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

COMMERCIAL ARBITRATION PETITION NO.262 OF 2017

- 1). Ramesh D. Shah, Adult, Indian)
Original, having his address at Unit)
No.S-14, 2nd Floor, Pinnacle Business)
Park, Shanti Nagar, Near Ahura Centre) MIDC, Mahakali Caves Road,)
Andheri (East), Mumbai – 400 093)
)
- 2). Ramesh Dhayalal Shah Family Trust)
through its authorized representative)
having his address at Unit No.S-14,)
2nd Floor, Pinnacle Business Park)
Shanti Nagar, Near Ahura Centre)
MIDC, Mahakali Caves Road,)
Andheri (East), Mumbai – 400 093) ...Petitioners

....Versus....

- 1). Tushar D. Thakkar, having his)
address at 109-A, Keval Industrial)
Estate, Senapati Bapat Marg,)
Lower Parel, Mumbai – 400 013.)
)
- 2). Tushar Clothing Private Limited,)
G-9,Vishal Compound, Near)
Brahma Compound, Rahnal,)
Bhiwandi – 421 302, District Thane) ...Respondents

Mr.Chetan Kapadia with Mr.Rahul Sarda and Mr.H.K. Sudhakara i/b
HKS Legal for the Petitioners.

Mr.Sharan Jagtiani with Mr.Ankoosh Mehta, Ms.Dhvani Shah,
Ms.Shubhi Ajitsaria and Mr.Hitesh Soni i/b Cyril Amarchand &
Mangaldas for the Respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 9TH NOVEMBER, 2017.
PRONOUNCED ON : 30TH NOVEMBER, 2017.

JUDGMENT :-

1. By this petition filed under section 14(2) and section 32 (2) of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioners have prayed for condonation of delay, if any, in filing this petition and pray that the Procedural Order Sheet No.3 dated 7th February, 2016 and Procedural Order Sheet No.4 dated 16th March, 2016 passed by the learned arbitrator thereby terminating the arbitral proceedings and refusing to take statement of claim on record by condoning the delay in filing the statement of claim and for recalling of the order terminating the arbitral proceedings be set aside. The petitioners have also prayed for an order and direction against the learned arbitrator to accept the statement of claim annexed as Exhibit – R along with annexures filed by the petitioners with the learned arbitrator on 24th February, 2016. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioners were the original claimants in the arbitral proceedings, whereas the respondents herein were the original respondents.

3. It is the case of the petitioners that the petitioners and the respondents became the shareholders of a company known as “ETCO Denim Private Limited” and were holding the shares in the said company. The parties entered into a Shareholders Agreement dated 12th December, 2012. It is the case of the petitioners that the respondents had committed defaults of its obligations under the said

Shareholders Agreement, as a result of which the said company faced serious financial difficulties. Dispute arose between the parties. The petitioners vide their letter dated 9th January, 2014 called upon the respondents to fulfill their obligations under the said Shareholders Agreement. The respondents vide their letter dated 18th April, 2014 refused to comply with their obligations under the said Shareholders Agreement. Various correspondence were exchanged between the parties. The petitioners thereafter addressed the letters on 15th May, 2014 and 4th July, 2014 to the respondents invoking arbitration agreement as contemplated under clause 9.3 of the Shareholders Agreement and requested the respondents to refer the disputes to arbitration. The respondents however, refused to refer the disputes to arbitration. The petitioners therefore, filed an application under section 11(6) of the Arbitration Act in the year 2014. By an order dated 15th July, 2015, passed by this Court, Shri Justice P.V. Hardas, a former Judge of this Court came to be appointed as a sole arbitrator.

4. Pursuant to the said order passed by this Court, the learned arbitrator entered upon the reference. Learned arbitrator held the first meeting on 15th October, 2015 and issued various directions, including the direction to the petitioners to file their statement of claim on or before 7th January, 2016 and directed the respondents to file their written statement and counter claim, if any, along with the documents, if any, to be relied upon by them on or before 31st March, 2016. The petitioners were granted time to file reply to the written statement and counter claim on or before 28th April, 2016 and directed the respondents to file rejoinder, if any on or before 26th May, 2016. Learned arbitrator directed both the parties to

make a written demand on each other for taking inspection of their respective documents within one week of 26th May, 2016 and to file their statements regarding admission / denial on or before 25th June, 2016. The next meeting was directed to be held on 25th June, 2016 for framing issues and for settling the issues.

5. On 14th December, 2015, Mr.Sudhir Motani on behalf of the petitioners addressed an email to the erstwhile advocates of the petitioners and forwarded the details and also for preparation of the statement of claim. On 31st December, 2015, the petitioners addressed a letter to the learned arbitrator requesting for extension of time by a period of six weeks pointing out that the extension was sought because of genuine reasons as the computation of the claim was complex and required thorough analysis by an expert third party. The petitioners accordingly requested the learned arbitrator for granting extension of time by a a period of six weeks. It is canvassed to the learned arbitrator that the said extension of time was based on the inputs from the Chartered Accountants, who were computing the claim. By a letter dated 5th January, 2016, learned arbitrator however, granted extension of time by three weeks to enable the petitioners to file statement of claim i.e. till 28th January, 2016.

6. It is the case of the petitioners that on 25th January, 2016, realizing that preparation of statement of claim would not be possible by the extended date continued to reason beyond their control, the petitioners addressed a letter on 25th January, 2016 to the learned arbitrator for a further period of extension of two weeks. Learned arbitrator passed an order by issuing Procedural Order Sheet dated 7th February, 2016 and terminated the arbitral proceedings. It was

recorded in the said order that the petitioners vide their letter dated 25th January, 2016 had requested for extension of two more weeks time to file their statement of claim. Learned arbitrator had granted sufficient time to the petitioners to file their statement of claim. The petitioners were already granted further time for filing their statement of claim. Learned arbitrator indicated that he was not be inclined to grant further time to the petitioners to file their statement of claim and accordingly rejected the request made by the petitioners for extension of time. It is the case of the petitioners that the Procedural Order Sheet dated 7th February, 2016 passed by the learned arbitrator came to be received by the petitioners only on 15th February, 2016.

7. The petitioners however forwarded the statement of claim along with the documents on 24th / 25th February, 2016 to the learned arbitrator and requested him to condone the delay in filing the statement of claim for various reasons recorded in the said letter. It was stated in the said letter that the factory of the petitioners was situated at Bijapur in Karnataka. Several details of production, sales sheets and all documentation relating to the factory which had been annexed to the statement of claim came to be produced from Karnataka. The said exercise was time consuming and thus there was delay in procuring documentation. The petitioners pointed out that they had undertaken the exercise of appointing a Chartered Accountants to evaluate the methodology of making the claim so as to make the claim reasonable in the eyes of the arbitral tribunal. The Chartered Accountant is a reputed person in the field of valuation.

8. It was mentioned in the said application that the petitioners had strongly felt that the said valuation by the Chartered Accountants

would help and assist the arbitral tribunal in understanding the complex nature of claim made by the petitioners. The claim was not filed based on an actual loss made by the said company i.e. ETCO Denim Private Limited but component of the claim also mainly consists of projections which required detailed study of the business as well as study of the Denim Industry which has been carried out by the Chartered Accountants who have assisted the petitioners in making the said claim. It was further set out that the business of the petitioners was expanding and the management has been travelling extensively domestically as well as to meet international clientele. The petitioners requested the learned arbitrator to take the statement of claim annexed on record and to reinstate the captioned arbitral proceedings between the parties. In the said 30 pages statement of claim, the petitioners had prayed for an order and directions against the respondents to pay an amount of Rs.124,00,98,006/- described in detailed in Schedule 1 to 6 of the particulars of claim and also prayed for an amount of Rs.8,86,05,284/- as and by way of interest at the rate of 18% p.a. as detailed in Schedule 7 to the particulars of claim.

9. On 16th March, 2016, learned arbitrator rejected the said application filed by the petitioners for taking the statement of claim on record, for condoning the delay in filing the statement of claim and for recalling of the order terminating the arbitral proceedings stating that apart from maintainability of the application of the claimants, no case was made out for granting reliefs prayed for by the petitioners. The petitioners accordingly filed this petition *inter-alia* praying for invoking sections 14(2) and 32 (2) of the Arbitration Act.

10. Mr.Kapadia, learned counsel for the petitioners invited my

attention to various annexures to the arbitration petition, including minutes of the arbitral proceedings and two orders passed by the learned arbitrator. He placed reliance on the order dated 15th July, 2015 passed by this Court appointing Shri Justice P.V. Hardas as a sole arbitrator. The respondents herein had made a statement before this Court that they sought to file a counter claim in the matter. This Court recorded the statement made by the learned counsel for the respondents and recorded that the respondents seek to file counter claim before the learned arbitrator. It was further made clear that the issue of arbitrability and maintainability of the counter claim is also kept open. Learned arbitrator thereafter held a meeting and issued the directions to both the parties to file the pleadings.

11. It is submitted by the learned counsel for the petitioners that the learned arbitrator has failed to give an opportunity of hearing to the petitioners on the application filed by the petitioners. Learned arbitrator failed to communicate to the petitioners that he had intended to terminate the mandate / arbitral proceedings and also failed to consider the reasons shown by the petitioners for extension of time in the impugned order passed on the petitioners' application. He submits that the learned arbitrator could have imposed adequate compensation for default in filing the statement of claim on time instead of non-suiting the petitioners completely.

12. It is submitted by the learned counsel that the respondents had filed criminal complaints against the petitioners with N.M. Marg Police Station on 22nd August, 2015 and also with Goregaon Police Station on 21st September, 2015. The petitioners started receiving phone calls from Goregaon Police Station directing them to appear

before the police in connection with the complaints lodged by the respondents. It is the case of the petitioners that lot of time got diverted in giving reply to the queries of the police.

13. It is submitted by the learned counsel that Mr.Abhay Sharma, who was an employee of the petitioners and was involved in preparation of the statement of claim and its computation went on leave during Diwali vacation. When the said employee was on leave during Diwali vacation, his services were terminated and discontinued. He however, did not hand over charge of the matters handled by him. His assistance's marriage was scheduled to take place on 22nd November, 2015 and thus he was also on full time leave from 7th November, 2015 to 2nd December, 2015.

14. It is submitted by the learned counsel that Mr.Sudhir Motani, who had replaced Mr.Umesh Sharma, thereafter prepared and sent the draft computation of claim to the erstwhile advocates of the petitioners. The said advocates however, did not approve the draft computation of claim which was sent by Mr.Sudhir Motani and advised that an independent external agency may be appointed for the purpose of computation of the claim accurately and comprehensively as the computation was complex. The petitioners thereafter approached M/s.Shaparia Mehta & Associates, LLP, Chartered Accountants. In the meanwhile, Christmas vacation also ensued. The petitioners' erstwhile advocate and counsel were not available during that period.

15. It is the case of the petitioners that since the computation of claim involved projection of future losses, the said Chartered

Accountants carried out a detailed analysis before preparing the same which also contributed to the delay, the valuation by the Chartered Accountant, being complex and based not only on actual losses but also future losses, took some time for computation. The management of the petitioners could not devote sufficient time due to extensive travel during the period. Since the records were kept in the factory of the petitioners in Karnataka, procuring those documents to Mumbai was time consuming. He submits that the petitioners had explained the delay in the correspondence addressed to the learned arbitrator which showed sufficient cause and thus the delay in filing the statement of claim ought to have been condoned and the statement of claim filed by the petitioners ought to have been taken on record by the learned arbitrator. He submits that the respondents have stood to gain by termination of arbitral proceedings as there would be no adjudication of petitioners' claims for the breaches by the respondents of their obligation under the Shareholders Agreement.

16. It is submitted that the petitioners had in fact originally applied for six weeks extension of time, whereas the learned arbitrator had granted only three weeks time. Within nine days of refusal of extension of time by the learned arbitrator, by an order dated 7th February, 2016, learned arbitrator terminated the arbitral proceedings without recording any reasons and without considering the explanation given by the petitioners for seeking further extension of time of two weeks in filing the statement of claim. He submits that it a matter of record that within nine days of seeking an application for further extension of two weeks, the petitioners had already forwarded the statement of claim with documents to the learned arbitrator. There was total delay of 27 days between 28th January, 2016 to 24th

February, 2016 in filing the statement of claim.

17. Learned counsel for the petitioners invited my attention to sections 25 and 32 of the Arbitration Act and submits that the time to file written statement and the counter claim granted to the respondents till 31st March, 2016 had not expired when the learned arbitrator terminated the arbitral proceedings on 7th February, 2016. He submits that the petitioners had already filed the statement of claim on 24th / 25th February, 2016 with the learned arbitrator giving detailed reasons as to why there was an inadvertent and inordinate delay in filing the statement of claim along with documents. The petitioners had also prayed for condonation of delay in filing the statement of claim and for seeking reinstatement of the arbitral proceedings. He submits that however, without calling the petitioners for personal hearing and allowing them to present their claim, learned arbitrator without recording any reasons ruled out that no case was made out for granting reliefs as prayed for without adverting to the grounds cited by the petitioners in the application for extension of time as well as in the covering letter forwarding the statement of claim dated 24th / 25th February, 2016.

18. Mr. Kapadia, learned counsel for the petitioners placed reliance on the judgment of the Delhi High Court in case of **Gangotri Enterprises Limited vs. NTPC Tamil Nadu Energy Company Limited, (2017) SCC OnLine Delhi 6560** and in particular paragraphs 3, 12 and 22 to 24 in support of his submission that the application filed by the petitioners under sections 14 (2) and 32 of the Arbitration Act for various reliefs in the petition is maintainable. He submits that since the learned arbitrator has terminated the arbitral

proceedings, resultantly the mandate of the learned arbitrator also stood terminated under section 32(3) of the Arbitration Act and thus the application filed by the petitioners would fall under section 14 (2) of the Arbitration Act.

19. Mr.Kapadia, learned counsel for the petitioners placed reliance on the judgment of the Andhra Pradesh High Court in case of **N. Jayalaxmi vs. R. Veeraswamy & Anr. (2003) SCC OnLine 796** and in particular paragraphs 19 and 23 to 25 in support of his submission that in view of the application made by the petitioners giving sufficient explanation for causing delay in filing the statement of claim, learned arbitrator ought to have granted further extension of two weeks in the interest of justice and could have imposed a reasonable costs upon the petitioners. He submits that it is a matter of record that the petitioners had filed the statement of claim within nine days from the date of making that application. Learned arbitrator ought to have shown latitude to the petitioners in such circumstances in view of the petitioners having made out a case for condonation of delay and for extension of time. He submits that no prejudice would have been caused to the respondents. The time to file the written statement and the counter claim granted to the respondents had not even expired.

20. Learned counsel for the petitioners placed reliance on the judgment of the Supreme Court in case of **San-A-Tradubg Company Limited vs. I.C. Textiles Limited, (2012) 7 SCC 192** and in particular paragraphs 15 to 19 in support of his submission that the learned arbitrator ought to have exercised his powers to grant extension of time to file the statement of claim. He also placed

reliance on the judgment of the Supreme Court in case of **ACC Limited vs. Global Cements Limited, (2012) 7 SCC 71** and in particular paragraph 21 and would submit that the Legislative policy embodied in sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The consequence of termination of the arbitral proceedings by the learned arbitrator is very serious and thus the learned arbitrator ought to have considered that the petitioners had made out sufficient cause for extension of time in filing the statement of claim by another two weeks.

21. Learned counsel for the petitioners placed reliance on a passage from Treatise of Russell on Arbitration 23rd Edition and more particularly paragraph 5.045 in support of his submission that in practice, the Tribunal will usually allow some latitude to a party who has further relevant submissions or evidence to put forward, though has to make it clear to the parties exactly where the line will be drawn. No such warning was given by the learned arbitrator to the petitioners that if the statement of claim would not be filed within the extended period of three weeks, the arbitral proceedings would be terminated.

22. It is submitted by the learned counsel that the learned arbitrator ought to have applied "sufficient cause test" while considering the application filed by the petitioners for further extension of time for two weeks in filing the statement of claim. Though the respondents had opposed the extension, it was prayed by the respondents that if any extension was to be granted, the petitioners should be asked to pay costs. He submits that learned arbitrator thus in such circumstances ought to have accepted the

alternate submission of the respondents and could have imposed reasonable costs upon the petitioners as a condition precedent for grant of further extension of two weeks.

23. Learned counsel for the petitioners placed reliance on the judgment of the Supreme Court in case of **Lalitkumar V. Sanghavi vs. Dharamdas V. Sanghavi & Ors. (2014) 7 SCC 255** and in particular paragraphs 10 to 12 in support of his submission that the orders passed by the learned arbitrator thereby terminating the proceedings can be examined by this Court under section 14(2) of the Arbitration Act. He also placed reliance on the judgment of this Court in case of **Neeta Lalit Sanghavi & Anr. vs. Dharamdas V. Sanghavi & Ors. (2015) SCC OnLine Bom. 4678** and in particular paragraphs 70 to 89 in support of his submission that the present application filed by the petitioners for setting aside the orders passed by the learned arbitrator terminating the proceedings filed by the petitioners under section 14 (2) read with section 32 of the Arbitration Act is maintainable.

24. Mr.Jagtiani, learned counsel for the respondents on the other hand submits that the learned arbitrator had already granted one extension of three weeks to the petitioners for filing statement of claim. He invited my attention to the letters addressed by the petitioners to the learned arbitrator on 31st December, 2015 and 25th January, 2016 seeking extension of time. He submits that only reason alleged by the petitioners in those two letters for seeking extension of time was that computation of claim was complex and required a thorough analysis of Chartered Accountants and gave no other reasons. He submits that however, in the arbitration petition filed by

the petitioners, various other alleged causes in filing the statement of claim. He submits that these grounds alleged for the first time in the arbitration petition cannot be considered by this Court to ascertain whether the petitioners had made out a sufficient cause for seeking further extension of two weeks for filing statement of claim or not. He submits that the learned arbitrator was a master of the proceedings. The power to grant extension of time to file statement of claim or the documents under section 24 of the Arbitration Act was a discretionary power. Learned arbitrator having exercised such discretion and has rendered a value decision, this Court cannot substitute such value decision by passing any other value decision.

25. Learned counsel placed reliance on section 19 of the Arbitration Act and would submit that since in this case the parties had not agreed to any procedure for conducting the arbitration proceedings, including the time for filing pleadings and documents, learned arbitrator was empowered to decide the procedure of conducting the arbitral proceedings in the first meeting held by the learned arbitrator. Since the directions given by the learned arbitrator for filing pleadings was by way of procedural order and such directions cannot be construed as substantive order, no intervention with procedural order is permissible. He submits that it is not the case of the petitioners that the initial period of six weeks granted by learned arbitrator to the petitioners to file statement of claim itself was an unreasonable and was shorter time than what was required for filing the statement of claim. Nor was the case of the petitioners that the extension of time of three weeks granted by the learned arbitrator initially for filing statement of claim was an unreasonable extension and was in violation of principles of natural justice or arbitrary.

26. It is submitted by the learned counsel that no legal grounds have been raised by the petitioners in the arbitration petition in support of the submission that learned arbitrator ought to have granted suitable extension and the same has not been granted. He submits that the order passed by the learned arbitrator was keeping in mind the purpose and intent of the Arbitration & Conciliation Act, 1996 of expeditious disposal of the arbitral proceedings. No case for interference is thus made out by the petitioners with the orders passed by the learned arbitrator.

27. Learned counsel for the respondents placed reliance on section 25(1)(a) of the Arbitration Act and would submit that the learned arbitrator has power to grant extension, which includes power to refuse grant of extension and to resultantly terminate the proceedings under section 25(1)(a) of the Arbitration Act. He submits that the proceedings were thus terminated by the learned arbitrator in this case under section 25(1)(a) of the Arbitration Act. Under section 32(2)(c) of the Arbitration Act, learned arbitrator is empowered to terminate the proceedings if it is found by the learned arbitrator that continuation of the proceedings has become unnecessary or impossible. Learned counsel however, does not dispute that even if the proceedings are terminated by the learned arbitrator under section 25(1)(a) of the Arbitration Act, such order can be subject matter of the enquiry under section 14(2) of the Arbitration Act.

28. Insofar as the submission of Mr.Kapadia, learned counsel for the petitioners that the learned arbitrator could not have terminated the proceedings even before expiry of time to file the

counter claim by the respondents is concerned, it is submitted that the learned arbitrator had given an opportunity to the respondents to file the counter claim, if any. In a given case, the respondents would not have filed the counter claim. He submits that in any event the respondents could have made a grievance in respect of the order passed by the learned arbitrator thereby terminating the arbitral proceedings before expiry of time granted by the learned arbitrator to the respondents to file the counter claim and not the petitioners. He submits that the respondents have not challenged the said order.

29. It is submitted by the learned counsel that the petitioners had already invoked arbitration agreement as far back as on 15th March, 2014 and thus the claims which were proposed to be made by the petitioners were already formulated and were crystallized much prior to the date of this Court appointing learned arbitrator or even prior to the date of invoking such arbitration agreement. Learned arbitrator entered upon the reference on 15th October, 2015 i.e. after one and half years of the petitioners invoking the arbitration agreement. The petitioners thus ought to have prepared and filed the statement of claim within the period of six weeks granted by the learned arbitrator. He submits that the learned arbitrator however, adopted fair, reasonable and judicious approach by granting three weeks extension though the petitioners did not deserve the same. He submits that the said period of three weeks expired on 28th January, 2016. Learned arbitrator accepted the reasons recorded by the petitioners in the letters seeking extension of time for six weeks and had granted three weeks extension.

30. It is submitted by learned counsel that the petitioners had

given new reasons in the application dated 24th February, 2016 while seeking recall of the order of termination of the proceedings, it was not permissible and such alleged causes were after thought. It is submitted by learned counsel that the learned arbitrator was not required to render any reasons while passing a procedural order.

31. Learned counsel for the respondents distinguished the judgment of this Court in case of **Neeta Lalit Sanghavi & Anr.** (supra) relied upon by the petitioners on the ground that the facts before this Court in the said judgment were totally different. The arbitration proceedings were pending before the learned arbitrator for about three years without any progress. The respondents in that case was asking for adjournment before the arbitral tribunal again and again and was not even paying the fees of the learned arbitrator. The arbitral tribunal was not placing the matter for hearing inspite of repeated requests made by the claimants in that case. He submits that in that case the respondents were in default, whereas in this case the petitioners are in default.

32. Learned counsel for the respondents placed reliance on the judgment of this Court in case of **Wanbury Ltd. vs. Candid Drug Distributors, (2015) SCC OnLine Bom.3810** and in particular paragraphs 32, 35, 38, 40 and 44 in support of his submission that the power to grant extension is discretionary power and once the learned arbitrator having exercised such discretion, such order cannot be interfered with. The parties in that matter had produced medical records which were considered by this Court while setting aside the order passed by the arbitral tribunal terminating the proceedings.

33. Learned counsel for the respondents distinguished the judgment of the Andhra Pradesh High Court in case of **N. Jayalaxmi** (supra) and would submit that even in the said judgment the Andhra Pradesh High Court has held that the learned arbitrator while granting extension of time has to draw a line and grant extension in a reasonable manner. He makes a similar submission insofar as passage from Treatise of Russell on Arbitration is concerned.

34. It is submitted by the learned counsel that the learned arbitrator was not required to issue any warning to the petitioners or was not required to mention in the first order of extension that if the statement of claim was not filed within the time prescribed, the arbitral proceedings would be terminated. He submits that the fact that though the learned arbitrator had granted extension of three weeks that itself would indicate that the learned arbitrator had intended that no further extension would be granted.

35. In support of his submission that there is difference between the provisions of section 32(2)(c) and section 25(1)(a) of the Arbitration Act, Mr. Jagtiani placed reliance on the judgment of the Supreme Court in case of **Srei Infrastrucutre Finance Limited vs. Tuff Drilling Private Limited, (2017) SCC OnLine SC 1210** and in particular paragraphs 4 and 5. He submits that it is not the argument of the respondents that remedy under section 14(2) of the Arbitration Act is not available, however, since the petitioners have not made out any legal ground for interfering with the procedural order passed by the learned arbitrator, this Court cannot interfere with the impugned order.

36. Learned counsel for the respondents placed reliance on the judgment of the Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 17, 19 and 29 to 34 in support of the submission that the arbitral tribunal is a master of the facts and law and thus no interference with the findings of fact or an order which is not perverse can be interfered with by this Court under section 14(2) of the Arbitration Act. He submits that the principles laid down by the Supreme Court while dealing with section 34 would apply to an application under section 14 read with section 32(2)(c) of the Arbitration Act.

37. Mr.Kapadia, learned counsel for the petitioners in rejoinder submits that the petitioners had made sincere efforts to prepare their statement of claim. He submits that on 14th December, 2014 itself, the details of computation of claim was furnished by the petitioners to their advocate. The said details were to be supported with the computation to be analysed by the Chartered Accountants. The time granted by the learned arbitrator was however, found inadequate when the petitioners starting working computation of claim. The petitioners therefore, applied for extension of time by giving sufficient explanation. Learned arbitrator however, did not appreciate sufficient cause shown by the petitioners.

38. On the issue whether the order passed by the learned arbitrator refusing to grant extension was discretionary order is concerned, learned counsel for the petitioners placed reliance on paragraph 44 of the judgment of this Court in case of **Wanbury Ltd.**

(supra) and submits that the learned arbitrator ought to have adopted judicial approach considering the application for extension of time. The consequence of an order of termination of proceedings for delay is very drastic and serious. No prejudice of any nature whatsoever nature would have been caused in view of the petitioners seeking further extension of two weeks. Learned arbitrator ought to have considered the cause of default and consequence and ought to have weighed the same together before passing drastic order of termination of proceedings. This Court has ample power to interfere with the said drastic order of termination of proceedings in such circumstances.

39. It is submitted that though the learned arbitrator had termed the orders of termination of proceedings as procedural order, such order causing tremendous hardship to the petitioners and leads to serious consequences, oral hearing was contemplated before passing of any such drastic order.

40. Insofar as the issue whether the respondents were bound to file counter claim or not is concerned, it is submitted that though an opportunity was granted by the learned arbitrator to the respondents to file the counter claim, if the respondents would not have chosen to file the counter claim, the respondents ought to have informed the learned arbitrator that they did not want to file the counter claim which they did not inform before 31st March, 2016. The statement of claim was though forwarded by the petitioners within nine days, the learned arbitrator rejected the second application for extension of time and terminated the arbitral proceedings.

41. Learned counsel for the petitioners invited my attention to paragraphs 16 and 18 of the statement of claim and would submit that the report of the Chartered Accountant sought by the petitioners on various issues was absolutely necessary which took some time, which was absolutely necessary to prove the claims of the petitioners. The petitioners had made substantial claim against the respondents and had produced the detailed production sale price in the said Chartered Accountants' record.

REASONS AND CONCLUSIONS :-

42. It is not in dispute that the petitioners had invoked arbitration agreement vide their advocates' letter dated 15th May, 2014. The respondents refused to refer the dispute to arbitration. There was further correspondence exchanged between the parties insofar as invocation of arbitration agreement is concerned. The petitioners thereafter preferred an application under section 11(6) of the Arbitration Act. By an order dated 15th July, 2015, the then designate of the Chief Justice disposed of the said arbitration application after hearing both the parties through their respective counsel and appointed Shri Justice P.V.Hardas, a former Judge of this Court as a sole arbitrator. It was recorded that the respondents seek to file counter claim before the learned arbitrator. It was made clear that the issue of arbitrability and maintainability of the counter claim was kept open.

43. Learned arbitrator thereafter issued directions in the preliminary meeting held on 15th October, 2015 (Procedural Order Sheet No.1). The learned arbitrator directed the petitioners (original

claimants) to file statement of claim on or before 7th January, 2016 and directed the respondents to file written statement and counter claim if any on or before 31st March, 2016. The petitioners were granted liberty to file their reply to the written statement on or before 28th April, 2016. The respondents were granted liberty to file rejoinder, if any, on or before 26th May, 2016. The learned arbitrator permitted inspection of the documents to the parties within one week from 26th May, 2016 and to be completed on or before 9th June, 2016. The parties were directed to file statement regarding admission/denial on or before 25th June, 2016 and directed that the next meeting of the arbitral tribunal shall be held on 25th June, 2016 at Mumbai.

44. It is not in dispute that the petitioners did not file statement of claim along with the documents within six weeks as directed by the learned arbitrator in the said preliminary meeting held on 15th October, 2015. The petitioners accordingly through their advocates' letter dated 31st December, 2015 requested the learned arbitrator to grant extension of six weeks to file statement of claim stating that the computation of the claim was complex and was required analysis by a chartered accountant whose report was awaited. The said request of the petitioners for seeking extension of time by six weeks was opposed by the respondents vide letter dated 11th January, 2016. The learned arbitrator vide order dated 5th January, 2016 however granted extension of three weeks to the petitioners and directed that the statement of claim be filed on or before 28th January, 2016.

45. The petitioners through their advocates' letter dated 25th January, 2016 sought further extension of two weeks to file statement of claim along with documents stating that the computation of the

claim was complex and was required analysis by a chartered accountant whose report was awaited. The learned arbitrator however terminated the arbitral proceedings on 7th February, 2016. The respondents objected the petitioners' further extension of time vide their advocates' letter dated 9th February, 2016 i.e. after termination of the arbitral proceedings by the learned arbitrator. The application for review/recall of the order dated 7th February, 2016 made by the petitioners vide an application dated 24th February, 2016 on various grounds came to be rejected by the learned arbitrator on 16th March, 2016. The said application for recall was objected by the respondents vide their advocates' letter dated 15th March, 2016.

46. The petitioners thereafter filed a Writ Petition (Lodging) No.1418 of 2016 impugning the order passed by the learned arbitrator. The said writ petition was dismissed in view of the petitioners not removing office objections before 20th September, 2016 in view of the conditional order passed by the learned Prothonotary and Senior Master on 23rd August, 2016. The said writ petition however subsequently restored by the learned Prothonotary and Senior Master in the Chamber Order No.631 of 2016 filed by the petitioners vide order dated 21st December, 2016 on payment of cost. The petitioners thereafter filed this petition.

47. A perusal of the record thus indicates that though the petitioners had requested for six weeks extension of time vide letter dated 31st December, 2015, the learned arbitrator granted only three weeks time. Before expiry of three weeks time, the petitioners applied for further extension of time by two weeks. It is not in dispute that within nine days of the petitioners making an application for

extension of time for the second time, the petitioners had already forwarded the statement of claim along with documents to the learned arbitrator along with an application for condonation of delay.

48. Insofar as issue of maintainability of this petition under section 14(2) read with section 32(2) of the Arbitration Act is concerned, a perusal of the prayer in the arbitration petition clearly indicates that the petitioners have prayed that the procedural order no.3 dated 7th February, 2016 and procedural order no. 4 dated 16th March, 2016 passed by the learned arbitrator be quashed and the termination of arbitral proceedings be set aside and delay, if any, be condoned. The petitioners had also prayed that the learned sole arbitrator or any other learned arbitrator appointed by this Court be directed to accept the statement of claim along with annexures / exhibits filed by the petitioners with the learned arbitrator on 24th February, 2016.

49. The Supreme Court in case of **Lalitkumar V. Sanghavi** (supra) has considered that the order passed by the learned arbitrator in that matter terminating the arbitration proceedings in view of the fact that the claimant took no interest in the matter for about four years. It is held by the Supreme Court that in such a situation, the order passed by the arbitral tribunal would fall under section 32(3) of the Arbitration Act and thus on cumulative reading of section 32 and section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be exercised by the Court as provided under section 14(2) of the Arbitration Act. The Supreme Court granted liberty to the appellant to approach the appellate Court for determination of the legality of the termination of the mandate of the

arbitral tribunal based upon order dated 29th October, 2017 by which the arbitral proceedings were terminated.

50. This Court in case of **Neeta Lalit Sanghavi and Anr.** (supra) upon such liberty granted by the Supreme Court in case of **Lalitkumar V. Sanghavi** (supra) entertained the application filed by the parties under section 14 of the Arbitration Act *inter-alia* praying for setting aside the termination of the proceedings by the arbitral tribunal and for other reliefs. This Court decided the said proceedings by rendering the judgment reported in **2015 SCC Online Bom 4678**. This Court considered various minutes of the meetings and the material placed on record by the parties and considered a situation where the petitioners had applied for an adjournment in the proceedings before the arbitral tribunal on the ground that he was required to undergo a surgery.

51. This Court adverted to the judgment in case of **Wanbury Limited vs. Candid Drug Distributors 2015 SCC Online Bom 3810** and also judgment of the Supreme Court in case of **Mohan Singh vs. International Airport Authority of India, (1997) 9 SCC 132** and held that the word 'shall' used in section 32(3) of the Arbitration Act has to be construed as 'may' to suppress any public mischief and to prevent injustice in the situation and that had happened in that case. This Court in the said judgment was pleased to set aside the order dated 29th October, 2007 passed by the arbitral tribunal by which the arbitral proceedings were terminated by the arbitral tribunal and restored the mandate of the arbitration tribunal.

52. Learned counsel for both the parties have placed reliance

on various paragraphs of the judgment of this Court in case of Wanbury Limited (supra). The arbitral tribunal in that matter had terminated the arbitral proceedings in view of the claimants not having filed the statement of claim within the time granted by the learned arbitrator. The arbitral tribunal had granted extension of time to the claimant to file statement of claim holding that the claimant had shown sufficient cause for not filing claim statement within the time prescribed by the arbitral tribunal and condoned the delay. The arbitral tribunal also directed the claimant to pay cost to the respondent. The said order passed by the arbitral tribunal condoning the delay and granting extension of time to the claimant was impugned by the respondent therein by filing a petition under sections 14(1)(a), 14(2) and 32(2)(c) of the Arbitration Act seeking declaration that the mandate of the arbitral tribunal was terminated.

53. This Court in the said judgment held that the statement of claim along with the documents can be filed by the claimant either within the time agreed upon by the parties and/or as directed by the arbitral tribunal. The power of the arbitral tribunal to determine the time for filing statement of claim along with documents and similarly to file statement of defence along with the documents includes the power to grant extension of time in case a sufficient cause is made out by claimant or respondent respectively. This Court held that 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. This Court held that the order passed by the arbitral tribunal granting extension of time and condoning delay in filing application for condonation of delay and filing statement of claim along with 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.

54. The Delhi High Court in case of **Gangotri Enterprises Limited** (supra) has adverted to the judgment of the Supreme Court in case of **Lalitkumar V. Sanghavi** (supra) and also the judgment of the Supreme Court in case of **SBP and Company vs. Patel Engineering Limited (2005) 8 SCC 618** and held that the termination of proceedings also terminate the mandate of the arbitral tribunal and thus the question relating to termination of the mandate can be agitated before a Court by virtue of section 14(2) of the Arbitration Act. If any controversy remains with regard to or concerning any grounds referred to in section 14(1)(a) of the Arbitration Act, a party may apply to the Court to decide on termination of mandate. The Supreme Court in the said judgment held that having regard to the scheme of the Act and more particularly on a cumulative reading of section 32 and section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the Court as provided under section 14(2). In my view, the judgment of the Supreme Court in case of **Lalitkumar V. Sanghavi** (supra) would apply to the facts of this case. I am respectfully bound by the principles laid down by the Supreme Court in that judgments. In my view, the proceedings thus filed by the petitioner *inter-alia* praying for setting aside the orders passed by the learned arbitrator thereby terminating the arbitral proceedings is maintainable under section 14(2) of the Arbitration Act. I am in agreement with the view expressed by the Delhi High

Court in case of **Gangotri Enterprises Limited** (supra).

55. Insofar as the judgment of the Supreme Court in case of **Srei Infrastructure Finance Limited** (supra) relied upon by Mr. Jagtiani, learned counsel for the respondents is concerned, it is held by the Supreme Court that when the arbitral tribunal without sufficient cause being shown by the claimant to file the claim statement can terminate the proceedings, subsequent to termination of proceedings, if the sufficient cause is shown, there is no impediment in the power of the arbitral tribunal to accept the show cause and permit the claimant to file the claim. It is held that the scheme of section 25 of the Act clearly indicates that on sufficient cause being shown the statement of claim can be permitted to be filed even after the time as fixed by section 23(1) has expired. It is held that even after passing the order of terminating the proceedings, if sufficient cause is shown, the statement of claims can be accepted by the arbitral tribunal by accept the show cause and there is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown.

56. The Supreme Court in the said judgment further held that section 33(3) further contemplates the termination of the mandate of the arbitral tribunal, whereas those words are missing in section 25. When the legislature has used the phrase “the mandate of the arbitral tribunal shall terminate” in section 32(3), non-use of such phrase in section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be re-commenced. The Supreme Court interpreted section 32(2)(c) and section 25(a) and held that section

32(2)(c) contemplates two grounds of termination i.e. (i) arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or (ii) impossible. The eventuality as contemplated under section 32 shall arise only when the claim is not terminated under section 25(a) and proceeds further. The word “unnecessary” or “impossible” as used in sub-clause (3) of section 32(2) cannot be said to be covering a situation where proceedings are terminated in default of the claim.

57. It is thus clear that the learned arbitrator has power to recall his earlier order of termination of proceedings on the ground that the statement of claim was not filed within the time granted by the learned arbitrator as fixed by section 23(1) if sufficient cause is shown by the claimant even after termination of the proceedings and in that event the statement of claim can be accepted by the arbitral tribunal by accepting the show cause and such order of recall would not be beyond the jurisdiction of the arbitral tribunal on sufficient cause being shown.

58. A perusal of the impugned orders passed by the learned arbitrator in this case indicates that the learned arbitrator did not look into sufficient cause shown by the petitioner in the two letters addressed by the petitioner seeking extension of time and also in the application for condonation of delay in filing the statement of claim mentioned in the application for recall of the order passed by the learned arbitrator which came to be rejected by the learned arbitrator vide order date 16th March, 2016. In my view, the learned arbitrator ought to have considered the cause shown by the petitioner for seeking extension of time and also for recalling of the order

terminating the arbitral proceedings before rejecting the said application.

59. In my view, the order of termination of proceedings by the learned arbitrator in toto would amount to termination of his mandate and causes serious hardship upon the petitioners. Learned arbitrator in such a situation ought to have made it clear in the order granting extension of three weeks to the petitioner that if the statement of claim was not filed within the extended period, the learned arbitrator would terminate the proceedings. Learned arbitrator however, did not put the petitioner to notice that such extension granted by the learned arbitrator was final extension and no further extension would be granted in any circumstances. Be that as it may, learned arbitrator did not render any reasons while rejecting the application for extension of time for the second time and did not render any finding as to whether the cause shown by the petitioner for further extension of time and for condonation of delay in filing the statement of claim was sufficient cause or not. In my view, learned arbitrator ought to have given an opportunity of being heard to the petitioner before passing any drastic order of termination of proceedings thereby terminating his own mandate. The principles of law laid down by the Supreme Court in case of **Srei Infrastructure Finance Limited** (supra) would assist the case of the petitioner and not the respondents.

60. It is not the case of the respondents across the bar that even if the impugned orders passed by the learned arbitrator are considered under section 25(a) of the Arbitration Act, the petition filed by the petitioner under section 14(2) of the Arbitration Act would not

be maintainable.

61. Russell on Arbitration has opined that in practice the tribunal will usually allow some latitude to a party who has further relevant submissions or evidence to put forward, but will need to draw the line at some point and it shall be made clear to the parties exactly where that line will be drawn. For example by giving advance warning of a cut-off date for evidence and submissions, provided of course it is not unreasonable to draw the line in that way, the tribunal should not fall foul of the requirement to give the parties a reasonable opportunity to present their case. Similar are the views expressed by Shri O.P. Malhotra on The Law & Practice of Arbitration & Conciliation, Third Edition, that termination of arbitral proceedings, in default of communication of his claim statement by the claimant, within the fixed time is a very serious step, resulting in rejection of the claim of the claimant. This power therefore, has to be exercised judiciously.

62. It is opined by Shri O.P. Malhotra in the said treatise that it is the duty of the arbitral tribunal to inform the claimant that he had failed to communicate claim of statement on the date fixed and for that is required him to show cause why the arbitral proceedings should not be terminated. It is opined that an opportunity to show sufficient cause for his failure to communicate his claim statement can only be given after he has factually failed to do that. It is stated by the learned author that it is therefore, desirable that where the claimant fails to communicate his claim statement on the day fixed for it by the tribunal, the tribunal should adjourn the hearing, and give the claimant an opportunity to show sufficient cause for his failure. If

the claimant still does not show his willingness to communicate his claim statement or fails to show sufficient cause for his failure, or remains silent, or the cause shown by him is a mere eyewash, then the order of the tribunal terminating the arbitral proceedings will be justified.

63. I am in complete agreement with the views expressed in Treatise of Russell on Arbitration and in the Treatise of Shri O.P. Malhotra on the Law & Practice of Arbitration & Conciliation. There is no dispute that the arbitral proceedings have to be disposed of expeditiously. The question that arises for consideration of this Court is that if the claimant shows sufficient cause for delay in filing the statement of claim while seeking extension of time, the same is required to be considered judiciously. In this case, the petitioner had sought six weeks extension of time to file statement of claim initially. Without rendering any reasons, learned arbitrator however, initially granted only three weeks extension to file statement of claim. The petitioner gave certain reasons in the application for further extension of time and gave additional reasons in the application for seeking condonation of delay in filing the statement of claim and for recall of the order passed by the learned arbitrator.

64. I have perused the statement of claim filed by the petitioner before the learned arbitrator belatedly, which is annexed to the arbitration petition. A perusal of the statement of claim filed by the petitioner indicates that the petitioner has placed reliance on the report of the Chartered Accountants viz. M/s.Shaparia Mehta & Associates, LLP, dated January, 2016. A perusal of the application for seeking extension of time and for seeking condonation of delay

clearly indicates that the petitioner had conveyed that computation of claim is complex and requires a thorough analysis by the Chartered Accountants. The petitioner has annexed the reports submitted by the Chartered Accountants in support of its claim filed before the learned arbitrator as it is apparent from a copy of the statement of claim with annexures annexed to the arbitration petition which refers to such report. It is also not in dispute that within nine days of the learned arbitrator terminating the proceedings, the petitioner had filed the statement of claim along with annexures with the learned arbitrator.

65. The respondents though had made a statement before this Court when the learned arbitrator was appointed by this Court under section 11(6) of the Arbitration Act that the respondents would file the counter claim, no such counter claim was filed by the respondents before the learned arbitrator. The respondents have also not filed any separate claim or any proceeding so far though the entire arbitral proceedings were terminated by the learned arbitrator on 7th February, 2016 which order was received by the petitioner on 15th February, 2016 till date. In my view, in these circumstances the learned arbitrator ought to have taken into consideration sufficient cause shown by the petitioner which jurisdiction the learned arbitrator has to recall his own order of termination of proceedings even if sufficient cause is made out after termination of proceedings, which the learned arbitrator failed to exercise. Learned arbitrator ought to have shown some latitude to the petitioner in view of the petitioner having shown sufficient cause before the learned arbitrator. No prejudice of any nature would have been caused to the respondents if the learned arbitrator would have granted an extension of further two weeks and would have accepted the statement of claim along with

the documents on record and would have simultaneously extended the time for filing written statement and the counter claim, if any. In my view, the learned arbitrator has failed to act judiciously in the facts of this case.

66. Insofar as the judgment of the Supreme Court in case of **Associate Builders** (supra) relied upon by Mr.Jagtiani, learned counsel for the respondents is concerned, the principles laid down by the Supreme Court in the said judgment are while dealing with the test of public policy applied to the arbitral award. There is no dispute about the principles of law laid down by the Supreme Court in the said judgment. Those principles however, cannot be extended to the proceedings filed under section 14(2) of the Arbitration Act.

67. Insofar as the submission of Mr.Jagtiani, learned counsel for the respondents that the petitioners ought to have been ready with the statement of claim when the petitioner had invoked arbitration agreement as far back as in the year 2014 and thus could not have asked for further extension of time is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondents. It is not the case of the respondents that under the arbitration agreement, the petitioner was required to submit a summary of claim including proof in support of such claim in the notice invoking arbitration agreement. The petitioner in this case had made huge claim for damages against the respondents and to prove such claim for damages and other claims made before the learned arbitrator, the petitioner was placing reliance upon the report of the Chartered Accountants. Proof has to be furnished by the petitioner only at the stage of filing of statement of claim and could not have

been furnished when the arbitration agreement was invoked by the petitioner.

68. Insofar as the submission of the learned counsel for the respondents that the impugned orders passed by the learned arbitrator were value order and cannot be substituted by this Court by another value order is concerned, in my view there is no merit in this submission made by the learned counsel for the respondents. If the petitioner has satisfied the test laid down under section 14(2) of the Arbitration Act and if the Court is satisfied that the learned arbitrator could not have terminated the proceedings judiciously which resulted in termination of mandate, such orders can be set aside under section 14(2) of the Arbitration Act and can be substituted by another order. In my view, learned arbitrator in these circumstances could have imposed a reasonable cost upon the petitioner and ought to have accepted the statement of claim along with the documents on record instead of terminating the proceedings and also the mandate.

69. I therefore, pass the following order :-

a). The impugned orders dated 7th February, 2016 and 16th March, 2016 are set aside. The arbitral proceedings are restored to file before the learned arbitrator.

b). Learned arbitrator is directed to take the statement of claim along with documents on record. Learned arbitrator is directed to grant extension of time to the respondents to file the written statement and counter claim, if any. The petitioner is directed to pay costs of Rs.50,000/- to the respondents within one week from today.

- c). The arbitration petition is allowed in aforesaid terms.

(R.D. DHANUKA, J.)