

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.11.2016

+ O.M.P. (T) (COMM.) 1/2016 & IA No. 648/2016

ARMY WELFARE HOUSING ORGANISATION Petitioner

versus

**M/S MATHUR & KAPARE
ASSOCIATES PVT LTD.**

.....Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Sandeep Sethi, Senior Advocate with
Mr A.K. Tewari.

For the Respondent :Mr Sudhanshu Batra, Senior Advocate
with Mr Bhuvan Gugnani.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Army Welfare Housing Organisation (hereafter 'AWHO') has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:

"In the premise it is most respectfully prayed that this Hon' ble Court may be pleased to declare, hold and direct that:

(a) The Sole Arbitrator having been rendered 'de jure / functus officio' on and after 10 October 2015 on account of the Petitioner declining to accord / grant consent for enlargement / extension of time to publish his award, and having lost mandate under Section 14(1)(a) of the Act cannot proceed with the adjudication of the disputes between the Petitioner and the Respondent as directed vide Arbitrators order dated 21 December 2016;"

2. The arbitration clause between the parties expressly provides that the arbitrator will make and publish his award within a period of four months of entering upon the reference. AWHO asserts that since the said period has elapsed, the arbitrator no longer enjoys the mandate to proceed with the arbitration proceedings. The respondent (hereafter 'MKAPL') disputes the above contention and contends that AWHO by its conduct has enlarged the time for making of the award.

3. Briefly stated, the relevant facts necessary to appreciate the aforesaid controversy are as under:-

3.1 AWHO is a society registered under the Societies Registration Act, 1860 and is engaged in promoting Group Housing Projects for serving the requirements of retired army personnel and their widows. MKAPL is a private company and is *inter alia* engaged in rendering architectural services.

3.2 AWHO entered into a contract with MKAPL on 06.09.2007 ('the Agreement') whereby MKAPL was appointed as an Architect for a group housing project promoted by AWHO on a plot of land situated at Kanamangala (White Fields), Bangalore, Karnataka.

3.3 It is AWHO's case that MKAPL breached the Agreement; it alleges that there was delay in completion at various stages and in addition, the designs submitted by MKAPL had serious technical flaws, which were discovered during the progress of the works. Accordingly, AWHO terminated the Agreement on 28.11.2011. MKAPL seriously disputes that

it was in breach of the Agreement and claims that termination of the Agreement by AWHO was wrongful, arbitrary and *malafide*.

3.4 Since the disputes between the parties could not be resolved, MKAPL invoked the arbitration clause by its letter dated 02.02.2013. In terms of the arbitration clause, AWHO appointed Mr Satish Chander, Chief Engineer (Contracts) as the Sole Arbitrator to adjudicate the disputes between the parties. The arbitrator entered upon reference on 03.10.2013 and by a communication of the said date, set down a schedule for completion of pleadings. The statement of claim was directed to be filed by 10.11.2013; pleadings in defence were directed to be filed by 15.12.2013; and rejoinder, if any, was to be filed by 05.01.2014. Both the parties, MKAPL as well as AWHO, sought extension of time on more than one occasion for submission of their claim. The arbitrator acceded to the request of the parties and extended time for filing of the pleadings. MKAPL filed its statement of claim before the arbitrator on 31.03.2014. AWHO filed its counter claim before the arbitrator on 28.04.2014 and sought time for filing the Statement of Defence upto 05.05.2014. The same was granted by the arbitrator. AWHO filed its statement of defence on 30.05.2014.

3.5 The arbitral proceedings before the arbitrator continued and, thereafter, several hearings were held. It is also a matter of record that hearings scheduled by the arbitrator on several occasions were deferred at the request of AWHO. The parties also filed further supplementary pleadings during the course of the proceedings.

3.6 The final arguments commenced before the arbitrator on 09.01.2015 and continued on 10.01.2015. Thereafter, the matter was adjourned to

20.02.2015 and 21.02.2015 and subsequently rescheduled to 27.03.2015 and 28.03.2015.

3.7 Arguments in defence were commenced on behalf of the AWHO on 27.03.2015 and continued also on 28.03.2015. Since the arguments remained inconclusive, the matter was adjourned to 22.05.2015 and 23.05.2015. The said dates of hearing were thereafter rescheduled to 31.07.2015 and 01.08.2015. AWHO concluded its arguments in defence to MKAPL's claims and in support of its counter claims, on 31.07.2015 and 01.08.2015 and also filed written submissions. Thereafter, the arbitrator adjourned the matter to 09.10.2015 and 10.10.2015 for hearing MKAPL's arguments in rejoinder and in defence to the counter claims raised by AWHO.

3.8 On 09.10.2015 and 10.10.2015, arguments on behalf of MKAPL were heard and the counsel for AWHO sought time to address arguments in rejoinder to the MKAPL's response to AWHO's counter claims. The matter was adjourned to 11.12.2015 and 12.12.2015. In the order dated 10.10.2015, recording the proceedings held on 09.10.2015 and 10.10.2015, the arbitrator recorded that both parties had given their consent for enlargement of time for making the award up to and including 30.06.2016. The said order was also signed by both the parties. However, the signatory of AWHO made a separate noting to the effect that AWHO would intimate about the enlargement of time separately.

3.9 Thereafter, AWHO sent a letter on 06.11.2015 stating that AWHO is not willing to give its consent for enlargement of time. AWHO followed the said letter by another letter dated 07.12.2015, *inter alia*, stating that AWHO had lost confidence in the arbitrator's impartiality and fair

adjudication of the disputes and also reiterating its stand that AWHO was not willing to give its consent for enlargement of time.

Submissions

4. Mr Sandeep Sethi, learned Senior Advocate appearing for AWHO contended that the arbitration clause expressly provided that the time for making of the award could be extended only by consent of both the parties and since in the present case, AWHO had declined to do so, the mandate of the arbitrator stood terminated. He earnestly contended that the record of proceedings held on 10.10.2015 clearly indicated that AWHO did not agree to the enlargement of time as recorded by the arbitrator and, therefore, a specific noting was made by the representative of AWHO that AWHO would intimate its stand on enlargement of time separately.

5. Mr Sethi also relied on the decision of the Supreme Court in **N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd.:** (2010) 2 SCC 385 in support of his contention that where the arbitrator failed to conclude the proceedings within the time as agreed between the parties, the mandate of the arbitrator would stand terminated unless it was extended with the consent of the parties.

6. Mr Sudhanshu Batra, learned Senior Advocate appearing for MKAPL submitted that AWHO had participated in the arbitration proceedings without any protest or objection and by its conduct, had waived the requirement of time specified for making the award. He submitted that the parties had spent several days in pursuing the arbitral proceedings and the arbitrator had also heard the parties at length. He submitted that the arbitral proceedings were almost concluded and all that

remained was for AWHO to advance arguments in rejoinder to the response of MKAPL to AWHO's counter claims. He submitted that during the course of hearing on 10.10.2015, the arbitrator had noticed that the arbitration clause provided for the arbitration to be concluded within a period of four months and brought this to the notice of the parties. The parties had readily accepted enlarging the time for making the award till 30.06.2016. However, AWHO had subsequently, sought to resile from its agreement by sending a letter dated 06.11.2015 declining to extend the time for making the award.

7. Mr Batra submitted that the contention that the representative of AWHO had not agreed to enlargement of time on 10.10.2015 was incorrect as the notings put by the said representative only stated that AWHO would intimate about the enlargement of time separately. He submitted that the said noting was made since the representative of AWHO felt it expedient that the enlargement of time be formally communicated to the arbitrator by the concerned authorities.

8. Mr Batra referred to the decision of the Supreme Court in **Bharat Sanchar Nigam Limited and Anr. v. Motorola India Private Limited: (2009) 2 SCC 337** and on the strength of the aforesaid decision contended that where the party knows that a requirement of the arbitration agreement is not complied with, but nonetheless, proceeds with the arbitration without raising any objection, it waives its right to object to the same. He also relied upon the decision of this Court in **Shyam Telecom Limited v. ARM Limited: 2004 (3) Arb. LR 146 (Delhi)** in support of the aforesaid contention. Mr Batra also referred to the decisions of the Bombay High Court in **Jayesh H. Pandya and Anr. v. Subhtex India Limited and Ors.:**

2008 (Suppl 2) Arb. LR 328 (Bombay) and Hindustan Wires Limited v. R. Suresh; Indian Oil Corporation Limited: 2013 Law Suit (Bom) 407.

9. Mr Sethi countered the submissions made by Mr Batra. Mr Sethi contended that since AWHO had participated in the arbitral proceedings till 10.10.2015 without protest, its consent for enlargement of the time could be considered only till 10.10.2015. He submitted that after 10.10.2015, AWHO had not participated in the arbitral proceedings and had expressly declined to do so and, therefore, it is clear that the time for making the award had expired on 10.10.2015. He also disputed the contention that the representative of AWHO had agreed for extension of the time for making the award till 30.06.2016.

Reasoning and Conclusion

10. At the outset, it is necessary to refer to clause 17 of the Agreement, which reads as under:-

"17. The Sole **Arbitrator** appointed by **the Chairman**, AWHO, for adjudication of disputes between Architect and Employer in terms of clause 15 above, shall make and publish his award within four months of entering upon reference. The Sole Arbitrator may, however, enlarge the time for making and publishing the award with the consent of both the parties."

11. It is apparent from the above that the arbitrator was required to make the award within a period of four months. It is trite law that where parties have agreed that the arbitral award be made within the specified time, the mandate of the arbitrator would expire with the expiry of the said specified period. In *Shyam Telecom Limited* (*supra*), a Coordinate Bench of this Court had held "*that expiry of the prescribed period for making the Award, would render the Arbitrator 'de jure' unable to continue with the*

proceedings and has the effect of termination of the mandate of the Arbitrator within the meaning of Section 14 of the Act".

12. It is also settled law that an arbitrator essentially draws his jurisdiction to adjudicate the disputes from the agreement between the parties. Thus, plainly, where the parties had specified a period for publication of the award, the mandate of the arbitrator would stand terminated with the expiry of the said period as the arbitrator would be denuded of the jurisdiction to proceed further. However, undisputedly, the parties can always by consent either waive the requirement of making the award within the time specified by them or extend the time for doing so. Thus, the only question to be addressed is whether in the present case, the parties had waived the requirement of making the award within a period of four months or had enlarged the time for making such award.

13. The arbitrator had entered upon reference on 03.10.2013 and it is a matter of record that none of the parties had filed any of the pleadings within the period of four months of the arbitrator entering upon the reference. Although the arbitrator had specified a schedule whereby the pleadings were to be completed by 05.01.2014, none of the parties had adhered to the said schedule. It is a matter of record that on 30.01.2014, AWHO requested for extension of time for submission of their claims till 31.03.2014. This request was acceded to by the arbitrator. However, AWHO had failed to file its claims even within the extended period of time. On 27.03.2014, AWHO once again requested the arbitrator for a further extension of time for submission of their claims by 30.04.2014 and finally filed its claims/counter claims before the arbitrator on 28.04.2014. This was much beyond the period of four months as specified in clause 17

of the Agreement. Indisputably, the parties participated in the arbitration proceedings and the record also indicates that extensive hearings were held by the arbitrator not only in respect of the claims and counter claims made by the parties but also for applications filed by the parties from time to time. Thus, it cannot be disputed that the parties by their conduct had waived the stipulation as to the award being published within a period of four months of the arbitrator entering upon the reference.

14. At this stage, it is relevant to refer to Section 4 of the Act, which expressly provides that where a party knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objections, he shall be deemed to have waived its right to so object. The said Section is set out below for ready reference:-

"4 Waiver of right to object. —A party who knows that—

- (a) any provision of this Part from which the parties may derogate, or
- (b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

15. Admittedly, AWHO had not raised any objection as to continuance of the arbitral proceedings after the expiry of four months from 03.10.2013, that is, four months after the expiry of the date of arbitrator entering upon reference.

16. Plainly, by virtue of Section 4 of the Act, AWHO had waived its right to insist on adherence to the time period for making the award as set out in the arbitration clause.

17. In *Shyam Telecom Limited* (*supra*), a Coordinate Bench of this Court considered a case where the arbitration clause provided that the arbitrator would make an award within a period of six months of entering upon reference. The said period expired but the parties continued to participate in the arbitral proceedings. The petitioner (therein) filed a petition under Section 14 of the Act praying that the arbitrator's mandate be terminated. The respondent, on the other hand, contested the said petition by contending that by participating in the arbitral proceedings, the petitioner had waived its right to object. The Court rejected the petition while observing as under:-

"Not only that, no objection was raised about the continuation of the Arbitral proceedings but the petitioner continued to participate in substantive proceedings before the Arbitrator up till the final stage of the proceedings. In the opinion of this Court, these facts and circumstances are so glaring so as to attract the doctrine of waiver within the meaning of Section 4 of the Act. It is a settled legal position that waiver will be deemed to have taken place when a party knowing that an irregularity has been committed, did not object to the same but participated in the Arbitration proceedings without protest. Section 4 of the 1996 Act corresponds to Article IV of 'UNCITRAL Modern Law'. The principle of waiver is not new in the Arbitration law as it was so far contained in the case law and has been codified in the statute. Besides, in the opinion of the Court the right to object the continuance of the proceedings on the ground of expiry of the stipulated period is one which falls in Part-I of the Act and which is derogable. The object of providing time limit for rendering an Award by the Arbitrator is aimed at expeditious resolution of the disputes rather than to leave the

disputes unsettled or inconclusive on the expiry of the stipulated period. -Thus, looking at the matter from any angle, this Court is of the opinion that having regard to the entirety of the facts and circumstances, the petitioner will be deemed to have waived its right to object about the continuation of the proceedings or alleging the termination of the mandate of the Arbitrator simply on the ground that the time prescribed under Article IV(3) of the Divestment agreement for making the Award had expired."

18. In *Jayesh H. Pandya (surpa)*, the Bombay High Court had considered a similar case where in terms of the arbitration agreement, the arbitrator was required to make the award within a period of four months from the date of service of the copy of the agreement and the time could be extended only with the consent of both the parties. Admittedly, the said clause was not brought to the notice of the arbitrator at the first preliminary hearing held on 04.05.2007. On that date, the arbitrator fixed the schedule for further proceedings; the pleadings were to be completed by 20.07.2007, discovery and inspection was to be completed by 27.07.2007; admission/denial of documents was to be completed by 10.08.2007; and the second preliminary hearing was scheduled to be held on 30.08.2007. There were certain delays on the part of the petitioner (therein) and the arbitrator also granted extension of time to the parties. The preliminary hearing took place before the arbitrator on 27.08.2007 and on that date, the learned counsel for the petitioner stated that the petitioner was not agreeable for extension of time. Clearly, there was only a few days left for expiry of the specified period of four months and an award could not be made within the said period. In the circumstances, initially, the arbitrator observed that it would be more appropriate for the claimant to obtain extension of time or a clarification from the Supreme Court that the arbitral tribunal could extend the time even without the consent of the respondents.

However, subsequently, the arbitral tribunal was invited to adjudicate the controversy and by an order dated 31.12.2007, the arbitrator rejected the contention that its mandate expired due to efflux of time. The said order was impugned before the Bombay High Court.

19. In the aforesaid context, the Bombay High Court held as under:-

"Parties to an arbitration agreement are entitled to stipulate the time within which an arbitral award is to be rendered. In the present case, the time which was prescribed was four months. In such a case, however, where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must at the earliest opportunity make its intention known to ensure compliance with a rigid standard as to time. To hold otherwise would be to encourage a lack of candour on the part of parties in their dealings before the Arbitrator. Interpretation of law by the Court must be such as to promote honesty, fairness and transparency on the part of parties and not such as would defeat the salutary object in the enactment of the Arbitration and Conciliation Act, 1996. Section 4 of the Act deals with a waiver of the right to object and inter alia stipulates that a party who knows that any requirement under the agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay, shall be deemed to have waived his right to object. Section 4 is indicative of the policy of the legislature. The petitioners stood by and allowed the Arbitrator to fix a time schedule for the filing of pleadings. If they had a serious intent of not allowing the proceedings to continue beyond the period of four months, it was the duty of the petitioners to inform the Arbitrator at the earliest when the time schedule was fixed by the Arbitral Tribunal. Counsel appearing on behalf of the petitioners, in fact, fairly stated before the learned Arbitrator on 27th August, 2007 that the contention which was sought to be taken up ought to have been urged on 4th May, 2007, but at that stage he had not read his papers. The petitioners' Advocate unfortunately sought to controvert the correctness of what was recorded by the learned

Arbitrator in his order dated 27th August, 2007. The Arbitrator, as the record would show, was constrained to set the record straight by a communication dated 27th September, 2007. The learned Arbitrator is justified in coming to the conclusion that the petitioners have by their conduct waived their objection to enforce a punctilious observance of the time schedule of four months. To adopt any other construction would frustrate the object and purpose of arbitral proceedings and bring the whole machinery provided by the Act to facilitate an efficacious recourse to arbitration into grave peril. Speaking for myself, I would decline to accept a construction which would lead to that result. The Court is duty bound to effectuate the object and intent of Parliament in enacting the law and the view which I have taken is one which will protect the object which Parliament had in view.”

20. I respectfully concur with the aforesaid view. In the present case, it is clear that AWHO had completely ignored the stipulation as to the time frame of four months and, therefore, must be held to have waived the same.

21. At this stage, it is important to note that it is not AWHO's contention that the arbitrator's mandate had ceased on 03.02.2014, that is, with the expiry of four months from the date on which the arbitrator entered reference. On the contrary, it was contended that since AWHO participated in the proceedings till 10.10.2015, the arbitrator's mandate should be deemed to have continued till then; but, as AWHO declined for any further enlargement of time, the arbitrator's mandate would cease on that date. In my view, this contention is unmeritorious and does AWHO no credit to raise it. The object of specifying the time period in the arbitration clause is to ensure expeditious resolution of the disputes. The fact that both the parties continued to participate in the proceedings without either raising

any objection clearly indicates that both the parties had waived the stipulation as to the time period in the arbitration clause. The import of AWHO's contention is that parties could continue to participate in the proceedings as long as they wished to do so but either party could terminate the arbitral proceedings at will at any time after four months of the arbitrator entering reference. This clearly cannot be accepted. Having agreed for resolution of the disputes by arbitration, it is not open for any party to unilaterally withdraw from the proceedings contrary to their agreement. It was certainly open for AWHO to decline to participate in the arbitral proceedings with the expiry of four months of the arbitrator entering upon the reference but, having participated in the proceedings and thereby having waived the stipulation as to time for making the award, it is not open for AWHO to unilaterally terminate the arbitration proceedings or to unilaterally restrict the time for making the award.

22. The decision of the Supreme Court in ***N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd.*** (*supra*) does not further the case of AWHO. In that case, the arbitrator was to complete proceedings by 27.03.2005, that is, within a period of six months from the date of appointment of the arbitrator. Despite holding several hearings, the arbitrator was unable to conclude the proceedings within the time fixed. In the circumstances, the parties had mutually agreed to extend the time till 31.08.2005 for making and publishing the award. Thereafter, the time was once again extended to 30.09.2005. That was not a case where any of the parties had by their conduct waived the condition as to the time period for making the award.

23. Although, it is held that the parties have by their conduct waived the stipulation for making the award, nonetheless, the principal object of

arbitration is expeditious disposal of disputes and, therefore, it would be apposite if the arbitrator concludes the proceedings and delivers the award within a period of twelve weeks from today.

24. In view of the aforesaid, the present petition is unmerited and is dismissed with the aforesaid observations. The pending application also stands disposed of.

25. No order as to costs.

NOVEMBER 30, 2016
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VIBHU BAKHRU, J

