IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 238 OF 2014

Shri. Tulsi P. Jashnani ... Applicant

vs.

M/s. Satco Capital Markets Ltd. & Anr. ... Respondents

WITH

ARBITRATION APPLICATION NO. 240 OF 2014

M/s. Manghandas Jayramdas ... Applicant

vs.

M/s. Satco Capital Markets Ltd. & Anr. ... Respondents

Mr. Rajendra Pai a/w Mr. A. Pai, Senior Counsel i/by Neuty N. Thakkar, Advocate for the applicant.
Mr. Simil Purohit a/w Mr. Girish Agarwal i/by M/s. Purohit & Co., Advocate for respondent No.1.

Coram : Smt. R. P. SondurBaldota, J.
Date : 1st December, 2015.

P.C. :

1 This is a common order on the above two applications filed under Section 11 r/w Section 15 of the Arbitration and Conciliation Act, 1996 ('the Arbitration Act', for short) against the same respondents under identical circumstances. The second application is by a partnership firm and the applicant in the first application is the brother of the managing partner of the partnership firm. They shall hereinafter referred to as the Firm and the applicant

respectively.

2 The brief identical statement of facts relevant for the present applications is as follows. By the order dated 16th July, 2010 passed by the Division Bench of this Court in Appeal No.209 of 2007, the award impugned in Arbitration Petition No.448 of 2006 was set aside and Mr. Pradeep Sancheti, Senior Advocate was appointed as Arbitrator to arbitrate the dispute represented in the Arbitration Petition. The claim of respondent No.1 being arbitrated by another Arbitrator was also referred to the same Arbitrator with liberty to the Arbitrator to take up the proceedings from the stage at which they were before the other Arbitrator. Accordingly, the Arbitration proceedings described in the two applications as A. M. No. F & O / M-025/2005 and A. M. No. F & O / M-026/2005 were taken up by the Arbitrator Shri. Pradeep Sancheti. The first Arbitration meeting was held on 28th October, 2010 and from that day it proceeded from time to time. After completion of the pleadings the applicant filed his affidavit of examination-in-chief on 21st July, 2012.

3 In the preliminary meeting the Arbitrator had directed the parties to deposit a sum of Rs.50,000/- as advance towards his fees, which had been duly deposited by both the sides. On 17th April, 2013, the Arbitrator issued directions for deposit of fees in A. M. No. F & O / M-026/2005. The applicant was directed to deposit a sum of

Rs.1,12,500/- being the fees payable as on that date and Rs.50,000/- as advance towards further hearings. The applicant sought time of one month to deposit the fees, which was granted to him with a caution that if he failed to deposit the fees, the Arbitral reference shall stand automatically terminated on expiry of one month in accordance with the proviso to Section 38(2) of the Arbitration Act. As regards A. M. No. F & O / M-025/2005, the direction to the firm was to make aggregate payment of Rs.1,00,000/- constituting Rs.50,000/- as per the earlier directions dated 11th February, 2012 and Rs.50,000/- towards further advance. In this case also a caution was given to the firm that on failure to deposit the fees on or before 30th April, 2013, the Arbitral reference shall stand automatically terminated. Respondent No.1 was also directed to deposit a sum of Rs.1,00,000/- on the same basis towards the Arbitrator's fees. In both the Arbitral proceedings the appellant and the firm issued cheques towards the deposit of arbitration fees, which cheques when presented for payment had returned dishonoured. Consequently, the self-operative order came into operation and the Arbitral proceedings stood terminated. The learned Arbitrator by his letter dated 21st June, 2013 informed the parties accordingly.

4 The Firm and the applicant, thereafter, preferred applications dated 10th July, 2013 under Section 33 of the Arbitration

Act for revival of the Arbitration proceedings by offering to pay the entire dues towards fees at that time. The application was opposed by respondent No.1 contending that the order dated 17th April, 2013 was a self-operative order and hence there was no scope for giving any further opportunity to the Firm and the applicant. The grievance raised of denial of appropriate opportunity to clear the dues before taking drastic action of termination of Arbitral proceedings, was without substance. The learned Arbitrator vide Minutes of the Meetings dated 2nd August, 2013, disposed off the application by rejecting the request. The learned Arbitrator opined that the scope of the arbitral authority under Section 33(1)(a) of the Arbitration Act being limited to correction of computation errors or clerical errors or typographical errors, the Arbitral Tribunal was not in a position to grant reliefs as prayed for in the applications.

5 Being aggrieved by the order, the Firm and the applicant have approached this Court. They contend that considering the stage of arbitral proceedings i.e. of recording of evidence, it would be fair and reasonable that they are concluded by hearing. According to them, the learned Arbitrator ought to have granted extension to deposit the fees. They allege that respondent No.1 had an ulterior motive in opposing continuation of arbitral proceedings initiated at the instance of the Firm and the applicant, on the one hand, it desires

to scuttle the arbitral proceeding initiated by the Firm and the applicant and on the other hand continue it's own claim. On these grounds, the applicant and the Firm seek relief in following terms:

> "a) that this Hon'ble Court be pleased to appoint a fit and proper person as the Sole Arbitrator to continue the Arbitration proceedings between the applicant and respondent no.1 arising under Application No.A.M. No.F&O / M-026/2005 filed with respondent no.2 on such terms and conditions as this Hon'ble Court may deem fit and proper".

6 Respondent no.1 contests the petition contending that the combined application made therein, under Sections 11 and 15 of the Arbitration Act is not maintainable and the petition deserves to be dismissed in limine. In it's affidavit filed to oppose the admission of the petition, respondent no.1 alleges that the Firm and the applicant have committed a huge fraud upon it and caused loss to the extent of Rs.2.00 Crores. Respondent no.1 has filed complaint with the Economic Offence Wing (E.O.W.) of Police. Then the working partner of the Firm went absconding and the fugitive notice had been issued by the Interpol. Later, when he returned to India, he was arrested and has been charge-sheeted.

7 Mr. Pai, the learned Senior Counsel appearing for the Firm and the applicant submits that there can be no impediment in law for filing an application under Section 11 of the Arbitration Act

for appointment of an Arbitrator alongwith application under Section 15 for termination of the arbitral proceedings. Mr. Pai refers to decision of the Apex Court in Lalitkumar V. Sanghavi (D) through LRs Neeta Lalit Kumar Sanghavi and Anr. Vs. Dharamdas V. Sanghavi and Ors, reported in (2014) 7 SCC, page 255. In the facts of the decision cited, the Presiding Arbitrator terminated the arbitral proceedings on the ground that the claimant had taken no interest in the matter during it's long pendency for a period of four years. Even the fees directed to be given had not been paid. The claimant then filed an application with a request to revoke the order of termination and later filed an application in the court for appointment of an Arbitrator. The application came to be dismissed holding that an application invoking Section 11 of the Arbitration Act was not maintainable and the remedy for the applicant was of filing a writ petition. This view was disapproved by the Apex Court in the appeal preferred by the claimant. The Apex Court held that the stand adopted that, any order passed by the arbitral Tribunal is capable of being corrected by the High Court under Articles 226 and 227 of the Constitution of India is not correct and that such an intervention by the High Court is not permissible. But at the same time, it also held that "that need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act". After considering the relevant provisions of Sections 14(2) and 32 of the Arbitration Act, the Apex Court held that the claimant was required to approach the court under Section 14(2) of the Arbitration Act. The relevant observations of the Apex Court read as under:

> "13 From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under Sub-Section 2. Sub-Section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in Sub-clauses (a) to (c) thereof.
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> 14 On the facts of the present case, the applicability of Sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, Sub-section (2), Sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 34, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)."

8 The second decision cited by Mr. Pai also of the Apex Court is in Union of India (UOI) vs. U.P. State Bridge Corporation Ltd., reported in 2014 (10) SCALE, page 561. In the facts of the decision cited, the arbitral tribunal constituted in the year 2007, consisting of railway authorities, despite of expiry of four years, had not completed the arbitral proceedings. Feeling exasperated due to prolongation of the matter, the appellant approached the High Court.

At that time, there was a vacancy in the arbitral tribunal. By the time, the High Court took up the case for hearing the respondent had filled up the vacancy. Taking note thereof, the High Court disposed off the application by giving last chance to the arbitral tribunal to complete the arbitral proceedings within a period of three months with liberty to the appellant to approach the court in the event arbitral tribunal failed to complete the proceedings within the prescribed period. The Tribunal failed to complete the proceedings within the time prescribed. Resultantly, the High Court was again moved pursuant to the liberty granted. The High Court took note of the dilatory tactics of the members of the arbitral tribunal in deciding the matter. It set aside the mandate of the tribunal and appointed a sole arbitrator to adjudicate the dispute between the parties. In the challenge to the order before the Apex Court, it was sought to be contended that as per scheme of the Act, even if the mandate of the arbitral tribunal was to be terminated, fresh tribunal could be constituted only in accordance with the arbitration agreement. Therefore, the High Court could have at the most directed constitution of another arbitral tribunal in accordance with the agreement between the parties and not appoint an independent sole arbitrator. This means the Apex Court on the background of the delay and inaction on the part of the arbitral tribunal was considering the question whether the arbitrator to be appointed under the circumstances had to be in accordance with the agreement between the parties or it could appoint an independent arbitrator. Thus the question for consideration of the Apex Court in the decision cited was entirely different. Hence, the decision cited is not relevant.

9 The next decision cited by Mr. Pai in Yashwith Construction Pvt. Ltd. Vs. Simplex Concrete Piles India Ltd. & Anr., reported in (2006) 6 SCC, page 204 can also be distinguished on facts. In the facts of that case on a dispute having arisen, the respondent-Company had appointed an arbitrator in terms of the arbitration agreement. The arbitrator however resigned whereupon the Managing Director of the respondent-Company, in view of the mandate of the arbitration agreement, promptly appointed another arbitrator. At that stage the petitioner approached the High Court with an application under Section 11 (5) r/w Section 15(2) of the Arbitration Act praying that a substitute arbitrator be appointed to resolve the dispute between the parties. The application was dismissed by the High Court holding that appointment of the second arbitrator by the Managing Director was valid in law. This order was confirmed by the Apex Court by the decision cited.

10 Mr. Purohit, the learned advocate for respondent no.1, submits per contra, by placing reliance upon the decision of the Apex

Court in Nimet Resources INC. And Another vs. Essar Steels Limited, reported in (2009) 17 SCC, page 313, that after passing the order of appointment of an arbitrator, in exercise of it's jurisdiction under Section 11 of the Arbitration Act, the Court does not and cannot retain any jurisdiction in itself for appointment of an arbitrator. Consequently, the only course open to the Firm and the applicant was an application under Section 14 (2) of the Arbitration Act to challenge termination of the mandate.

11 The first question arising for the consideration of the court is whether there could be a combined application under Sections 11 and 15 of the Arbitration Act. Section 11 of the Act gives jurisdiction to the Court to appoint an arbitrator to adjudicate dispute between the parties where there is an arbitration agreement between them. Section 15 provides for termination of mandate and substitution of the arbitrator. This provision is in addition to Sections 13 and 14 of the Arbitration Act providing for termination of mandate of an arbitrator. It's Sub-section 1 provides for two additional circumstances for termination of mandate i.e. (a) where the arbitrator withdraws from the office for any reason or (b) by or pursuant to the agreement of the parties. In the event of termination of mandate, Sub-Section 2 provides for appointment of a substitute arbitrator. The bare reading of the two provisions i.e. Section 11 and

Section 15 is sufficient to know that there cannot be a combined application under the two provisions as they provide for completely different sets of circumstances. Therefore, there is substance in the argument of Mr. Purohit that the application as filed for reliefs under Sections 11 and Section 15 of the Arbitration Act is not maintainable.

12 The next question would be whether the application is maintenable under either of the two provisions. Section 15 provides for termination of mandate of an arbitrator. There is distinct difference in termination of mandate of an arbitrator and termination of arbitral proceedings. The provisions regulating termination of the mandate of an arbitrator are Sections 13, 14 and 15 of the Arbitration Act. These provisions essentially relate to any difficulty or concern as regards the specific arbitrator conducting the arbitral proceedings. It can be either challenge to the Arbitrator on the grounds specified in Section 13 or failure or impossibility on the part of the arbitrator to act or his withdrawal from the office for any reason or the parties agreeing for termination of his mandate. It is therefore obvious that on termination of mandate of an arbitrator, the arbitral proceeding between the parties do not get terminated. There is no adjudication of the dispute between the parties. In the circumstance, the arbitral proceedings can be continued by appointment of a substitute arbitrator. The termination of arbitral

proceedings on the other hand as provided in Sections 32 and 38 of the Arbitration Act brings an end to the arbitral proceeding itself. The circumstances provided in Sections 32 and 38, relate to the conduct of the parties to the arbitral proceedings. The parties either wholeheartedly participate in the arbitral proceedings or fail to participate for any reason specified in Sections 32 and 38. In case of participation, the arbitral proceedings would culminate into the final award under Section 32(1). In case of existence of circumstances either under Section 32(2) and Section 38(2), the arbitral proceedings get terminated. With conclusion of the arbitral proceedings under either of the two provisions, there is no scope for appointment of a substitute arbitrator to continue the arbitral proceedings. In the case on hand, there is termination of arbitral proceedings. Therefore, Section 15 of the Arbitration Act will have no application. By termination of the arbitral proceedings, the arbitration agreement between the parties would stand exhausted and there can be no fresh or substitute appointment of an arbitrator under the same arbitration agreement. Therefore, there could be no application for appointment of an arbitrator under Section 11 by resorting to the same arbitration agreement. In such circumstances, the only remedy available to the party is to challenge the order of termination of arbitral proceedings as already been pointed out by the Apex Court in it's decision in Lalit Kumar case cited by Mr. Pai.

The above applications therefore filed under Section 11 r/w Section 15 of the Arbitration Act are not maintainable and hence dismissed.

[Smt. R. P. SondurBaldota, J.]