

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 16th October, 2012

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LPA No.701/2012

AWASTHI CONSTRUCTION CO.

..... Appellant

Through: Mr. R. Rajappan, Adv. with Ms. Rajni,
Adv.

Versus

GOVT OF NCT OF DELHI & ANR.

..... Respondents

Through: None.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra court appeal impugns the order dated 22nd August, 2012 of the learned Single Judge of dismissal of WP(C) No. 5117/2012 preferred by the appellant.

2. The said writ petition was preferred by the appellant assailing the order dated 20th November, 2009 of an Arbitral Tribunal of terminating arbitral proceedings in exercise of powers under Section 25(a) of the Arbitration and Conciliation Act, 1996, upon the failure of the appellant to appear therein or to submit its statement of facts/claim inspite of notices

dated 2nd September, 2009 and 12th October, 2009 and the latter of which had informed the appellant that upon its failure to submit the statement of facts/claims by 15th November, 2009 without any valid reason, the proceedings shall be terminated without further notice. The said arbitral proceedings had arisen out of a work order placed by the Government of NCT of Delhi (GNCTD) on the appellant and which work order provided for resolution of disputes arising therefrom by arbitration of an arbitrator to be appointed by the GNCTD. It is the claim of the appellant, that the GNCTD failed to provide the work site or perform its other obligations under the work order within the stipulated time leading the appellant to request for closure of the contract; that the GNCTD in compliance of the said request closed the contract and though returned the earnest money deposit and performance guarantee of the appellant but denied the claim made by the appellant for loss of profit, damages and interest and which led the appellant to invoke the arbitration clause; that the Arbitral Tribunal comprising of the sole arbitrator nominated by the GNCTD though claimed to have issued the notices aforesaid to the appellant but none of the said notices were received by the appellant; that the appellant upon learning of termination of the arbitration proceedings approached the GNCTD averring that it had not

received the notices and hence had no occasion to appear before the Arbitral Tribunal and requested for appointment of another arbitrator. The GNCTD however declined to substitute another arbitrator in place of the Arbitral Tribunal earlier appointed. The appellant, through the medium of the Right to Information Act, 2005, claims to have learnt that the notices aforesaid purportedly sent by the Arbitral Tribunal though intended to be sent by registered post, were sent by ordinary post. The appellant further claims that upon receipt of the said information the appellant again approached the GNCTD for directing the Arbitral Tribunal to resume the arbitral proceedings but the said request was also declined on 4th May, 2010.

3. With the aforesaid case the writ petition impugning the order dated 20th November, 2009 of the Arbitral Tribunal was filed and seeking further direction to the GNCTD to appoint another Arbitrator.

4. The learned Single Judge dismissed the writ petition holding the same to be barred by laches, observing that the writ petition had been filed after more than two years and four months of the last communication from the GNCTD and after nearly three years of the admitted knowledge on 9th December, 2009 of the order dated 20th November, 2009 of the Arbitral Tribunal. It is further observed by the learned Single Judge that the notices

sent by the Arbitral Tribunal were at the same address as the address given by the appellant in the writ petition and there is no reason to believe that these notices as well as the order dated 20th November, 2009 of the Arbitral Tribunal were not dispatched to the appellant. The delay in approaching the Court was held to be unexplained.

5. Though the writ petition was dismissed on the aforesaid grounds but the learned Single Judge without expressing any final opinion has also expressed doubts as to the very maintainability of the writ petition and as to the judgment of a Single Judge of the Patna High Court in ***Senbo Engineering Limited v. State of Bihar*** AIR 2004 Patna 33 on which reliance was placed by the appellant in support of the maintainability of the writ petition against the order of the Arbitral Tribunal.

6. The appellant in this appeal contends that there was no undue delay in filing the writ petition inasmuch as the appellant, even after receipt of the communication dated 4th May, 2010 (supra) was pursuing with the officers of the GNCTD. It is further contended that no remedy is available against an order of the arbitral tribunal under Section 25(a) since the same is not an

award as contemplated in Section 32 of the Act and irreparable injury is being caused to the appellant.

7. We, as appellate Bench, see no reason to interfere with the discretion exercised by the learned Single Judge in exercise of powers under Article 226 of the Constitution of India in holding the petition to be barred by laches. Though it is vaguely suggested that the appellant even after 4th May, 2010 was pursuing with the officers of the GNCTD but there is nothing to substantiate the same. Not a single letter has been written by the appellant after 4th May, 2010 and after a silence of two years and four months, the writ petition was filed on 14th August, 2012. Even if it were to be believed that the appellant was personally pursuing in the office of the GNCTD, the same will be of no avail. The GNCTD had unequivocally vide its letter dated 4th May, 2010 informed the appellant that its request for substitution of the arbitrator could not be acceded to. It is the settled principle of law (see ***Rabindranath Bose v. Union of India*** (1970) 1 SCC 84, ***Karnataka Power Corporation Ltd. v. K. Thangappan*** (2006) 4 SCC 322 and ***Shankara Cooperative Housing Society Limited v. M. Prabhakar*** (2011) 5 SCC 607) that mere repeated reminders cannot keep the *lis* alive especially in the absence of any assurance having been meted out that the matter was under

consideration. It cannot be lost sight of, that according to the appellant himself the contract was closed on 20th June, 2008. The claim if any for loss of profits and damages arising therefrom had to be made within three years thereof. Though the said claim was made and Arbitral Tribunal appointed but its proceedings terminated as aforesaid. The writ petition was filed more than four years after the contract was closed. A clear case of the appellant having by its conduct conveyed that it was no longer interested in pursuing the matter is made out and no illegality has been committed by the learned Single Judge in not disturbing the quietus which the appellant by its conduct had allowed the matter to attain.

8. We have also drawn the attention of the counsel for the appellant to the judgment of the Supreme Court in *S.B.P. & Co. vs. Patel Engineering Ltd.* (2005) 8 SCC 618 in paragraphs 45 and 46 whereof it has been held as under:

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved

party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is

pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.”

In view of the aforesaid dicta of the Supreme Court, the doubts expressed by the learned Single Judge as to the very maintainability of the writ petition against the order of the Arbitral Tribunal are well placed.

9. As far as the judgment of the High Court of Patna relied upon by the appellant is concerned, the same merely follows the judgment of a Single Judge of the Bombay High Court in *Anuptech Equipments Private Ltd. v. Ganpati Co-operative Housing Society Ltd.* AIR 1999 Bombay 219. The reasoning which prevailed with the Bombay High Court, can be analyzed as under:

- A. That the Act uses three different expressions i.e. arbitral award, order and decision, with remedies thereagainst provided in Section 11(7), Section 13(3), Section 14(2), Section 16(5), Section 34 and Section 37(2).
- B. No remedy had been provided against certain orders of the arbitral tribunal and one instance whereof was an order under Section 25(a) of the Act.

- C. Section 5 of the Act prohibits intervention in arbitral process, ruling out approaching the Civil Courts against such orders.
- D. The remedy under Section 34 against such order is also not available, being available only against an award or an interim award.
- E. That for an order to be an award, it must be akin to a decree.
- F. An order under Section 25(a) terminating the proceedings for default in filing a statement of claim could not be treated as an award.
- G. That if such orders were to be read as an award, it would create an anomaly inasmuch as termination can happen under Section 32(2) or under Section 16 also and remedy of appeal is provided whereagainst, indicating that order of termination of proceeding is different from an award.
- H. That while under Section 31, an award is required to state reasons, an order under Section 25(a) may be without any reason.

I. Finding no remedy available against such an order, it was held that the jurisdiction under Article 226 available against any person or authority could be invoked against an order under Section 25(a) of the Act.

10. Though the Patna High Court in ***Senbo Engineering Ltd.*** (supra) merely followed the Bombay High Court in holding the writ petition to be maintainable but also examined, whether the arbitral tribunal has the power and authority to recall its earlier order terminating the proceedings and following the judgments holding the Adjudicator under the Industrial Disputes Act, 1947 to be having such powers, held that the arbitral tribunal has the power of procedural review and authority to recall, on sufficient cause being shown, an order terminating the proceedings under Section 25(a).

11. We may notice that a Single Judge of this Court in ***Indian Oil Corporation Ltd. v. ATV Projects India Ltd.*** 112 (2004) DLT 701 also held a writ petition to be maintainable against an order under Section 25(a). The bar of Section 5 was held to be applicable only when there is a live arbitral proceeding and not available where arbitral proceedings have terminated. It was further held that the arbitral tribunal on such termination of the

proceedings becomes *functus officio* and cannot review its order. LPA No. 862/2004 against the said judgement of the learned Single Judge is however pending consideration.

12. We may also notice that the same learned Judge who sitting in Bombay High Court had pronounced the judgment in ***Anuptech Equipments Private Ltd.***, sitting as the Chief Justice of High Court of Allahabad, in ***S.K. Associates v. Indian Farmer and Fertilizers Cooperative Ltd.*** MANU/UP/2357/2010, reiterated that an arbitral tribunal would be such a ‘person’ to whom a writ could go under Article 226 of the Constitution of India and that due to the non availability of a remedy to an aggrieved person, held the remedy of Article 226 to be available. Though the observations aforesaid of the Supreme Court in ***S.B.P. & Co.*** (supra) were noted but were held to not apply to termination of proceedings under Section 25(a). It was further held that, termination of proceedings if does not result in an award, though cannot give rise to a challenge under Section 34 but if the claim is within limitation it is open to a party to apply afresh.

13. Notice may also be taken of the dicta of another Division Bench of the Bombay High Court in ***Rashtriya Chemical Fertilizers Ltd. v. J.S. Ocean Liner Pte. Ltd.*** MANU/MH/0355/2010 though holding the writ remedy to

be available, but to be confined to minimum and to be exercised in very exceptional and deserving cases.

14. The High Courts of Bombay, Allahabad and Patna have held the writ remedy to be available only for the reason of no other remedy being available to a party aggrieved from an order under Section 25(a). The Patna High Court however held that, notwithstanding the arbitral proceedings having been closed, the remedy of approaching the arbitral tribunal is available and further held the arbitral tribunal, upon being satisfied with the sufficiency of the cause for default given, is empowered to set aside the dismissal in default. It was however not considered that if such remedy of approaching the arbitral tribunal is available, the writ remedy could not be justified on the ground of 'no remedy'.

15. The first question which thus according to us needs to be answered is, whether the remedy of approaching the arbitral tribunal for review/recall of termination of proceedings is available, inasmuch as the only consideration which has prevailed in the judgements aforesaid for holding the writ remedy to be available is that a party cannot be left remediless. If the remedy of approaching the arbitral tribunal is available, the said reasoning would disappear.

16. Though the remedy of review has in *State of Arunachal Pradesh v. Damani Construction Co.* (2007) 10 SCC 742 been held to be not available to an arbitral tribunal and it is otherwise a settled principle that the power of review is not an inherent power and must be conferred by law either expressly or by implication (and of which there is no indication in the Arbitration Act) but the Supreme Court in *Grindlays Bank Ltd. v. CGIT* 1980 Supp SCC 420 followed in *Kapra Mazdoor Ekta Union v. Birla Cotton Spg. And Wvg. Mills Ltd.* (2005) 13 SCC 777 though in the context of Industrial Adjudicator, carved out a difference between a procedural review and a review on merits. It was held that procedural review is inherent or implied in a Court or a Tribunal, to set aside a palpably erroneous order passed by it under a misapprehension. On the contrary, a review on merits is for correction of error of law apparent on the face of the record. The law that there is no power to review unless the statute specifically provides for it, was held to be applicable to review on merits and not to a review sought due to a procedural defect. It was held that such procedural defect or inadvertent error must be corrected *ex debito justitiae* to prevent the abuse of process and such power inheres in every Court or Tribunal. Cases where a decision is rendered by the Court or a quasi judicial authority without notice to the

opposite party or under a mistaken impression that notice had been served upon the opposite party were held to be falling in the category where the power of procedural review may be invoked. It was held that the party seeking such review has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceedings and invalidated the order made therein inasmuch as the opportunity of hearing was denied without the fault of that party. The Supreme Court held that in such cases the matter has to be re-heard in accordance with the law without going into the merits of the order passed and the order is liable to be recalled and reviewed not because it is erroneous but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake. It was yet further held that once it is established that the party was prevented from appearing at the hearing due to sufficient cause, the matter must be re-heard and decided again. It is important to at this stage highlight that the Supreme Court in ***Damani Construction Co.*** (supra) was concerned with review of an award and which power of “review on merit” was held to be not vested in the arbitral tribunal.

17. We may in this regard also notice that the legislature, in Section 25, has not provided for termination of proceedings automatically on default by

a party but has vested the discretion in the arbitral tribunal to, on sufficient cause being shown condone such default. We are of the view that no distinction ought to be drawn between showing such sufficient cause before the proceedings are terminated and after the proceedings are terminated. If the arbitral tribunal is empowered to condone default on sufficient cause being shown, it matters not when the same is shown. It may well nigh be possible that the sufficient cause itself is such which prevented the party concerned from showing it before the proceedings terminated. It would be a pedantic reading of the provision to hold that the arbitral tribunal in such cases also stands denuded. Once the legislature has vested the arbitral tribunal with such power, an order of termination cannot be allowed to come in the way of exercise thereof.

18. There is another reason for us to hold so. The emphasis of the Arbitration Act is to provide an alternative dispute resolution mechanism. The provisions of the Act ought to be interpreted in a manner that would make such adjudication effective and not in a manner that would make arbitration proceedings cumbersome. A view that the arbitral tribunal is precluded, even where sufficient cause exists, from reviving the arbitral proceedings and the only remedy available to a party is a writ petition and

which remedy is available only in the High Court often situated at a distance from the place where the parties are located, would be a deterrent to arbitration. It is also worth mentioning that Section 19(2) of the Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. The parties may, while so laying down the procedure, provide for the remedy of review/revival of arbitral proceedings and which agreement would be binding on the arbitral tribunal. If the arbitral tribunal in such a situation would be empowered to, on sufficient cause being shown, revive the arbitral proceedings, we see no reason to, in the absence of such an agreement hold the arbitral tribunal to be not empowered to do so. If it were to be held that such power of review/recall is not available to an arbitral tribunal, the arbitral tribunal would not be competent to set aside an order under Section 25(b) also, compelling the respondent against whom proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise.

19. Before parting with the said line of reasoning, the consequences of the arbitral tribunal entertaining such procedural review may also be discussed. If the Arbitral Tribunal finds sufficient cause and restores the arbitral proceedings, the challenge to such order of restoration would lie along with

challenge to the award itself if against such aggrieved party. However if the arbitral tribunal does not accept as sufficient, the cause furnished for default, the arbitral tribunal would necessarily give reasons therefor within the meaning of Section 31 and such order of the Arbitral Tribunal would definitely constitute an award remedy whereagainst would be available under Section 34 of the Act. The definition in Section 2(1)(c) of the Act of an “arbitral award” is an inclusive one i.e. of the same including an interim award; else an arbitration award is not defined. However, sub-Section (1) of Section 32 provides for termination of arbitral proceedings either by an arbitral award or by an order of the arbitral tribunal under sub-Section (2) of Section 32. An order of dismissal of an application for review/recall of an order under Section 25(a) does not fall under any of the clauses in sub-Section (2) of Section 32. The same thus has to necessarily fall within the meaning of award.

20. We are further of the view that the proceedings under the Arbitration Act cannot at all times be viewed through the prism of CPC. The Act equates the award to a ‘decree’ only for the purposes of the enforcement thereof under Section 36 and our concepts and terminology of a suit cannot otherwise be applied to arbitration proceedings. The Supreme Court in

Paramjeet Singh Patheja v. ICDS Ltd. (2006) 13 SCC 322 held that the legal fiction of equating the award to a decree is for the limited purpose of enforcement and not intended to make an award a decree for all purposes. Ordinarily even the default termination order under Section 25(a) would be an award, with the remedy however available to the party of approaching the arbitral tribunal with sufficient cause for setting aside of the default termination order. We may in this regard notice that Section 34 allows an arbitral award to be set aside when a party was under some incapacity or when proper notice of the arbitral proceedings was not served or when the party was otherwise unable to present his case. The said grounds for setting aside would be invoked only if orders as under Section 25(a) were to be an award and there would have been no occasion for the legislature to provide such grounds under Section 34 if default orders were not to be an award. The same also follows from sub-Section (4) of Section 34 whereunder, upon challenge under Section 34 being made to such termination, the Court has been empowered to relegate the parties to the arbitral tribunal. We see no reason to not hold an order under Section 25(a) to be an award merely because the remedy of appeal against orders of terminations under Section 16(2) & (3) has been provided. Further, the order under Section 25(a),

stating default on the part of the party, would satisfy the requirement of the award to contain reasons. Moreover, merely because the arbitral tribunal fails to give any reasons cannot be a ground for making its orders unassailable under Section 34.

21. It cannot be lost sight of that though in the present case one of the contracting parties is Government but it may not always be so. The law of arbitration in the Act is the same, whether the contracting parties are Government/State within the meaning of Article 12 of the Constitution of India or private parties. What has been held by the Bombay, Patna and the Allahabad High Courts would equally apply to arbitration between the private parties and would tantamount to the jurisdiction under Article 226 being invoked against such private arbitrators and the parties. We are in the present state of affairs not prepared to hold so especially when in our view the remedy within the Act is available. In this regard it may be noticed that the Madras High Court in *Mangayarkarasi Apparels P. Ltd. v. Sundaram Finance Ltd.* MANU/TN/0504/2002 has disagreed with *Anuptech Equipments Private Ltd.* and held that the arbitral tribunal is not “other authority” within the meaning of Article 226 and writ remedy against the orders of the arbitral tribunal is not available.

22. The appellant in the present case did not approach the Arbitral Tribunal and kept approaching the GNCTD which under the contract was the party vested with the power to appoint the arbitrator. However GNCTD had already exercised such power by appointing an arbitrator and it is not open to the parties to upon such default closure again approach the appointing authority for appointment of an arbitrator. If that were to be permitted, it may become a tool of harassment and may render the proceedings pursuant to the earlier request for appointment redundant. We therefore, besides agreeing with the reasoning given by the learned Single Judge, further hold the writ petition filed by the appellant to be not maintainable.

The appeal is accordingly dismissed. No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

OCTOBER 16, 2012
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