

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.05.2018

+ **O.M.P. (COMM) 162/2018 & IA Nos.5225/2018 & 5226/2018**

ECONOMIC TRANSPORT ORGANISATION Petitioner

versus

SPLENDOR BUILDWELL PVT. LTD. Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sujeet Kumar Mishra, Mr Haider Ali and Mr Abhishek Panwar.

For the Respondent : Ms Namitha Mathews, Ms Poorva Pant and Mr Pulkit Malhotra with Mr Manish Prakash AR of the Respondent.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning an order dated 29.11.2017 (hereafter 'the impugned order') passed by the Arbitral Tribunal consisting of the sole arbitrator, Mr. Mohinder Singh, Advocate (hereafter 'the Arbitral Tribunal').

2. The Arbitral Tribunal was constituted to adjudicate the disputes that have arisen between the parties in relation to the 'Space Buyer Agreement' (hereafter 'the Agreement') entered into by them.

3. The Arbitral Tribunal has observed, in the impugned order that the petitioner (claimant before the Arbitral Tribunal) was neither interested in final submission of the claims nor desired to withdraw the claims from the Arbitral Tribunal and was only interested in delaying the proceedings on one pretext or the other. Accordingly, by the impugned order, the Arbitral Tribunal terminated the arbitral proceedings under Section 25(a) of the Act in view of the failure of the petitioner to file the Statement of Claims despite several opportunities.

4. The learned counsel for the petitioner has assailed the impugned order, essentially, two grounds. First, that the Arbitral Tribunal had erred in holding that the petitioner had been provided ample opportunities to file a statement of claim and the arbitral proceedings were terminated without any prior notice informing the petitioner as to any such action; and Second, that the mandate of the Arbitral Tribunal to make any order or award stood terminated on 18.11.2017 (one year from the date of the Arbitrator entering reference) in terms of Section 29A of the Act and, therefore, the Arbitral Tribunal had no jurisdiction to pass the impugned order.

5. Briefly stated, the relevant facts necessary to address the controversy are as under:-

5.1 The petitioner is a company engaged in logistics, project transportation, parcel services, bulk movement, and warehousing. The

Respondent – Splendor Buildwell Pvt. Ltd. – is a company, *inter alia*, engaged in the business of developing and dealing with real estate.

5.2 M/s Star India Projects – a registered partnership firm – and the petitioner entered into a Memorandum of Understanding (hereafter ‘the MOU’) dated 14.04.2012, whereby the petitioner agreed to buy a total area of 3675 sq. ft. of space at a Basic Sale Price (BSP) of ₹4800/- per sq. ft. along with seven car parking slots at the rate of ₹2,00,000/- each in an IT/ITES project named as “ Splendor Spectrum One” located at Sector-58, Gurgaon (hereafter ‘the Property’). As per the MOU, the petitioner was to pay a sum of ₹1,76,40,000/- for the Property and an additional sum of ₹2,00,000/- for seven car parking spots, each. The petitioner claims that in terms of the MOU, it paid certain amounts in installments.

5.3 The petitioner claims that certain disputes arose in respect of the MOU mainly on account of demands of payment of further installments for the Property. The petitioner contends that the respondent had not obtained necessary sanctions from the concerned authorities and, consequently, construction of the Property had not commenced and, therefore, the demands made were unjustified.

5.4 Thereafter, the parties entered in to a Space Buyer Agreement (‘the Agreement’) dated nil (stamp paper purchased on 12.03.2014). M/s Ishayu Builders and Developers Private Limited also signed the Agreement as a confirming party.

5.5 Thereafter, on 31.10.2015, the respondent sent a notice of cancellation informing the petitioner that its booking of space admeasuring 3675 sq. ft. super area in the project 'Spectrum One' was cancelled and the earnest money of ₹35,28,000/- along with a non-refundable amount of ₹41,78,590/- including service tax, interest and brokerage stood forfeited.

5.6 The petitioner responded by issuing a legal notice dated 03.02.2016 calling upon the respondent to withdraw the earlier notice dated 23.01.2016 and also to pay damages which were quantified at ₹50 lacs. This was followed by another legal notice dated 11.03.2016. Thereafter, on 11.07.2016, the petitioner lodged a complaint with the Economic Offences Wing of Delhi Police.

5.7 On 24.10.2016, the petitioner caused another notice to be sent to the respondent invoking the arbitration clause and calling upon the respondent to appoint an arbitrator for adjudication of the disputes. The petitioner also offered without prejudice to its contentions to enter into one time settlement at mutually agreeable terms.

5.8 The respondent proceeded to appoint Mr Mohinder Singh, Advocate as the Sole Arbitrator by a letter dated 19.11.2016. On 03.12.2016, the Arbitrator sent a notice to the petitioner informing it that the Chairman-cum-Director of the respondent had appointed him as the Sole Arbitrator to adjudicate the disputes between the parties and that he had scheduled a hearing on 14.12.2016. The petitioner was requested to appear on the said date.

5.9 The petitioner did not appear on the date fixed; however, sent a letter dated 14.12.2016 informing the arbitrator that the petitioner had rejected his appointment as the Sole Arbitrator and decided to move the Delhi High Court under Section 11 of the Act for appointment of an arbitrator. The petitioner further requested the arbitrator not to conduct any hearing or pass any order which would affect its rights or interest in the suit property.

5.10 Thereafter, the petitioner filed an application before this Court under Section 11 of the Act (***Arb.P. 201/2017*** captioned “***Economic Transport Organization Limited v. Splendor Buildwell Private Limited***”). The said petition was withdrawn by the petitioner on 15.05.2017 “*with liberty to raise his objection as an appropriate stage.*”

5.11 In the meanwhile, the Arbitral Tribunal held a hearing on 19.01.2017 as scheduled. However, none appeared on behalf of the petitioner on that date. Thereafter, the Arbitral Tribunal issued another notice fixing the next date of hearing on 03.02.2017. However, none appeared for the petitioner on that date as well. However, prior to that date, the petitioner sent a letter to the Arbitral Tribunal informing the Arbitral Tribunal that the petitioner had filed an application before the Delhi High Court for appointment of a neutral arbitrator. In view of the said communication, the Arbitral Tribunal decided to defer the proceedings to await the decision of this Court and, therefore, adjourned the proceedings to 20.05.2017. On 20.05.2017, none

appeared for the petitioner and the Arbitral Tribunal adjourned the hearing to 01.06.2017.

5.12 On 01.06.2017, the petitioner filed an application styled as under Section 13(2) of the Act.

5.13 The respondent sought two weeks' time to file reply to the application and the Arbitral Tribunal listed the same for hearing on 12.07.2017. On that date, the Arbitrator signed and filed a declaration under Section 12 of the Act as called upon by the petitioner confirming that there were no circumstances, which may call into question his independence and impartiality. The arbitrator further declared that he had no relationship or interest in any of the parties or in relation to the subject matter of the dispute whether financial, business, professional or of any other kind or in the outcome of the award. He further stated that there were no circumstances, which were likely to affect his ability to devote sufficient time to the arbitration or to complete the same.

5.14 In view of the above declaration, the Arbitral Tribunal rejected the petitioner's request for the sole arbitrator to withdraw from the arbitral proceedings. At this stage, the learned counsel appearing for the petitioner requested that the arbitral proceedings be deferred since the petitioner had filed a petition before the National Consumer Disputes Redressal Commission (NCDRC) for Specific Performance of the Agreement and further compensation. It was submitted that since the disputes before NCDRC and the Arbitral Tribunal are the

same, the proceedings before the Arbitral Tribunal be adjourned *sine die*. This request was rejected and the petitioner was permitted to file its claims alongwith all documents within a period of four weeks from that date. The Arbitral Tribunal also observed that the petitioner was intending to delay the arbitral proceedings on one ground or the other.

5.15 The petitioner failed to file a Statement of Claim as directed and instead filed an application praying that the arbitral proceedings be adjourned *sine die* till disposal of its Consumer Complaint (***Economic Transport Organization Ltd. v. Splendor Buildwell Pvt. Ltd.: C.C. No. 211 of 2017***) pending before NCDRC. This application was also rejected by the Arbitral Tribunal. In addition, the petitioner had also filed an application under Section 12 of the Act seeking disclosure in the form as specified under Sixth Schedule of the Act, which was provided by the Arbitral Tribunal. The petitioner also declined to pay the arbitral fee as directed.

5.16 On 26.08.2017, the Arbitral Tribunal passed an order giving a final opportunity to the petitioner to file its Statement of Claims within a period of two weeks with an advance copy to the respondent and the matter was scheduled to be taken up on 04.10.2017.

5.17 On the next date of hearing (that is, on 04.10.2017), the parties expressed their desire to settle the matter amicably and the Arbitral Tribunal adjourned the hearing to 11.10.2017 and on that date, it was again adjourned to 06.11.2017 at the request of the parties. On 06.11.2017, the parties indicated that the matter was not settled and

the next hearing was scheduled on 21.11.2017. On 21.11.2017, it was reported that the parties had not settled their disputes. In the circumstances, the Arbitral Tribunal directed that it was fit and proper that the petitioner file its statement of claims as the same had not been filed till date. The Arbitral Tribunal gave one last and final opportunity to the petitioner to file the statement of claims on or before 29.11.2017 and the next hearing was scheduled on 29.11.2017.

5.18 The petitioner failed to file the statement of claims as directed and on 29.11.2017, the Arbitral Tribunal passed the impugned order terminating the arbitral proceedings.

5.19 In the meantime, the petitioner filed an application under Section 14 of the Act [*Economic Transport Organisation v. Splendor Buildwell Pvt. Ltd.: O.M.P.(T)(COMM.) 98 of 2017*], *inter alia*, praying that the mandate of the sole arbitrator be terminated and an arbitrator be appointed in his place.

6. In the aforesaid proceedings, it was contended before this Court that the mandate of the arbitrator had terminated as he had failed to deliver an award within a period of one year from entering upon reference. The said petition was dismissed on 04.12.2017 on the learned counsel for the respondent producing a copy of the impugned order. However, this Court expressed its *prima facie* view that the arbitrator had entered upon reference on 03.12.2016 and not on 19.11.2016 as contended on behalf of the petitioner. This Court also adversely commented on the conduct of the petitioner. However,

since the proceedings had already been terminated, this Court found that the petition had become infructuous and the same was dismissed.

7. The petitioner appealed against the order dated 04.12.2017 passed by this Court in O.M.P.(T)(COMM.) 98 of 2017 by filing an appeal before the Division Bench of this Court (*Economic Transport Organisation v. Splendor Buildwell Pvt. Ltd.: FAO(OS) (COMM) 25/2018*). This appeal was dismissed as withdrawn on 09.02.2018 providing the petitioner the liberty to challenge the impugned order (referred to as “award”).

Submissions

8. As noticed above, learned counsel for the petitioner has contested the proceedings on two fronts. First, he submitted that the petitioner was not afforded sufficient opportunity to file its Statement of Claim and the Arbitral Tribunal had erred in passing the impugned order. And second, he submitted that the mandate of the Arbitral Tribunal had expired on 18.11.2017 and, therefore, the Arbitral Tribunal had no jurisdiction to pass the impugned order.

Reasons and Conclusion

9. The first and foremost issue to be considered is whether the impugned order is an award that can be challenged under Section 34 of the Act.

10. The contention that the petitioner was not afforded sufficient opportunity to participate in the proceedings or file its statement of

claims, is unmerited. The records clearly indicate that the petitioner was afforded sufficient opportunity to file its statement of claims but had failed to do so. The conduct of the petitioner leaves no room for doubt that the petitioner was not interested in pursuing its claims before the Arbitral Tribunal and had taken all steps to ensure that the proceedings are delayed on one pretext or the other. In view of the above, the decision of the Arbitral Tribunal to terminate the proceedings cannot be faulted.

11. Section 23(1) of the Act expressly provides that the claimant would file a statement of facts supporting his claims, points in issue and the relief or remedy sought by it within the time as agreed between the parties or as determined by the Arbitral Tribunal. In this case, the Arbitral Tribunal had successively (on three occasions) fixed the time for petitioner to file its statement of claims; but as noticed above, the petitioner had failed to file its statement of claims. At this stage, it would also be relevant to refer to Section 25(a) of the Act, which reads as under:-

“25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

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

* * * * *

12. As is apparent from the plain language of Clause (a) of Section 25 of the Act, the Arbitral Tribunal is required to terminate the

proceedings if the claimant fails to communicate his statement of claims. Thus, the Arbitral Tribunal had acted in conformity with the provisions of the Act in terminating the arbitral proceedings and it cannot be faulted for doing so.

13. The next question to be considered is whether the impugned order is without jurisdiction, as the mandate of the Arbitral Tribunal stood terminated on 18.11.2017. The arbitrator had issued a notice dated 03.12.2016 indicating that they had received a letter dated 19.11.2016 appointing him as the arbitrator. There is no material to indicate as to on which date this notice was received. However, the Arbitral Tribunal had accepted his appointment by a letter dated 03.12.2016. A Coordinate Bench of this Court had observed that *prima facie* it appears that the letter dated 19.11.2016 was received by the arbitrator on 03.12.2016 as he had accepted his appointment on receipt of the aforesaid letter.

14. This Court neither considers it apposite nor necessary to address the controversy in these proceedings for two reasons. First and foremost, the order terminating the proceedings cannot be termed as an award and, therefore, the impugned order cannot be challenged by way of this petition under Section 34 of the Act. This is also clear from Section 32 of the Act, which is set out below:-

“32. Termination of proceedings.—

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

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

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

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

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

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

15. Section 32(1) of the Act makes it amply clear that the arbitral proceedings may either be terminated by a final award or by an order passed under Section 32(2) of the Act. An order terminating the proceedings for the reason that the claimant had failed to file its statement of claims would fall under Section 32(2)(c) of the Act as it would become unnecessary and impossible to carry on the proceedings for want of due diligence on the part of the petitioner in pursuing the proceedings.

16. In *Lalitkumar V. Sanghavi and Anr. v. Dharamdas V. Sanghavi and Ors.: (2014) 7 SCC 255*, the Supreme Court considered a case where the Arbitral Tribunal had terminated the arbitral proceedings by an order, the relevant extract of which read as under:-

“The matter is pending since June 2003 and though the meeting was called in between June 2004 and 11-4-2007, the claimant took no interest in the matter. Even the fees directed to be given is not paid.

In these circumstances please note that the arbitration proceedings stands terminated. All interim orders passed by the Tribunal stand vacated.”

17. In the said case, the Bombay High Court had rejected the appellant’s application under Section 11 of the Act for appointment of an arbitrator with the observation to the effect that the appellant’s remedy was by way of a writ petition and not by an application under Section 11 of the Act. The Supreme Court referred to an earlier decision in the case of *S.B.P. & Co. v. Patel Engineering Ltd. and Anr.: (2005) 8 SCC 618*, whereby the court had held that an intervention by the High Court against an order of the arbitral tribunal under Section 226 or 227 of the Constitution of India was not permissible. In the aforesaid context, the Supreme Court also considered the apprehension of the appellants they would be rendered remediless.

18. In the aforesaid context, the Supreme Court observed as under:-

“11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. 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)”.

19. As is apparent from the relevant extract of the judgment quoted above, the Supreme Court had held that an order of the arbitral tribunal terminating the arbitral proceedings for want of the claimant pursuing its claims would be an order under Section 32(2) of the Act and the remedy available to a party against such an order terminating the arbitral proceeding would be under Section 14 of the Act and not under any other provision. A challenge under Section 34 of the Act was not contemplated for the obvious reason that an order under Section 32(2) of the Act is not an award.

20. In view of the above, this Court is of the view that the present petition is not maintainable.

21. Secondly, the import of the impugned order is that the Arbitral Tribunal has terminated the proceedings. The petitioner claims that the impugned order is *non est* as the mandate of the Arbitral Tribunal

stood terminated on 18.11.2017. However, in terms of sub-section (4) of Section 29A of the Act, the mandate of the arbitrator(s) would terminate if the award is not made within the specified time, “*unless the Court has, either prior to or after the expiry of the period so specified, extended the period*”. Thus, the Court can also extend the period after the specified period has expired. Given the conduct of the petitioner, this Court finds no reason why the mandate of the Arbitral Tribunal not be extended to sustain the impugned order. Thus, even if it is found that the arbitrator had received the letter of appointment not on 03.12.2016 – as per the *prima facie* view expressed by the Coordinate Bench of this Court in the order dated 04.12.2017 passed in disposing of the petitioner’s petition captioned “*Economic Transport Organisation v. Splendor Buildwell Pvt. Ltd.: O.M.P.(T)(COMM.) 98 of 2017*” – but on 19.11.2016, the Court could always extend the time under Section 29A(4) of the Act.

22. In view of the above, the present petition is dismissed. All the pending applications are also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 09, 2018
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