

IN THE HIGH COURT OF JUDICATURE AT PATNA
Request Case No.15 of 2015

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1. M/s Prasad Construction & Co. a registered partnership firm having office at Subhagan, Madhucom lane, Ratu Road, P.O. & P.S. Ratu, Dist. Ranchi (Jharkhand) through authorised signatory of the joint venture Bharat Bhushan, son of late Madan Mohan Prasad, at Lila Mohan Niwas, Nai Sarai, P.O. & P.S. Biharsharif, Dist. Nalanda (Bihar).
2. M/s Juvenile Engineers Private Limited, both having office at Subhangan, Madhucom Lane, Ratu Road, P.O. & P.S. Ratu, Dist. Ranchi (Jharkhand).

..... Petitioners

Versus

1. Steel Authority of India Limited having registered office at Ispat Bhawan, Lodi Road, New Delhi through Bokaro Steel Plant unit head Managing Director At and P.O. Bokaro Steel City, District Bokaro.
2. The Deputy General Manager [Project]. Bokaro Steel Plant, At & P.O. Bokaro Steel City, District Bokaro.
3. Incharge Officer, Steel Processing Unit (PKG2) of Bokaro Steel Plant, At & P.O. Mahanar, Dist. Vaishali.

..... Respondents

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Appearance:

For the Petitioners : Mr. Nand Kishore Singh,
Mr. Jitendra Kumar Singh, Advocates
For the Respondents : Mr. G. M. Mishra,
Dr. Ratan Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN
ORAL JUDGMENT
Date: 31-08-2016

Heard learned counsel for the petitioners and learned counsel
for the respondents.

2. The present application has been filed under Section 11(6) read with section 15(2) of the Arbitration and Conciliation Act, 1996 ("the Act" for short) for appointment of a substitute Arbitrator in view of the ongoing arbitration proceedings having been terminated by the Arbitrator, Sri K.P. Choudhary.

3. According to the petitioners who comprise a joint venture of



a partnership firm (petitioner no. 1) and a private limited company (petitioner no. 2), an arbitrator was appointed by this Court in Request Case No. 01 of 2011 by its order dated 13.07.2011. Arbitration proceedings then commenced in respect of claims and disputes arising out of a contract agreement dated 17.04.2009 for a total value of Rs. 7,11,68,319/- for the work of construction of a boundary wall, and area development work for establishment of steel processing unit at and P.O. Mahnar, District Vaishali. In course of the arbitration proceedings, the petitioners sought inspection of the work site for assessing the volume of work done under the agreement, which prayer, however, was opposed by the respondents. The Arbitrator ordered that instead of assessing the volume of work done, the entire entitlement of the petitioner for payment would be decided first and, in case required, inspection of the work site would be conducted. The petitioners raised an objection in this regard and refused to participate further in the arbitration proceedings. By order dated 08.09.2014 (Annexure-1), the sole Arbitrator, Sri K.P. Choudhary, in view of the intention on the petitioners-claimants' part to remain absent from the proceedings, terminated the arbitral proceedings in terms of Section 32(2)(c) read with Section 38 of the Act.

4. Learned counsel for the petitioners submits that the ongoing arbitral proceedings did not culminate in a final award and were terminated by the learned Arbitrator under Section 32(2)(c) of the Act.



The necessary and automatic effect of termination of arbitral proceedings under Section 32(2)(c) is to attract Section 32(3) in terms of which the mandate of the arbitral tribunal also terminates. This entitles the claimant to seek appointment of a substitute Arbitrator under Section 15(2) of the Act, as otherwise he is rendered remediless, the arbitral proceedings having been terminated and no final decision by way of an award having been passed on the claims which formed the subject matter of arbitration.

5. Learned counsel for the petitioners relies on the decisions of the Supreme Court in *M/s Senbo Engineering Ltd., vs. State of Bihar & others*, AIR 2004 Patna 33; *M/s N.R. Construction Pvt. Ltd. vs. The Project Engineers and others*, 2005 (1) PLJR 581; *Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd and another*, (2006) 6 SCC 204; *S.B.P. and Company vs. Patel Engineering Limited and another*, (2009)10 SCC 293; and *Lalitkumar V. Sanghavi (D) Th. L. Rs. Neeta Lalit Kumar Sanghavi and another vs. Dharmadas V. Sanghvi and others*, AIR 2014 SC (Supp) 1705.

6. Learned counsel for the respondents, on the other hand, submits that the order dated 08.09.2014 passed by the Arbitrator is self-speaking and the arbitral proceedings had to be terminated by reason of the non-cooperative stance of the petitioners who had decided not to attend the proceeding which was at its final stages. He also submits that the provisions of Section 15(2) would not come into

play for the purpose of appointment of a substitute arbitrator where the arbitral proceedings have been terminated under Section 32(2)(c) of the Act.

7. Having heard the parties and on a careful consideration of the materials on record, this Court deems it necessary first to advert to the relevant provisions of the Act, which are reproduced hereinbelow for the sake of ready reference –

“14. Failure or impossibility to act. –

(1) The mandate of an arbitrator shall terminate if –

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate -

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the

replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

32. Termination of proceedings.

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where----

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

8. A perusal of Section 32 shows that an arbitrable proceeding may be terminated either by passing a final arbitral award or by an order passed under Section 32(2). In turn, Section 32(2) contemplates an order for termination of the arbitral proceedings in the situations enumerated thereunder, being quite distinct from the situations contemplated under Section 15(1). The greater significance lies in the distinction between 'termination of arbitral proceedings' under Section 32 and 'termination of the mandate of an arbitrator' under Section 15 of the Act. In the instant case, the Arbitrator has passed an order expressed to be under Section 32(2)(c) terminating the arbitral proceedings, implying thereby that continuance of the arbitral proceedings had become unnecessarily or impossible. If the arbitral



proceedings themselves terminate and no longer survive, the mandate of the Arbitrator as a necessary consequence must also terminate. This has been statutorily provided in Section 32(3) as an Arbitrator cannot function in absence of an arbitral proceeding. That is the only effect of Section 32(3) and cannot be connected to the termination of mandate of an Arbitrator under Section 15 as the latter provision operates in situations where the arbitral proceeding remains alive. It is for this reason that Section 15(2) provides for the appointment of a substitute Arbitrator which must be understood to refer only to cases where the arbitral proceedings survive. I am, therefore, of the view that by reason of the arbitral proceedings having been terminated under Section 32(2)(c) in the instant case, the question of appointment of a substitute Arbitrator by resort to Section 15(2) does not arise.

9. The view I have taken finds support from a decision of the High Court of Delhi rendered on 13th September, 2011 in *M/s Chemical Sales Corporation & others Vs. M/s A & A Laxmi Sales and Service Private Limited & others* [IA No. 2313/2009 in CS (OS) No. 47/2005], wherein it has been held as follows:-

“11.... The termination of arbitral proceedings is different from termination of the mandate of arbitrator. The mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end but not the arbitral proceedings. For example, if the parties to the arbitration agreement had fixed a period of six months for completion of arbitral proceedings and making of an award by the Arbitral Tribunal and the Arbitral Tribunal fails to do so on or before expiry of six months, the mandate of arbitral Tribunal shall come to an end but not the arbitration proceedings and in such an eventuality, if a

substitute arbitrator is appointed than he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier arbitrator. However, in case arbitration proceedings are terminated within the meaning of section 32 of the Act resulting in termination of mandate of arbitrator, the same cannot continue merely by appointing another arbitrator. In such a scenario, first of all, the arbitration proceedings have to be revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings. ”

10. The decisions relied upon by learned counsel for the petitioners, in my opinion, do not aid his contentions.

The decision in Yashwith Constructions Pvt. Limited's case (supra) was rendered in the context of resignation of the Arbitrator, in whose place a substitute Arbitrator was appointed. It was clearly not a case where the arbitral proceedings had been terminated.

The decision in S.B.P. and Company's case (supra) involved the question of appointment of a third arbitrator after the Arbitrator appointed by the respondent no. 1 declined to accept the appointment. It was held that the Arbitrator not having entered upon the arbitration at all, there could be no question of his withdrawal from the office of Arbitrator so as to enable respondent no. 1 to appoint a substitute Arbitrator. It was further held that the Arbitrator appointed by the appellants would proceed with the matter as sole Arbitrator. This was also not a case where the arbitral proceedings had been terminated.

In Lalitkumar's case (supra), the Supreme Court was not considering the issue of appointment of a substitute Arbitrator under Section 15(2), rather the matter arose out of the dismissal of an



application under Section 11 for appointment of another arbitrator, consequent upon termination of the earlier arbitral proceedings by the erstwhile Arbitrator appointed by a Judge of the Bombay High Court, as not maintainable. The Supreme Court concluded that the reasons for such termination of the arbitral proceeding were relatable to Section 32(2)(c) and for which, the appropriate remedy lay under Section 14(2) of the Act.

The decision of this Court in M/s N.R. Construction Pvt. Limited's case (supra) had been delivered long before the decision of the Apex Court in Lalitkumar's case (supra) was rendered. Besides, the main issue revolved around the question whether or not the erstwhile Arbitrator could be reappointed as a substitute Arbitrator. This Court concluded that such appointment could not be made and hence another Arbitrator was appointed in his place. The specific question with regard to the effect of termination of arbitral proceedings in terms of Section 32(2)(c) did not come up for consideration.

11. Reading the provisions of the Act as well as the various judicial decisions in a harmonious manner, I am of the view that where the arbitration proceedings have been terminated with reference to Section 32(2)(c), the question of appointment of substitute Arbitrator under Section 15(2) cannot arise and the only remedy available to the petitioners is to first question the validity of the termination of the arbitral proceedings by approaching the appropriate Court under

Section 14(2) of the Act whereupon the Court would examine the controversy regarding the arbitrator having become de jure or de facto unable to perform his functions or for other reasons having failed to act without undue delay. Admittedly, the petitioners have not taken recourse to such remedy in the instant case. As has further been held in Lalitkumar’s case (supra), an application for appointment of an arbitrator under Section 11 of the Act is not maintainable pursuant to termination of arbitral proceedings, and hence the prayer of the petitioner in this behalf is equally devoid of merit. The apprehension of the petitioner that he would be rendered remediless if a substitute Arbitrator is not appointed and the order of the arbitral Tribunal terminating the arbitral proceedings is allowed to attain finality, must be held to be misconceived in view of Lalitkumar’s case (supra).

12. The petition, therefore, fails and stands dismissed, with liberty to the petitioners to avail of the remedy in terms of Section 14(2) of the Act, if so advised.

(Vikash Jain, J)

B.T/Chandran

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