

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 14th DAY OF MARCH 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. No.219 of 2018

In the matter of the
Arbitration & Conciliation
Act, 1996

And

In the matter of the Arbitral
dispute arising under the
shareholders Agreement dated
22.12.2011

L & T Infrastructure Development Projects Limited,
rep. by its Chief Financial Officer,
Mr.Karthikeyan T.V.,
Registered office P.B.No.979,
Mount Poonamallee Road,
Manapakkam, Chennai-600 089.

... Applicant

-Versus-

Ashoka Concessions Limited,
rep. by its Director,
Mr.Satish Dhondulal Parakh,
Ashoka House, Ashoka Marg,
Vadala, Nashik-422 011
Maharashtra

... Respondent

Application praying that this Hon'ble Court be pleased
to extend the period for completing the arbitral
proceedings and making of the arbitral award by such time.

This application coming on this day before this court
for hearing the court made the following order:-

This application seeks extension of the period for
completion of arbitration and passing of arbitral award.

2. The brief resume of facts that are necessary to
decide this application are that a consortium comprising of



Larsen & Toubro Limited and Ashoka Buildcon Limited, the parent companies of the Applicant and Respondent herein was awarded a project for 6 laning of the Pimpalgaon - Nasik - Gonde section of National Highway 3 in the State of Maharashtra under NHDP Phase - III by the National Highways Authority of India in January, 2009. A Special Purpose Vehicle (SPV), PNG Tollway Limited (in short 'PNG') was incorporated to implement the project and on 08.07.2009 entered into a concession agreement with NHAI.

3. Three companies, L&T, L&T Transco Private Limited and ABL, subscribed to the share capital in PNG. A shareholders agreement was entered into between the parties dated 22.12.2011 setting out the rights and obligations of each of the parties in respect of the governance and operations of the road project.

4. Disputes arose as between the parties that are not referred to in detail herein as they are not relevant to determine the question involved in the application. Suffice it to say that the disputes were referred to arbitration in accordance with the relevant clause in the shareholders agreement. There being no consensus among the parties for an Arbitrator, O.P.No.547 of 2017 was filed and by order dated 25.10.2016 Mr.Justice S.Rajeswaran was appointed as sole Arbitrator.

5. The list of dates and events as agreed upon by both parties and as relevant to decide this application is set out hereunder:

Date	Events
15.11.2016	Arbitrator enters upon reference fixing preliminary hearing on 30.11.2016.
09.01.2017	Preliminary hearing rescheduled to 20.1.2017 on account of unforeseen circumstances. The hearing on 20.1.2017 was postponed on account of Jallikattu protest
25.01.2017	Preliminary hearing takes place
07.02.2017	Applicant seeks extension of time till 14.2.2017 to file statement of claim.
14.2.2017	Statement of claim served on the respondent by e-mail and physical copy received on 16.02.2017.
04.03.2017	Supporting documents sought by respondent.
07.03.2017	Extension of time sought by respondent for filing statement of defence awaiting service of claimants' documents.
08.03.2017	Documents sought by respondent furnished by the applicant.
24.03.2017	Statement of defence filed by respondent.
11.04.2017	Time sought by applicant to file reply to statement of defence
05.05.2017	Reply to statement of defence filed along with memo seeking extension of time therefor.
06.05.2017	Learned Arbitrator directs that reply to rejoinder of applicant, if any, to be filed by respondent on or before 26.05.2017.
24.05.2017	Clarification sought by learned Arbitrator as to whether respondent intends to file a reply.
27.05.2017	Extension of time to file reply to applicants' rejoinder sought till 28.06.2017 by respondent on account of unavailability of respondents' counsel
30.05.2017	Learned Arbitrator extends extension of time for rejoinder as sought.
28.06.2017	Rejoinder filed by respondent.
30.06.2017	Learned Arbitrator records completion of pleadings. Both parties are directed to circulate draft issues. Parties are directed to appear for settlement of issues either before 18.07.2017 or after 18.08.2017 on account of non-availability of Learned Arbitrator in the interim.
29.08.2017	Draft issues filed by the applicant
30.08.2017	Direction from learned Arbitrator to the respondent to file draft issues.
05.09.2017	Respondent filed draft issues.

09.10.2017	Draft issues finalised by learned Arbitrator. Claimant was directed to file proof affidavit or in the absence of any witness, to revert with a date of hearing convenient to both parties.
02.11.2017	Reminder to applicant about directions dated 09.10.2017. Learned Arbitrator communicates to the parties that the period of one year in terms of section 29A expires by 19.11.2017 and seeks consent of both parties to extend the mandate for completion of proceedings by six months in terms of section 29A(3).
19.11.2017	Mandate of one year expires.
15.12.2017	Proof affidavit filed by the applicant after service upon respondent.
22.12.2017	Hearing fixed on 25.01.2018 for cross examination of witnesses. Learned Arbitrator directs the parties to file a joint memo consenting to the extension of time.
01.01.2018	Letter from the respondent counsel rejecting consent for extension of time and reiterating that mandate of learned arbitrator Arbitrator had terminated.
03.01.2018	Letter from the respondent counsel to learned Arbitrator requesting that hearing fixed on 25.01.2018 be reconsidered in view of the expiry of mandate.
04.01.2018	Letter from applicant counsel to respondent counsel drawing attention to oral discussion between both counsel regarding the question of consent for extension of mandate and requesting the respondent to reconsider the decision not to consent.
04.01.2018	Communication from the learned Arbitrator putting the applicant to notice that necessary steps be taken by it in view of rejection of consent by respondent.
05.01.2018	Present application filed.

6. Thereafter, on 11.01.2018, the counsel for the respondent, in reply to applicant counsels' letter dated 04.01.2018 reiterates his stand rejecting consent for extension of mandate.

7. The learned counsel for the applicant maintains that the issue of consent for extension had been

specifically raised by him, and had, subject to confirmation from the respondents' client, been given.

8. The counsel for the respondent vaguely recollects that the conversation had taken place prior to 19.11.2017 and insists that it was mainly restricted to an enquiry regarding the proof affidavit. Even assuming that the issue of consent for extension had been raised, it was subject to confirmation by the client that has not been received. This cannot, and should not, according to him, have weighed with the applicant in seeking extension as per statute and within time.

9. In the background of the aforesaid facts, the legal issue that arises before me concerns the interpretation of sections 29A(3) and 29A(4) of the Arbitration and Conciliation Act, 1996 ('Act'). As far as the submissions relating to the telephonic conversation inter se the counsel are concerned, they are in the realm of assumptions and presumptions on both sides and I prefer not to dwell on the same. The matter is thus decided on the basis of the submissions made on the legal provisions and my interpretation thereof. The relevant provisions are extracted hereunder:

'29-A. Time-limit for arbitral award. (1).The award shall be made within a period twelve months from the date the arbitral tribunal enters upon the reference.

Explanation - For the purpose of this subsection, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as

the case may be, have received notice, in writing, of their appointment.

(2).....

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

.....

10. Section 29A sets out a scheme and strict timelines to re-affirm the position that arbitration is a speedy remedy, which cannot meander endlessly. Time is very clearly the essence of the Act.

11. Learned counsel for the applicant relies upon a judgment of the Supreme Court in the case of *Surendra Trading Company V. Juggilal Kamalpat Jute Mills Limited and others* (2017 SCC OnLine SC 1208) rendered in the context of the Insolvency and Bankruptcy Code, 2016 (in short,

Code), wherein the Supreme Court, while considering the two time periods set out under section 9(5) of the Code confirms unequivocally in paragraph 18 that the statutory scheme laying down time limits sends a clear message that time is the essence of the Code. The rationale of this judgement extends to the Arbitration Act as well.

12. A faint oral argument, though not raised in the counter, advanced made by the learned counsel for the respondent is to the effect that no extension may be granted in cases where the application seeking extension is itself filed after the termination of the mandate of the learned Arbitrator. I disagree. The language of section 29A(4) indicates clearly that extension may be granted by the Court *either prior to or after the expiry of the period so specified*, being the period of one year. There is nothing to suggest that an application seeking extension has to be filed prior to the expiry of mandate.

13. In my view, the scheme, in spirit, envisages that the extension may be sought even in anticipation of expiry of mandate so as to ensure a seamless proceeding with no interruptions for seeking extension of mandate that would only serve to delay. While that would be the preferred rule to be followed, the provisions do not indicate that applications filed after the expiry of mandate are beyond the purview of consideration under section 29A(4). On the contrary, the provisions of section 29A(4) & (5) provide an avenue to the Court to extend the mandate after taking into

consideration all relevant factors in this regard. Such determination would include taking into consideration the elapse of time after expiry of mandate before an application for extension is filed before the Court.

14. Section 32 of the Act dealing with termination of proceedings states as under:

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

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

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

(b) the parties agree on the termination of the proceedings, or 26

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

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

15. The provisions of section 32 are absolute and cover, in sub-section (1), situations where a final award has been passed by the tribunal or those situations contemplated under sub-section (2), being, a withdrawal of proceedings by the claimant, except if valid objection is raised by the respondent, agreement of parties or

discretion exercised by the tribunal. Such termination is subject only to the provisions of section 33 dealing with correction and interpretation of award and additional award and section 34(4), where proceedings for arbitration are resumed by order of Court.

16. Conspicuously, termination of proceedings upon expiry of mandate of learned Arbitrator is not included within the scheme or ambit of section 32. Termination of mandate is thus to be construed in the context of section 29A, read as a wholistic scheme, that includes discretion given to the court to either consider or refuse extension based upon the circumstances of a case and upon imposition of terms if the Court thinks it necessary.

17. Thus, notwithstanding the use of word 'shall' in section 29A(4), the time limits imposed by section 29A are elastic enough to provide for an extension should the circumstances so warrant and at the discretion of the Court.

18. I draw support from the judgement of the Supreme Court in the case of *Surendra Trading Company* (supra), specifically paragraph 18, wherein the rationale of various judgements of the Supreme Court on this question are extracted to the effect that rules of procedure are the handmaid of justice and the object of procedure is only to advance the cause of justice.

19. In conclusion, while upon expiry of mandate of 12 months from the date of reference, the proceedings for arbitration stand unquestionably terminated, the Court may, at its discretion consider extension of mandate. Upon such extension, the termination occasioned by operation of section 29A(4) lapses and proceedings for arbitration stand revived subject to the satisfaction of terms imposed by the court, if any.

20. In the facts and circumstances of this case, I believe that the extension as sought for is warranted and I extend the mandate of the learned Arbitrator by a period of six (6) months from date of receipt of this order.

21. What remains is consideration of section 29A(5), which provides for the conditional imposition of terms and conditions.

22. The imposition of terms and conditions is to be viewed in the context of the conduct of the parties over the tenure of the proceedings. If one were to place the instances of delay committed by the applicant and those committed by the respondent on a balance, (based on the agreed sequence of events circulated jointly) this is what transpires:

(i)The applicant has delayed the filing of statement of claim.

(ii)The supporting documents have not been annexed to the claim and have been supplied to the respondents only upon

specific request thus delaying the filing of statement of defence.

(iii) Proof affidavit has been filed only on 15.12.2017, though the learned Arbitrator has, as early as on 09.10.2017, directed filing of the same and that too, only after a reminder from the learned Arbitrator on 02.11.2017.

(iv) The mandate in this case has expired on 19.11.2017 and the present application seeking extension has been filed on 05.01.2018.

23. There is one instance of delay by the respondent relating to filing of reply to rejoinder only on 28.06.2017, though the learned Arbitrator had directed it to be done by 26.05.2017. The extension sought of one month between 27.05.2017 and 28.06.2017 was on account of the non-availability of its counsel during the summer vacations.

24. The scales, in my view, tip in favour of the respondent upon consideration of the weight of evidence available on record. Surely the applicant ought to have exercised greater care overall particularly towards the conclusion of the proceedings, when proof affidavit was filed after the elapse of more than two months, that too after the expiry of the mandate of the learned arbitrator, and in displaying a rather casual approach after the termination of mandate, prior to approaching this Court. The applicant will bear the cost of three forthcoming sittings before the learned Arbitrator, exclusively.

25. This application is ordered and the mandate of the learned Arbitrator is extended by six (6) months from the date of receipt of a copy of this order, subject to the terms imposed.

Sd/-DR.A.S.M.J

14.03.2018

//Certified to be a true copy//

Dated this the day of 2018

jj 19/06/18 COURT OFFICER
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the Order/Judgment Decree in this format.