

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved : 02.06.2016

Delivered on : 07.06.2016

CORAM :

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE

AND

The Hon'ble MR.JUSTICE R.MAHADEVAN

W.P. No.8057 of 2016

Bharat Heavy Electricals Limited
Power Sector - Southern Region
E.V.Periyar Building, Anna Salai,
Chennai 600 035. ... Petitioner

-vs-

1.M/s.Jyothi Turbopower Services Private
Limited, H.No:6-94/7/9/216, Phase-UU,
Huda Colony, Chandanagar, Hyderabad
500 050, Rep. By its Managing Director,
Mr.Bhaskar.

2.The Sole Arbitrator / The Arbitral Tribunal,
No.5, Justice Ramanujam Road,
Malaviya Avenue, Shastri Nagar,
Chennai 600 020.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari to call for the records of the order dated 22.12.2015 passed by the 2nd respondent and quash the same.

For Petitioner : Mr.Krishna Srinivasan
for Mr.S.Ramasubramaniam & Asso

For Respondents : Mr.Thriyambak J.Kannan

* * * * *

O R D E R

THE HON'BLE CHIEF JUSTICE

The alternative dispute resolution mechanism of arbitration inter alia has the objective of expeditious resolution of commercial disputes. This objective is often breached by the manner in which the arbitration proceedings carry on. We are confronted with the factual situation where the statement of claim itself was not filed resulting in the learned Arbitrator / the second respondent exercising powers under Section 25 (a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') and terminating the proceedings. These proceedings were sought to be reopened by the first respondent / original claimant by filing an application, the maintainability of which was objected to by the petitioner without even filing a reply on the ground that once the Arbitrator has terminated the mandate, he had become functus officio. The Arbitrator, however, opined to the contrary vide the impugned order dated 22.12.2015 that there was an implied power of procedural review which was sought to be exercised in respect of the prayer made for recalling the order of termination of the proceedings and calling upon the petitioner to file a counter on merits. The question which, thus, arises for consideration is whether an Arbitrator actually becomes functus officio and incapable of recalling such an order terminating the proceedings.

2.The factual matrix required for determination of the aforesaid legal issue is limited in its scope. A contract agreement dated 31.03.2010 was entered into by the petitioner with the first respondent / claimant for purposes of handling at site stores/storage yard, transportation to site of work, erection, testing and commissioning of 67.5 MW STG with associated auxillaries and 1 No.Turbo Blower with its auxillaries including supply and application of final painting for STG unit 5 (STG-5) and Turbo Blower of Unit 4 (TB-4). This contract agreement was, however, shortclosed by the petitioner. The contract contains an arbitration clause 2.36 requiring reference to sole arbitration of General Manager or his nominee of the petitioner. The first respondent / claimant invoked the arbitration clause on 13.06.2012 eliciting no reply and resulting in O.P.No.799 of 2012 being filed under Section 11 (6) of the said Act, which was allowed vide an order dated 06.03.2015 appointing the second respondent as the Sole Arbitrator. The learned Arbitrator commenced the proceedings and on 25.04.2015 granted time to the first respondent / claimant to file the statement of claim by 31.07.2015. No statement of claim was filed and thus, the learned Arbitrator sent an email to the counsel for the first respondent on 26.08.2015 as a reminder, to which a response was received vide

email dated 27.08.2015 informing that the counsel was not getting any communication from the first respondent / claimant and that he would inform the party accordingly. The learned counsel for the petitioner, however, sent an email dated 29.08.2015 seeking an order from the learned Arbitrator to terminate the arbitration proceedings under Section 25 (a) of the said Act. Since the statement of claim was still not filed, an email was sent on 03.10.2015 by the learned Arbitrator to the counsel for the first respondent that if no information was received on or before 15th of October, 2015, the proceedings would be terminated. The counsel for the first respondent / claimant vide email dated 03.10.2015 informed that there had been no receipt of information from his client and he would communicate the matter, which was soon followed by a communication requesting one (1) week's time to file the statement of claim on or before 19.10.2015, which was acceded to. Since still no statement of claim was filed, the learned Arbitrator vide order dated 24.10.2015, terminated the proceedings on the ground that the first respondent / claimant apparently had no interest in proceeding with the arbitration. It is only thereafter that the counsel for the first respondent filed a petition dated 14.11.2015 enclosing the claim petition and an affidavit attested on 31.10.2015 seeking recall of the order of termination passed on 24.10.2015.

3.The petitioner objected to such a request on the ground that the learned Arbitrator was not in seisin over the dispute any more being a persona designata having been appointed under Section 11 of the said Act and such designation having been terminated by passing the order under Section 25(a) of the said Act, whereby he had become functus officio and thus, seeking return of the statement of claim as being not maintainable.

4.The learned Arbitrator proceeded thereafter to hear the parties and vide order dated 22.12.2015 held that there was a clear implied power of procedural review and in exercise of which the Tribunal could entertain the petition to recall the order of termination of proceedings dated 24.10.2015. Since the petitioner, at the inception, had refused to file any reply on merits, concerned by the fact that it may amount to implied jurisdiction of the Arbitrator, time was granted to the petitioner to file the counter within two (2) weeks from the date of receipt of the order so that a decision could be taken on the merits of the application of the first respondent / claimant.

5.The petitioner, however, invoked the jurisdiction of this Court under Article 226 of the Constitution of India to assail the said order.

6. We may note that the Registry raised an objection qua the maintainability of the writ petition and this Court, vide order dated 23.02.2016, permitted numbering of the writ petition subject to the issue of maintainability being examined. The matter was, thereafter, taken up for final hearing at the joint request of the parties on 02.06.2016, when both sides advanced their respective pleas.

7. The plea of the learned counsel for the petitioner was that Chapter V of the said Act deals with the conduct of arbitral proceedings commencing from Section 18 and concluding with Section 25 of the said Act. In terms of Section 23, the statements of claim and defence are required to be filed within a period of time agreed upon by the parties or as determined by the Arbitral Tribunal. The consequences of default are set forth in Section 25, which reads as under:

'25. Default of a party:- Unless otherwise agreed by the parties, where, without showing sufficient cause:-

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23, the arbitral tribunal shall terminate the proceedings.

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.'

8. Since the first respondent / claimant had failed to file the statement of claim in accordance with sub-section (1) of section 23 within the time agreed upon, it was submitted that the Arbitral Tribunal had rightly terminated the proceedings on 24.10.2015. It was emphasized that the Arbitral Tribunal really had no option in view of the use of the expression 'shall'. It was submitted that the consequences are distinct where there is failure to file the statement of defence in accordance with Section 23 (1), where the respondent in the arbitration proceedings would be required to be set ex parte. Similarly, if there was failure to file documents as per Section 23 (2), still the proceedings would continue resulting in an award. Once an order as passed under Section 25(a) of the said Act, it was submitted that the Arbitrator became functus officio and loses seizin over the matter.

9.As to what is meant by the phrase ''functus officio'', a reference was made to the Law Lexicon of Ramanatha Iyer defining it as under:

''Having Discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. One who has fulfilled his office or is out of office; an authority who has performed the act authorises so that the authority is exhausted.''

10.In the context of appointment of an Arbitrator, it was pointed out that the same was the result of the exercise of jurisdiction by the Chief Justice of the High Court under Section 11 (6) of the said Act and not as per the agreement by the parties. However, we may note that the order of appointment dated 06.03.2015, after holding that the Court would have to exercise jurisdiction under Section 11 (6) of the said Act, in para 6 appointing the Arbitrator begins ''With consent of parties...'' The mandate, it was submitted, was liable to be concluded in the following circumstances:

- (i) When the tribunal rules that it lacks jurisdiction to decide the dispute referred to it - Section 16 (1)
- (ii) When the Claimant fails to file its statement of claim - Section 25(a)
- (iii) If the parties settle the dispute - Section 30
- (iv) Upon a final arbitral award being passed - Section 32 (1)
- (v) When the Claimant withdraws his claim or the parties agree to terminate the proceedings or the Tribunal finds it unnecessary or impossible to continue the proceedings - Section 32 (2)

11.Learned counsel for the petitioner, while referring to the aforesaid five circumstances, pleaded that an award would come to be passed by the Tribunal in respect of eventualities (i), (iii) and (iv). On the other hand, under Clauses (ii) and (v) above, where the arbitral proceedings are to be terminated, an order is to be passed terminating the proceedings. While an order passed under Section 32 (2) was subject to the provisions of Section 34 of the said Act, inasmuch as sub-section 3 of section 32 makes such termination of mandate of the Arbitral Tribunal subject to sections 33 and 34 (4) of the said Act, there was no such corresponding provision qua termination of proceedings under Section 25 (a) of the said Act.

12.Insofar as the provisions of appeal under the Act are concerned, a chart was presented as under to show as to in what circumstances such remedy of appeal would be available:

Sl.No.	Relevant Provision	Relevant provision of appeal / set aside
1.	Order passed under Section 16(3)	Section 37
2.	Order passed under Section 17	Section 37
3.	Order passed under Section 34	Section 37
4.	Order passed under Section 8	Section 37
5.	Order passed under Section 9	Section 37
6.	Order passed under Section 13(4)	Section 34
7.	Order passed under Section 16	Section 34
8.	Order passed under Section 30	Section 34

13. In respect of all the aforesaid eventualities, it was submitted that the remedy was specifically provided under Sections 34 and 37 of the said Act, which was not so in the case of termination of proceedings under Section 25 (a) of the said Act. Since the Act did not contemplate any remedy to a party so aggrieved by the order, the only available route to assail the same was by filing a writ petition under Article 226 of the Constitution of India.

14. Learned counsel conceded that there was judicial pronouncement of different High Courts both Division Benches and Single Judges opining that an order passed under Section 25 (a) would be deemed to be an award and hence, an application under Section 34 can be filed to set aside the award, it was submitted that the said conclusion was erroneous as it amounted to legislating.

15. In the aforesaid context, our attention was invited to the impugned order as to how the learned Arbitrator has dealt with the issue.

16. On the aspect as to what would be the remedy available in case of the proceedings being terminated, learned counsel for the petitioner submitted that it could only be by way of another petition being filed under Section 11 of the said Act. We may note here the submission of the learned counsel for the first respondent / claimant that though this plea may prejudice his client, still what was sought to be contended by the learned counsel for the petitioner would not be correct as the arbitration clause provided for the mode of appointment of the Arbitrator. The first respondent would, thus, be required to once again invoke the arbitration clause giving a right to the petitioner to appoint the Arbitrator before the jurisdiction of the Court under Section 11 could be so invoked. However, the impugned order has referred to the judgment of the Bombay High Court in Dilnawaz Kohinoory vs. Boman Kohinoor, reported in Manu/MH/0533/2001 holding that the Court has no power under

Section 11 of the said Act to deal with a second request for appointment of an Arbitrator unless the order closing the proceedings was set aside. Such a view has also been adopted by the learned Judge of the Calcutta High Court in NRP Projects Pvt Ltd. vs. Hirat Mukhapadhyay and another, reported in 2013 (1) Cal LJ 621 in para 71 of the judgment. The latter judgment also is good for the proposition that an aggrieved party is not entitled to maintain a writ petition under Article 226 of the Constitution of India, a view also adopted by the Division Bench of the Delhi High Court in Awasthi Construction Co. vs. Govt. of ACT of Delhi & another, reported in 2012 SCC online Del 443.

17. The Arbitral Tribunal has also made a reference to the judgment of the learned Single Judge of this Court in Mangayarkarasi Apparels (P) Ltd. vs. Sundaram Finance Ltd., 2002 (2) CTC 585, opining that the expression 'other authority' within the meaning of Article 226 of the Constitution of India would not include an Arbitral Tribunal and thus, the remedy either under Article 226 or 227 of the Constitution of India against the order of an Arbitral Tribunal would not be available. In support of the contention, the learned Single Judge of this Court has referred to the judgments of the Hon'ble Supreme Court in Kihoto Hollahan vs. Zachillhu, 1992 Supp (2) SCC 651 and Jaswant Sugar Mills vs. Lakshmi Chand, reported in AIR 1963 SC 677.

18. The learned Arbitrator has also opined that an order under Section 25 (a) of the said Act cannot be construed to be an award as there is no decision on merit and thus, it may not be possible to maintain an appeal under Section 34 of the said Act (reliance was placed on the decision of the Division Bench of the Delhi High Court in ATV Projects India vs. IOC & another, (2013) 200 DLT 553). The learned Arbitrator thus opined that since a party cannot be without a remedy, what should be the remedy in such a situation needed to be examined. The Tribunal, while accepting that there cannot be any power of review inherent in character, that proposition would apply to decision on merits. However, with respect to procedural review, the implied power is available with the Tribunal to deal with petitions similar to the ones in the present case. The observations made by the Hon'ble Supreme Court in Grindlays Bank Ltd. vs. The Central Govt. Industrial Tribunal, reported in AIR 1981 SC 806, in latter part of para 13 were specifically referred to, which are once again extracted as under:

'13. Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one

of law and is apparent on the face of the record. It is in the latter sense that the Court in Patel Narshi Thakershi ase (AIR 1970 SC 1273) held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every Court or Tribunal.'

19. The Division Bench's opinion of the Delhi High Court in ATV Projects India Ltd. case (supra) was referred to to support the conclusion where paras 17 and 18 of the judgment read as under:

'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 high 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 who, proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise."

20. We may note that one of the pleas noted by the Arbitral Tribunal is that an SLP was filed against the aforesaid judgment of the Division Bench of the Delhi High Court, but it was observed that there was no stay of the operation of the judgment.

21. Learned counsel for the petitioner, in support of his plea, referred to the judgment of the Hon'ble Supreme Court in *Kapra Mazdoor Ekta Union vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. and another*, (2005) 13 SCC 777. In the context of an award under the Industrial Disputes Act, 1947, the scope of the two types of review, one procedural and other on merits was examined. The question whether a Tribunal was functus officio having earlier made an award which was published by the appropriate Government was examined and in that context, it was observed that the jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. On application of principles discussed, it was held that where a Court or quasi-judicial authority having jurisdiction to adjudicate on merits proceeds to do so, the judgment or an order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with the power of review by express provision or by necessary implication. However, the procedural review belongs to a different category. Illustratively, this situation is stated to arise where the Court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so, commits a procedural illegality, which goes to the root of the matter and invalidates the proceeding itself and consequently, the order passed therein. There may also be cases where there may be absence of notice to the opposite party or under a mistaken impression that the notice has been served or the matter is taken up on the date other than specified.

22. On the other hand, learned counsel for the first respondent / claimant sought to contend that such a writ petition in any case would not be maintainable, as it is a writ against the private contractual action and it is not a statutory arbitration. Even the essentials of a writ of certiorari had not been pointed out and the alternative efficacious remedy was available, as the order passed by the second respondent was still pending consideration in the arbitration proceedings and on a decision being rendered, the remedy would be to challenge the claim under Section 34 of the said Act. In fact, the present case is one where there are pending arbitration proceedings, as no final view has been taken as yet by the learned Arbitrator (reliance has been placed on the decision of the Hon'ble Supreme Court in *Lalithkumar vs. Dharamdas*, (2014) 7 SCC 255 and *CDC Financial vs. BPL Communication*, (2013) 12 SCC 140. The writ would also go against the very principle of minimal interference in arbitration proceedings and the power of procedural review existed (vide *Fiza Developers vs. AMCI*, (2009) 17 SCC 796 and *Anand Gajapathi Raju vs. P.V.G. Raju*, (2000) 4 SCC 539)

23. In sum and substance, the contention of the learned counsel for the first respondent / claimant based on the set of judgments discussed in the impugned order was that on merits of the present case, learned Arbitrator was well within his rights to issue notice to call for a decision on the merits of the application filed seeking recall of termination of proceedings.

24. On a conspectus of the aforesaid, we are of the opinion that the views of the different High Courts referred to aforesaid cannot be doubted and the plea of the learned counsel for the petitioner that those amount to judicial legislation is fallacious.

25. In so far as the merits of the controversy are concerned, the very wordings of Section 25 show that clause (a) is preceded by the expression "'without showing sufficient cause'". Thus, if sufficient cause is shown, there would be no need to terminate the proceedings before the Arbitral Tribunal. The claimant would be, thus, within its right to move the Arbitral Tribunal to show, even if there was termination of proceedings, that such termination was erroneous or was required to be recalled on sufficient cause being shown.

26. The views of both the Delhi and the Calcutta High Courts are consistent in this behalf that the appropriate course of action to follow in such a situation would be to move the Tribunal itself seeking recall of the order and the exercise of power of such recall would be within the meaning of procedural review. Whether, in the given facts of the case, such a power is to be exercised favourably or not in favour of the applicant

would be a matter on the factual matrix of the case and that stage has not even arisen in the present case.

27. We reject the plea of the learned counsel for the petitioner that on termination of proceedings under Section 25 (a) of the said Act, the Arbitrator becomes functus officio, as he is a persona designata. Both the methods of appointment of Arbitrator are possible, i.e. by consent or through the process of Court. The position would not be different in the two situations. It is not as if there is a better sanctity to the appointment of an Arbitrator which enlarges the power if he is appointed by mutual consent, while there are abridged powers if he is not appointed by the Court.

28. Thus, we conclusively hold that the appropriate remedy in case of termination of proceedings under Section 25 (a) would require the Arbitral Tribunal itself to be moved, which would then examine the aspects on merits as to why the order does or does not require to be recalled.

29. We are also in agreement with the views of both the Calcutta and Delhi High Courts and in view of the aforesaid finding, that the remedy under Article 226 of the Constitution of India is not really available as the aforesaid is the appropriate remedy. The invocation of jurisdiction of this Court by the petitioner is, in turn, predicated on a belief that either of the parties aggrieved have to approach this Court under its extraordinary writ jurisdiction. However, we have already explained the remedy available and any further challenge to an order which may be passed in such application would, in turn, depend on the fate of it. The said Act is a complete code in itself and the basis is that there should not be periodic judicial intervention in arbitration proceedings. Were a favourable order to be passed commencing arbitration proceedings, the option would only be to challenge the award, if so advised, under Section 34 of the said Act. Similarly, if the application was to be dismissed, the position would really be no different.

30. We are, thus, of the view that the writ petition is not the appropriate remedy and would not be maintainable.

31. The petitioner has, in fact, unnecessarily rushed to Court where even the merits of the application are yet to be examined. The petitioner seeks to make a mountain out of a molehill on the ground that there have been some extraordinary delay and the first respondent / claimant should be held to have missed the bus. The delay really is for a period beyond 31st of July till November when the statement of claim was filed.

However, on merits of factual matrix of the case, we say no more because that is an aspect to be considered by the learned Arbitrator, as the application is still pending for consideration on merits. Since the time period of two (2) weeks for filing reply to the application by the petitioner has expired, we grant two weeks further time for the same from this date.

32.Writ Petition is, accordingly, dismissed in the aforesaid terms, leaving the parties to bear their own costs.

-s/d-

Assistant Registrar (CSVI)

True Copy

Sub-Assistant Registrar

sra

To

1.The Sole Arbitrator / The Arbitral Tribunal,
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Chennai 600 020.

+1 cc to M/s.Ramasubramaniam & Associates Advocates sr.30448

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