

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 1461 OF 2014**

Wanbury Ltd.)
A company incorporated under the)
provisions of the Companies Act, 1956 and)
having its Registered Office at 10th Floor,)
B-Wing, BSEL Tech Park, Sector – 30A,)
Opposite Vashi Railway Station, Vashi,)
Navi Mumbai 400 705) **..... Petitioner**

Versus

Candid Drug Distributors)
A partnership firm registered under the)
provisions of the Indian Partnership Act,)
1932 and having its place of business at)
M.L.Nehru Road, Panbazar,)
Guwahati 781001 Assam) **..... Respondent**

Mr.P.K.Samdhani, Senior Advocate, a/w. Mr.Vishal Talsania, Mr.Mahesh Londhe, Mr.Akshay Udeshi, i/b. M/s.Sanjay Udeshi & Co. for the Petitioner.

Mr.Dushyant Purekar for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 29th JUNE, 2015

PRONOUNCED ON : 15th JULY, 2015

JUDGMENT :

By this petition filed under section 14(1) (a), 14(2) and 32(2) (c) of the Arbitration and Conciliation Act, 1996, the petitioner seeks a declaration that the mandate of the arbitral tribunal constituted by an order dated 8th October, 2013 in Arbitration Petition No.46 of 2012 is terminated. The petitioner also seeks an order that the order dated 30th September, 2014 passed by the arbitral tribunal

thereby entertaining and allowing the application of the respondent for condonation of delay in filing statement of claim alongwith documents and proceeding with the arbitration proceeding further be set aside. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner herein was the original respondent and the respondent herein was the original claimant before the arbitral tribunal. On 13th January, 2013, the parties entered into an agreement whereby the respondent was appointed as non-exclusive C&F Agent of the petitioner. The said agreement came to be terminated by the petitioner on 6th April, 2006. The respondent filed a suit (20 of 2007) on 30th March, 2007 against the petitioner in the Court of Civil Judge (Senior Division) No.1, Kamrup at Guwahati and inter alia praying for a money decree of Rs.1,71,24,267/-. By an order dated 19th May, 2008 the said suit was dismissed for want of territorial jurisdiction. The said order was upheld by the Guwahati High Court by an order dated 10th February, 2011.

3. On 20th January, 2011 the respondent filed an arbitration petition (46 of 2012) under section 11(6) of the Arbitration Act inter alia praying for appointment of an arbitrator. By an order dated 8th October, 2013 the learned designate of the Chief Justice appointed two arbitrators for deciding the disputes and directed the learned arbitrators to appoint a presiding arbitrator. The said order for appointment of the learned arbitrators was confirmed by the Supreme Court by an order dated 31st January, 2014.

4. On 11th February, 2014, the arbitral tribunal called a meeting. The arbitral tribunal issued direction to the parties to file pleadings. The respondent herein (original claimant) was directed to file statement of claim togetherwith all the

documents on or before 21st April, 2014 and to furnish a copy thereof to the petitioner's advocate by the same date. The petitioner herein was directed to file a written statement and counter claim togetherwith all documents on or before 16th June, 2014. The arbitral tribunal also granted liberty to the respondent herein to file rejoinder and reply to counter claim on or before 14th July, 2014. In the said meeting, the arbitral tribunal also recorded that the parties had agreed that the presiding arbitrator would be at liberty to give further directions, as occasions may arise without calling a meeting of the arbitrators unless the parties otherwise would desire a hearing by the tribunal. The next meeting was fixed on 30th July, 2014 for the purpose of considering the pleadings and to determine the points in dispute.

5. In the meeting held on 30th July, 2014 the respondent herein as well as their advocates were absent. The respondent did not file statement of claim alongwith documents as directed by the arbitral tribunal. The arbitral tribunal recorded in the said meeting that Shri Purekar, advocate had telephonically informed the arbitral tribunal that he wanted two weeks time to take further steps in the matter. The said request for time when communicated to the petitioner by the arbitral tribunal, the petitioner through their advocates opposed on the ground that the date fixed for the filing of the statement of claim had already expired and thus no statement of claim could be filed by the respondent. The petitioner through their advocates suggested that the arbitration proceedings should be terminated and the petitioner be awarded cost of arbitration so far incurred.

6. The arbitral tribunal decided to give an opportunity to the respondent herein to make an application for condonation of delay subject to the payment of cost of Rs.30,000/- as a condition precedent before entertaining their application for condonation of delay. The learned advocate representing the petitioner made a

submission before the arbitral tribunal that in the event of the respondent herein failing to comply with the said order viz. to pay cost as condition precedent and thereafter to file an application for condonation of delay, the proceedings should be terminated and the petitioner be awarded the cost incurred till then. The arbitral tribunal in the said meeting granted time to the respondent upto 19th August, 2014 for the purpose of filing an application for condonation of delay if they were so advised after paying cost of Rs.30,000/- to the petitioner herein as cost condition precedent.

7. It was made clear that if the respondent herein fail to pay cost of Rs.30,000/- as cost condition precedent before filing of the application for condonation of delay and even after paying such cost, does not take an action to file an application for condonation of delay on or before 19th August, 2014, the arbitration proceedings will automatically stand terminated and the petitioner herein will be entitled to recover the cost of Rs.1,80,000/- from the respondent herein by way of cost so far incurred in the arbitration. It was further directed that the further direction would be given by the arbitral tribunal if and when the presiding arbitrator would receive the application for condonation of delay and reply to that application.

8. On 20th August, 2014, the learned advocate representing the respondent herein addressed a letter to the arbitral tribunal with a copy thereof to the learned advocate representing the petitioner herein. In the said letter the respondent alleged that the concerned partner of the respondent firm, Mr.P.K.Banerjee was not in Guwahati since the first week of August 2014 till 18th August, 2014 as his wife was admitted in the hospital in Delhi from 3rd August, 2014 till 17th August, 2014. It was stated that Mr.P.K.Banerjee had been time and again out of Guwahati due to

ill health of his wife. A copy of the discharge summary was annexed along with the said letter for perusal of the arbitral tribunal. The respondent through their advocates requested the arbitral tribunal to extend the time for filing of statement of claim and application for condonation of delay by one week from 19th August, 2014.

9. The arbitral tribunal was informed that the statement of claim had been already affirmed by Mr.P.K.Banerjee on 19th August, 2014 and the same had been sent to the learned advocate by courier on the same day. The learned advocate informed that the said statement of claim would be received by him on Friday and would be filed by him before the arbitral tribunal. The respondent through their advocate also forwarded a demand draft of Rs.30,000/- towards the cost to the learned advocate representing the petitioner herein. A copy of the demand draft was enclosed along with that letter for the record of the arbitral tribunal.

10. The petitioner herein through their advocate raised an objection by making an endorsement on the said letter dated 20th August, 2014 contending that the arbitral tribunal had already passed an order on 30th July, 2014 which was self operative order. It is contended that the arbitration proceedings were already terminated upon the failure of the respondent to comply with the directions issued in the meeting dated 30th July, 2014 and thus there was no arbitration pending between the parties. It was contended that there was no question of the respondent making any application and the petitioner accepting the demand draft. The petitioner accordingly returned the demand draft with the said letter and called upon the respondent to refrain themselves to adopt any procedure or practice of making any application.

11. On 12th September, 2014, the arbitral tribunal recorded that the respondent through their advocate had filed an application for condonation of delay in filing statement of claim. Since the arbitral tribunal had not received any response from the petitioner, the arbitral tribunal fixed a meeting on 30th September, 2014 and directed the parties to attend the meeting in the office of the learned presiding arbitrator.

12. The petitioner vide their advocate's letter dated 23rd September, 2014 to the arbitral tribunal once again contended that since the respondent had not complied with the order dated 30th July, 2014 by filing any application for condonation of delay on or before 19th August, 2014 nor had paid the cost, the arbitration proceedings had already been automatically terminated on 19th August, 2014. The petitioner also referred to their reply written on the copy of the letter addressed by the advocate of the respondent on 20th August, 2014 contending that the arbitral proceedings had already been terminated. The petitioner contended in the said letter that since no arbitration was pending, the petitioner was not duty bound to respond to the letter under reply addressed by the arbitral tribunal however as a business practice, the petitioner thought it prudent to address the said letter and to bring the facts to their notice. The petitioner requested the arbitral tribunal to recuse themselves from entertaining such application of the respondent since the arbitration proceedings did not exist. The petitioner also informed the arbitral tribunal that they were not duty bound to attend any meeting as mentioned in the letter and would not attend the said meeting.

13. On 30th September, 2014 the arbitral tribunal considered the said application dated 20th August, 2014 filed by the respondent for condonation of delay in filing statement of claim and also the objection of jurisdiction raised by the petitioner.

The petitioner did not appear before the arbitral tribunal. The respondent appeared through their learned advocate and made various submissions to controvert the objections raised by the petitioner that the arbitral tribunal had no jurisdiction to consider such application for condonation of delay or that the arbitral tribunal had become infructuous officio.

14. The arbitral tribunal passed an order on 30th September, 2014 holding that the respondent had shown sufficient cause for not filing claim statement within the time prescribed by the arbitral tribunal and condoned the delay in filing the application for condonation of delay as well as the claim statement. The arbitral tribunal directed the respondent to tender to the petitioner's advocate an amount of Rs.60,000/- which would include earlier awarded cost of Rs.30,000/- by a bank draft on or before 31st October, 2014 togetherwith all documents including claim statement and on proof of having tendered that to the satisfaction of the presiding arbitrator the claim statement shall stand admitted. The arbitral tribunal granted time upto 30th November, 2014 to the petitioner to file written statement alongwith documents relied upon with copies to the respondent and to the three members of the tribunal and granted time to the respondent herein to file rejoinder on or before 15th December, 2014.

15. It is the case of the respondent that pursuant to the said order passed by the arbitral tribunal, the respondent has already served a copy of the statement of claim and demand draft of Rs.60,000/- towards cost within the time prescribed. The learned advocate for the petitioner however declined to accept the said statement of claim as well as demand draft. On 30th September, 2014, the petitioner lodged this petition inter alia praying for declaration that the mandate of the arbitral tribunal stood terminated and for quashing and setting aside of the said

order dated 30th September, 2014.

16. Mr.Samdhani, learned senior counsel for the petitioner invited my attention to the correspondence referred to aforesaid and also the minutes of the meeting held by the arbitral tribunal. He submits that there was a gross delay on the part of the respondent in pursuing the arbitral proceedings. He submits that in view of the conditional order passed by the arbitral tribunal on 30th July, 2014 directing the respondent to file statement of claim alongwith application for condonation of delay after paying the cost of Rs.30,000/- on or before 19th August, 2014 and making it clear that in case of failure, the arbitration proceedings would automatically stand terminated, the respondent admittedly not having complied with the said conditional order dated 30th July, 2014, the arbitral proceedings stood terminated automatically on 19th August, 2014.

17. It is submitted that since the arbitral proceedings stood terminated, the mandate of the arbitral tribunal also stood terminated on 19th August, 2014 itself and thus the arbitral tribunal could not have exercised their jurisdiction thereafter. The arbitral tribunal therefore could not have passed any order on 30th September, 2014 condoning the delay in filing statement of claim and for payment of cost. It is submitted that under section 32(2) (c), the arbitral tribunal is bound to terminate the proceeding where the continuation of proceedings for any other reasons not provided in section 32(1) or 2(a) and (b) becomes unnecessary or impossible. He submits that since the arbitral tribunal has proceeded with and has condoned the delay and has taken the statement of claim alongwith documents on record, the present petition filed under section 14(2) of the Arbitration and Conciliation Act, 1996 is maintainable.

18. In support of the aforesaid submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Lalitkumar V.Sanghavi vs.Dharamdas V.Sanghavi and others*** reported in (2014) 7 SCC 255 and in particular paragraphs 5, 11 and 12 and also placed reliance on the judgment of Delhi High Court in case of ***Indian Oil Corporation Ltd. vs. ATV Projects India Ltd. and another*** 2005 (124) Company Cases 45 and in particular paragraphs 6 to 10, 13, 17 and 23. He submits that once the arbitral tribunal had become functus officio, it had no power to review its own order.

19. Mr.Purekar, learned counsel appearing for the respondent on the other hand supported the reasons rendered by the arbitral tribunal and submits that this petition filed under section 14 is not maintainable. He submits that once the arbitral tribunal had granted time to file statement of claim alongwith documents by a particular date, it possesses power to grant extension of time to file statement of claim and documents. There was no further order passed by the arbitral tribunal after issuing the direction on 30th July, 2014 terminating the proceedings. He submits that the respondent was prevented by a sufficient cause for filing application for condonation of delay and had produced several documents in support of the said plea including the papers relating to the admission of the wife of the partner of the respondent in hospital. He submits that power of the arbitral tribunal to condone delay is implicit in the power of the arbitral tribunal to issue directions to file pleadings and documents.

20. Learned counsel for the respondent submits that in any event the objection raised by the petitioner was about the jurisdiction of the arbitral tribunal to entertain the application for condonation of delay and for taking the statement of claim on record on the ground that the arbitral tribunal had become functus

officio, in view of the arbitral proceedings having been terminated, the same issue was raised under section 16 of the Arbitration and Conciliation Act, 1996 and the arbitral tribunal having rejected such plea, the remedy of the petitioner would be to file arbitration petition under section 34 of the Arbitration Act alongwith the final award and not this proceeding under section 14(2). In support of this submission, learned counsel appearing for the respondent placed reliance on the judgment of this court in case of ***Bharat Sanchar Nigam Ltd. vs. The Maharashtra Micro and Small Scale Enterprises Facilitation Council & Additional Commissioner (Revenue) & Ors.*** delivered on 31st March, 2015 in Arbitration Petition No.990 of 2014 and in particular paragraphs 16, 19, 20 and 21.

21. Learned counsel appearing for the respondent also placed reliance on the judgment of Supreme Court in case of ***Mohan Singh and Ors. vs. International Airport Authority of India and Ors.***, reported in (1997) 9 SCC 132 and in particular paragraphs 18, 19 and 21. He also placed reliance on the judgment of Patna High Court in case of ***M/s.Senbo Engineering Ltd. vs. State of Bihar and others*** reported in ***AIR 2004 Patna 33*** and in particular paragraphs 22, 25, 26, 30, 31 and 32 and would submit that since the respondent had failed to file an application for condonation of delay within the time prescribed by the arbitral tribunal due to the reasons mentioned in the application for condonation of delay which were beyond the control of the respondent and the said delay was not attributable to any negligence, inaction or want of bonafide on the part of the respondent, the arbitral tribunal has rightly condoned the delay having found that the respondent had shown sufficient cause for not filing application for condonation of delay and in filing statement of claim. He submits that since the respondent has shown sufficient cause in not filing application for condonation of delay and also the statement of claim and had forwarded a demand draft of

Rs.30,000/- towards cost, the arbitral tribunal had full authority and power to recall the earlier order and to condone delay in filing such application and also the statement of claim and delay in payment of deposit of the cost.

22. Learned counsel appearing for the respondent then placed reliance on the judgment of Andhra Pradesh High Court in case of ***N.Jayalaxmi vs. R.Veeraswamy, Sole Arbitrator, General Manager (Finance), Airports Authority of India (NAD) and Anr.***, reported in ***2004(1) Arb.LR 31 (AP)*** and in particular paragraphs 26 and 28 and would submit that the word 'shall' stated in section 25(2) is not decisive in construing whether a provision is mandatory or directory. He submits that if an object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of enactment, the same should be construed as directory.

23. Learned counsel for the respondent distinguished the judgment of Supreme Court in case of ***Lalitkumar V.Sanghavi (supra)*** relied upon by the learned senior counsel for the petitioner on the ground that the facts before the Supreme Court in the said judgment were totally different. He submits that the issue before the Supreme Court was whether the application under section 11 was maintainable once the arbitral proceedings were terminated by the arbitral tribunal or an application under section 14 only could be filed. He submits that in that case the proceedings were terminated by the arbitral tribunal in the year 2007 since there was no progress for last four years. He submits that the facts of this case are however totally different. He submits that the respondent has in any event already acted upon the said order 30th September, 2014. The present petition is not

maintainable on that ground also.

24. Mr.Samdhani, learned senior counsel in rejoinder submits that the respondent has not challenged the order dated 30th July, 2014 passed by the arbitral tribunal by which the proceedings stood terminated automatically in view of the respondent admittedly not complying with the directions issued by the arbitral tribunal. Learned senior counsel made an attempt to distinguish the judgment of Patna High Court in case of *M/s.Senbo Engineering Ltd. (supra)* and also judgment of Andhra Pradesh High Court in case of *N.Jayalaxmi (supra)*. He submits that the question before the Andhra Pradesh High Court was whether the provisions under section 25(a) are mandatory or discretionary. Insofar as judgment of this court in case of *Bharat Sanchar Nigam Ltd. (supra)* is concerned, learned senior counsel distinguished the said judgment on the ground that in the said proceedings, this court has considered that once objection under section 16 is raised before the arbitrator by the respondent whether application under section 14 could be filed by the applicant or not. He submits that the petitioner had not filed any application under section 16 before the arbitral tribunal.

REASONS AND CONCLUSION

25. There is no dispute that in the meeting held on 11th February, 2014, the arbitral tribunal had issued direction to the parties to file pleadings alongwith documents. Insofar as the respondent herein (original claimant) is concerned, the arbitral tribunal directed them to file statement of claim togetherwith all documents on or before 21st April, 2014 and similarly issued directions to the petitioner herein to file their written statement and counter claim on or before 16th June, 2014. The arbitral tribunal fixed the next meeting on 30th July, 2014 for the purpose of considering the pleadings and to determine the points in dispute. On

30th July, 2014, the respondent could not remain present before the arbitral tribunal. The arbitral tribunal in the minutes of the said meeting recorded that the learned advocate representing the respondent had telephonically informed the arbitral tribunal that he wanted two weeks time to take further steps in the matter. The said request was however opposed by the learned advocate representing the petitioner before the arbitral tribunal.

26. The arbitral tribunal however decided to give an opportunity to the respondent herein to make an application for condonation of delay subject to the payment of cost of Rs.30,000/- as a condition precedent before entertaining his application for condonation of delay. The arbitral tribunal however made it clear that the respondent herein was granted time upto 19th August, 2014 for the purpose of filing an application for condonation of delay after paying the cost of Rs.30,000/- as a condition precedent. In the said order, it was provided that if the respondent fails to pay cost of Rs.30,000/- as cost condition precedent before filing of the condonation application and even after paying such cost does not take action to file an application for condonation of delay on or before 19th August, 2014, the arbitration proceedings would automatically stand terminated and the petitioner herein would be entitled to recover the cost of Rs.1,80,000/- from the respondent herein by way of cost.

27. A perusal of the record indicates that it was the case of the respondent that the statement of claim was already affirmed by Mr.P.K.Banerjee, the concerned partner of the respondent and the same had been sent to the learned advocate, by him by courier on the same day. The learned advocate representing the respondent addressed a letter on 20th August, 2014 with a copy thereof served upon the learned advocate representing the petitioner herein. A perusal of the said letter indicates

that it was the case of the respondent that the concerned partner of the respondent firm Mr.P.K.Banerjee was not in Guwahati since the first week of August 2014 till 18th August, 2014 as his wife was admitted in the hospital at Delhi from 3rd August, 2014 till 17th August, 2014 and had been time and again out of Guwahati due to her ill health.

28. The respondent also annexed a copy of the discharge summary alongwith the said letter for perusal of the arbitral tribunal. By the said letter, the learned advocate for the respondent requested the arbitral tribunal to extend the time for filing statement of claim and application for condonation of delay by one week from 19th August, 2014. The respondent also forwarded demand draft of Rs.30,000/- towards cost to the learned advocate representing the petitioner. A copy of the said demand draft was also enclosed alongwith the said letter for perusal of the arbitral tribunal. The said letter was served upon the learned advocate representing the petitioner on the same day.

29. The learned advocate for the petitioner made an endorsement on the said letter contending that the arbitration proceedings were already terminated in view of the failure on the part of the respondent to comply with the directions given in the meeting dated 30th July, 2014 and since no arbitration was pending, there was no question of the respondent making any application for condonation of delay or for the petitioner to accepting the demand draft. The learned advocate of the petitioner returned the demand draft alongwith the said letter contending that since there was no arbitration between the parties, the respondent shall refrain themselves to adopt any procedure or practice of making any application.

30. The arbitral tribunal however by their notice dated 12th September, 2014

called a meeting on 30th September, 2014 in view of the application for condonation of delay filed by the respondent through their advocate. The petitioner raised an objection about the jurisdiction of the arbitral tribunal by their advocate's letter dated 23rd September, 2014 and contended that there was no arbitration pending and thus the petitioner was not bound to attend any meeting and would not attend the said meeting.

31. A perusal of the order passed by the arbitral tribunal on 30th July, 2014 indicates that none appeared for the petitioner before the arbitral tribunal on 30th July, 2014. The respondent through their learned advocate attended the meeting. The arbitral tribunal has referred to the letter dated 23rd September, 2014 also in the said order addressed by the petitioner's advocate raising various objections and informed the arbitral tribunal that the petitioner would not attend any meeting as directed by the arbitral tribunal. The arbitral tribunal therefore heard the learned advocate representing the respondent.

32. The arbitral tribunal in the said order has considered the authentic copies of the hospital records produced by the respondent showing that rightly from April 2014 till 17th August, 2014 concerned instructing client who was in charge of the litigation was busy in attending to his wife's illness and consequent hospitalization at distant places like Chennai and Delhi away from Assam and as soon as his wife was discharged from hospital on 17th August, 2014 his advocate applied for extension of one week on 20th August, 2014. The respondent had affirmed the delay of condonation application on 22nd August, 2014 before Notary of Assam and sent it through courier for representing it before the arbitral tribunal on 25th August, 2014. A perusal of the said order indicates that the arbitral tribunal after recording the submissions made by the respondent through their advocate

considered the whole matter in dept and unanimously came to the conclusion that on the uncontroverted facts as disclosed in the documents filed on behalf of the respondent herein, there was sufficient cause for delay in filing application for condonation of delay as well as application for filing claim statement on or before 19th August, 2014 and the earlier application made by the learned advocate of the respondent was on 20th August, 2014 asking for one week time.

33. The arbitral tribunal held that the said request of the respondent made through their advocate deserves to be considered since within that one week's time from 19th August, 2014, the respondent filed their application for condonation of delay as well as statement of claim. The petitioner was offered draft for cost amount of Rs.30,000/ as well as copies of relevant pleadings. However, the same was not accepted by the petitioner. The arbitral tribunal held that the cumulative effect of sections 16, 19, 23 and 25 having regard to their intent to promote justice and secure expeditious resolution of disputes as held by the Supreme Court in case of ***Gas Authority of India vs. Keki Construction Ltd.*** gave ample power to the arbitral tribunal to grant extension of time for filing statement of claim after condonation of delay for sufficient cause notwithstanding the self operative order dated 30th July, 2014.

34. The arbitral tribunal was satisfied that the respondent had shown sufficient cause for not filing claim statement within time prescribed by the arbitral tribunal and therefore arbitral tribunal condoned the delay. The arbitral tribunal however directed that the respondent shall tender to the petitioner's advocate an amount of Rs.60,000/- which includes earlier awarded cost of Rs.30,000/- by a bank draft on or before 31st October, 2014 togetherwith all documents including claim statement and further directed that on proof of having tendered that to the satisfaction of the

presiding arbitrator, the claim statement shall stand admitted. By the said order, the arbitral tribunal granted time to the petitioner to file written statement alongwith documents upto 30th November, 2014 and granted time to the respondent herein to file rejoinder upto 15th December, 2014.

35. The respondent in this proceeding has filed a reply in which the respondent has annexed a copy of the application made by the respondent for condonation of delay alongwith its annexures. The respondent has annexed discharge summary of Mrs.Swapna Banerjee and other medical reports which was produced for consideration of the arbitral tribunal. A perusal of the said record clearly indicates that the wife of the concerned partner of the respondent was quite often hospitalized in different hospital, one at Delhi and another at Chennai. A perusal of the affidavit in reply filed by the respondent indicates that within the time prescribed by the arbitral tribunal in the said order dated 30th September, 2014, the respondent served a copy of the statement of claim and demand draft of Rs.60,000/- towards cost. The advocate for the petitioner however declined to accept the same. The respondent has already lodged the statement of claim with the arbitral tribunal on 30th October, 2014 as directed by the tribunal. The petitioner has lodged this petition on 30th October, 2014. It is thus clear that the respondent has already acted upon the said order dated 30th October, 2014 passed by the arbitral tribunal.

36. A perusal of the record clearly indicates that the learned advocate representing the respondent had already informed and had requested the arbitral tribunal for time on phone prior to 19th August, 2014. On 20th August, 2014, the learned advocate had already applied for extension of time and had forwarded the demand draft to the advocate representing the petitioner.

37. Under section 23(1) of the Arbitration and Conciliation Act, 1996, the claimant has to state the facts supporting his claim, the points and issues and the relevant remedy sought and the respondent shall state his defence in respect of those particulars within a period of time agreed upon by the parties or determined by the arbitral tribunal. Under section 25(a) of the said Act, if the claimant fails to communicate his statement of claim in accordance with section 23(a) (1), the arbitral tribunal is empowered to terminate the proceedings. If however the respondent fails to communicate his statement of defence in accordance with section 23(1) under section 25(b), the arbitral tribunal is empowered to continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant.

38. In my view, the statement of claim alongwith the documents can be filed by the claimant either within the period of time agreed upon by the parties or as directed by the arbitral tribunal. The power of the arbitral tribunal to determine the time for filing statement of claim alongwith documents and similarly to file statement of defence alongwith the documents includes the power to grant extension of time in case a sufficient cause is made out by either party. In my view, such power of extension of the arbitral tribunal is implicit in their power to determine the time to file pleadings and documents prescribed under section 23(1) of the Arbitration Act.

39. Under section 32 of the Act, the arbitral tribunal has power to issue an order for termination of the arbitral proceedings for eventuality provided in sub-sections (a), (b) and (c) of section 32. It is not the case of either party that eventuality under sub-section 2(a) or (b) of section 32 had occurred. It is the case of the

petitioner that the order dated 30th July, 2014 passed by the arbitral tribunal thereby terminating the proceeding was under section 32(2) (c) of the Arbitration Act in view of the respondent's failure to file statement of claim alongwith documents and therefore the continuation of proceedings had become unnecessary or impossible. It is not in dispute that the arbitral tribunal did not pass any further order for termination of the proceedings after 30th July, 2014.

40. A perusal of the order dated 30th September, 2014 clearly indicates that on 20th August, 2014 itself the respondent had already applied for condonation of delay and had submitted demand draft of Rs.30,000/-. In my view, the said order granting extension of time and condoning delay in filing application for condonation of delay and filing statement of claim alongwith documents was a procedural order passed by the arbitral tribunal which order could be recalled under section 23 of the Arbitration Act and time to file pleadings and documents could be extended in view of the claimant having made a sufficient cause.

41. The arbitral tribunal thus does not cease to have power to issue a procedural directions and to grant extension of time if the sufficient cause is made out by a party in not filing pleadings and documents. In my view, the said order passed by the arbitral tribunal in granting extension of time and condoning delay is thus not without jurisdiction of the arbitral tribunal. The Supreme Court has time and again has held that it is the duty of the court to give effect to the policy on law i.e. to promote efficiency of arbitration.

42. Supreme Court in case of **Mohan Singh and Ors. (supra)** has held that the word 'shall' though prima facie given impression of being mandatory character, it requires to be considered in the light of the intention of the legislature by carefully

attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. It is submitted that if an object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether. Effect must be given to all the provisions harmoniously to suppress public mischief and to promote public justice. In my view parties have to be encouraged for resolution of dispute through arbitration and such proceedings cannot be allowed to be scuttled on the ground that there was default on the part of a party to file pleadings or documents by few days though due to unavoidable circumstances.

43. In my view, the word 'shall' used in section 32(2) has to be construed as 'may' otherwise the arbitral tribunal will have no power to pass an order for extension of time to file pleadings and documents even if sufficient cause is made out and if such procedural conditional order is not allowed to be recalled. Merely because application for condonation of delay or statement of claim is filed belatedly by few weeks due to sufficient cause, it cannot be construed that continuation of proceedings became unnecessary or impossible. In my view the word 'shall' in section 32 thus has to be construed as 'may' to suppress any public mischief and to prevent injustice in the situation as has occurred in this case.

44. In my view the power of the arbitral tribunal to condone delay in filing pleadings and documents and continue the arbitral proceedings if the sufficient cause is made out in not filing the same is implicit in the power prescribed under

section 32(2) of the Arbitration and Conciliation Act, 1996 also. It is not in dispute that the arbitral tribunal did not pass any fresh order for declaring the arbitral proceedings as terminated. Before the said order became effective, the respondent had already affirmed the statement of claim. The learned advocate representing the respondent had already informed the arbitral tribunal about his request for seeking two weeks time to file such application. The said oral request was followed by an application in writing on the very next day. The respondent had thereafter filed detailed application enclosing various medical records of the wife of the concerned partner of the respondent which showed the sufficient cause made out by the respondent in not filing statement of claim alongwith documents and an application for condonation of delay within the time prescribed by the arbitral tribunal.

45. In case of *M/s.Senbo Engineering Ltd. (supra)*, the Patna High Court has considered an issue whether the arbitral tribunal has power and authority, in an appropriate case to call its earlier order terminating under section 25(a) of the Act. Patna High Court while considering the power of the arbitral tribunal under section 25(a) in a case where the party could not remain present before the arbitral tribunal considered an illustration that none of the party could not remain present before the arbitral tribunal who was proceeding from place A to place B and on the way the said party meets with an accident and for that reason was prevented from appearing before the arbitral tribunal on the fixed date and time. It is held that though the party undoubtedly had sufficient cause for not attending the proceeding, it would be physically impossible for the said party to show the cause to the arbitral tribunal on the date fixed in the proceeding. The arbitral tribunal in that matter had taken a view that the arbitral tribunal had no authority or power to recall the order under section 25(a) and to restore the proceedings because there

was no express provision under the Act giving any such power to the tribunal. The Patna High Court has accepted the submission of the party who had shown sufficient cause that the arbitral tribunal has full authority and power to recall an order under section 25(a) of the Arbitration and Conciliation Act as the said power was very wide power and was implicit in the opening sentence of section 25.

46. In my view, the said principles laid down by Patna High Court can be extended in the facts of this case also. In my view, the order passed by the arbitral tribunal thereby condoning the delay in filing statement of claim alongwith the documents and the application for condonation of delay is a procedural order by exercising such power which are implicit under section 32(2) read with section 23 of the Arbitration and Conciliation Act, 1996. I am in agreement with the views expressed by Patna High Court in case of *M/s.Senbo Engineering Ltd. (supra)*.

47. Andhra Pradesh High Court in case of *N.Jayalaxmi (supra)* has held that under section 32(2) of the Arbitration Act, the arbitral tribunal shall issue an order for termination of the proceedings where the arbitral tribunal finds that the continuation of proceeding has become unnecessary or impossible. This would furnish sufficient guidelines for exercising power under section 25(a) as well. It is held that only when arbitral tribunal finds that continuation of the proceeding is impossible for non filing of the pleadings within the extended time, the arbitral tribunal shall be terminated. The Andhra Pradesh High Court also adverted to the judgment of Supreme Court in case of *Mohan Singh (supra)* on the issue as to whether the word 'shall' is not decisive in construing whether a provision is mandatory or directory and in a given situation, the word 'may' is required to be construed as 'shall' and vis-a-versa. It is held that if section 25(a) is read as mandatory, the same would defeat sections 19, 23 (1) and 32(2) of the Arbitration

Act and such a recourse should be avoided. In my view the words 'shall' in section 25(a) and 32(2) has to be construed as 'may' and the arbitral tribunal has implicit power in those provisions to grant extension and condone delay in filing pleadings and documents and to recall its order, which orders are in the nature of procedural orders. I am in agreement with the views expressed by the Andhra Pradesh High Court.

48. Since this court has taken a view that the arbitral tribunal has implicit power to grant extension of time and condone delay in filing statement of claim with documents and since in this case an application for condonation of delay is rightly allowed in view of the respondent having made out a sufficient cause, I do not propose to go into the issue as to whether the objections raised by the petitioner of jurisdiction before the arbitral tribunal to hear any application made by the respondent for condonation of delay would be an objection under section 16 of the Arbitration and Conciliation Act or not.

49. A perusal of the record clearly indicates that the respondent has already acted upon on the order dated 13th September, 2014 passed by the arbitral tribunal and has already filed statement of claim alongwith documents before the arbitral tribunal. The petitioner however did not accept the payment of cost and copy of the statement of claim alongwith documents. No relief can be granted to the petitioner on that ground also.

50. Respondent is directed to serve copy of the statement of claim alongwith documents upon the petitioner within one week from today alongwith cost as awarded by the arbitral tribunal.

51. The petitioner is permitted to file written statement alongwith documents and also counter claim if any, within six weeks from the date of service of statement of claim alongwith documents and furnish a copy thereof to the respondent's advocate simultaneously. Both parties are also directed to appear before the arbitral tribunal for further directions in the matter and shall proceed with the arbitral proceedings without any further delay.

52. In the event of petitioner refusing to accept the statement of claim and documents and also the amount of cost, the respondent would be at liberty to deposit the amount of cost in this court and the same shall be subject to the further orders as may be passed by the arbitral tribunal. Upon such deposit, the Prothonotary and Senior Master shall invest the said amount in the fixed deposit of a nationalised bank initially for a period of one year and renew for further period after obtaining further orders from this court.

53. If the petitioner refuses to accept the service of the statement of claim alongwith documents and does not file any written statement alongwith documents and counter claim within the time prescribed, the arbitral tribunal shall be at liberty to proceed with the matter in accordance with the provisions of Arbitration and Conciliation Act, 1996.

54. In my view there is no merit in the petition filed by the petitioner and the same is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]