the petitioner. However, the petitioner states that he is not ready to accept the award amount. It is for the petitioner to take appropriate position in that regard.

16. Dismissed. No costs.

[G.S. KULKARNI, J.]