

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (T) (COMM.) 91/2017 & I.A. Nos.13595/2017, 14086/2017**

Reserved on: 23th February, 2018
Date of decision: 5th April, 2018

ANGELIQUE INTERNATIONAL LIMITED Petitioner
Through Mr.R.K. Sanghi, Mr.Ishan Sanghi,
Mr.Satendra Kumar and
Ms.Shreya Rao, Advs.

versus

SSJV PROJECTS PRIVATE LIMITED & ANR. Respondents
Through Mr.Sachin Datta, Sr. Adv. with
Ms.Prity Sharma and Ms.Rijuta
Mohanty, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the order dated 19th September, 2017 passed by the Sole Arbitrator terminating the arbitration proceedings as far as the claim petition filed by the petitioner is concerned, while proceeding further with the counter claims filed by the respondent no.1.

2. Before advertng to the submissions made by the parties, a few facts may be noted.

3. The dispute between the parties is in relation to the Joint Venture Agreement dated 9th September, 2005 executed between the petitioner and respondent no.1. The respondent no.2 is the joint venture firm formed under the said agreement.

4. Respondent no.2 has been awarded the work of ‘Reconstruction, Rehabilitation and completion of Salma Dam Project (3x14 MW), Afghanistan, Package III: Main Civil and Hydro-Mechanical Work.’

5. Disputes having arisen between the parties, the Sole Arbitrator was appointed by this Court vide its order dated 5th September, 2016 passed in the Arbitration Petition no.442/2016 to adjudicate the same.

6. One of the major contentions raised by the counsel for the petitioner is that, in response to a query under the Right to Information Act, the Public Information Officer of this Court has given the information that the above order passed by this Court was delivered to the Sole Arbitrator through the special messenger on 19th September, 2016. Based on the above information, the Counsel for the petitioner submits that on 19th September, 2017, the date of the impugned order, the arbitrator had become *functus officio* in terms of Section 29A of the Act.

7. Section 29A (1) of the Act is reproduced herein below:-

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

Explanation.—For the purpose of this sub-section, 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.”

8. A reading of the above mentioned Section would show that the Arbitrator must pass the award within a period of 12 months from the date when the Arbitral Tribunal enters upon the reference. For the purpose of calculating this period, the Arbitral Tribunal is deemed to have entered upon the reference on the date on which the Arbitrator receives the notice of his appointment.

9. In the present case, the parties had agreed before the Arbitrator that the reference had been entered into by the Arbitrator on 20th September, 2016 and the period of 12 months would expire on 19th September, 2017. This was also recorded by the Arbitrator in his order dated 13th August, 2017. The Arbitrator in his order dated 25th August, 2017 again recorded that the order appointing him as a Sole Arbitrator was received by him only on 20th September, 2016.

10. In view of the above, in my opinion, merely relying upon the information received under the Right to Information Act, the consistent stand of the Sole Arbitrator and the parties in the arbitration proceedings that the Arbitrator has received the order passed by this Court appointing him as the Sole Arbitrator only on 20th September, 2016 and that the period of 12 months would expire on 19th September, 2017, cannot be faulted and it cannot be said that the Arbitrator, when he passed the impugned order dated 19th September, 2017, had become *functus officio*

or *de jure* unable to act as an Arbitrator for the purpose of the application of Section 14 of the Act.

11. It is further contended by the counsel for the petitioner that the arbitrator has erred in terminating the arbitration proceedings with respect to the claims filed by the petitioner due to the expiry of 12 months from the date of his entering upon reference. He submits that a reading of Section 29A(1) of the Act would show that if the award is not passed within a period of 12 months from the date of entering upon the reference, the arbitration proceedings themselves do not come to an end, but it is only the mandate of the Arbitrator that would stand terminated. He submits that termination of the arbitration proceedings takes place under Section 32 of the Act, wherein, failure of the Arbitrator to pass the award within the time prescribed under Section 29A(1) of the Act is not mentioned as a circumstance that would also lead to termination of the proceedings. In support of the above proposition, he relies upon the following judgments:-

(i) *Kifayatullah Haji Gulam Rasool & Others vs. Smt. Bilkish Ismail Mehsania & others* (MANU/MH/0415/2000);

(ii) *Shyam Telecom Ltd. vs. ARM Ltd.* (MANU/DE/0867/2004).

12. On the other hand, the learned Senior Counsel for the Respondent submits that in the present case, the Arbitrator has rightly terminated the arbitration proceedings as far as the claims filed by the petitioner are concerned. For this purpose, he has relied upon various proceedings before the Arbitrator; applications filed by the petitioner itself before the

Arbitrator and also to the fact that the petitioner itself has filed a civil suit being CS(OS) No.505/2017 before this Court, thereby, clearly stating its intention not to proceed with the arbitration proceedings with respect to its claims. Senior Counsel for the respondents submits that the above mentioned action on the part of the petitioner would clearly show that the Arbitrator had no choice but to terminate the arbitration proceedings with respect to the claim petition filed by the petitioner and has rightly done so in the impugned order. He further submits that in any case, an order terminating the arbitration proceedings can be challenged only by way of a petition under Section 34 of the Act as such order amounts to an award as defined in Section 2(1)(c) read with Section 31 of the Act.

13. I have considered the submissions made by the counsel for the parties. The Arbitrator in the impugned order has recorded as under:-

“On being asked by Ld. Counsel for the Claimant that on one hand there was an application seeking permission to file additional affidavit and documents, and on the other an application stating that a petition has been filed u/s 14 & 15 before the Hon'ble High Court for the termination of mandate of the Arbitrator and appointment of substituted Arbitrator and that, the mandate of this Tribunal was expiring today u/s 29A(1) in the absence of there being any consent for extension by the Claimant. With regard to the application filed before me stating that the Claimant has filed a petition u/s 14 & 15 of the Act before the High Court, I may like to record that the procedural as well as substantive orders passed during the conduct of arbitration proceedings, will speak and justify that there was no failure either de-jure or de-facto on the part of this Tribunal to perform its functions. These orders will speak about, though very subtly and humbly as to the reasons of delay of the proceedings, and which I need not comment at this stage.

The Ld. Counsel while maintaining that the Claimant is unable to give consent for extension of the term of this Arbitral Tribunal u/s 29(3), more so in view of its having filed a petition u/s 14 & 15 of the Act. On being asked from the AR of the Claimant as also the Director Mr. V.K. Jain in this regard, they both maintained that the Claimant cannot give consent for extension of the tenure of this Arbitral Tribunal in view of the aforesaid. Despite my explaining the consequences of absence of consent for extension resulting in termination of the mandate of the arbitration, as has been repeatedly informed, the Claimant maintains the same stand. Hence, I am left with no option but to terminate the present arbitration proceedings so far as the Claim Petition is concerned.”

14. As the Arbitrator has taken note of the conduct of the arbitration proceedings, I would also make a brief reference to the same, as in my opinion, it would have a bearing on the challenge made by the counsel for the petitioner. As noted above, the Arbitrator entered upon the reference on 20th September, 2016. Upon entering the reference, the Arbitrator held the first sitting on 22nd September, 2016, when the procedural order was passed by the Arbitrator fixing the dates for the completion of the pleadings. Thereafter, various proceedings were held on different dates.

15. Certain applications were also filed by both the parties on which arguments were addressed by the counsels for the parties before the Arbitrator.

16. On 1st June, 2017, submission made by the counsel for the petitioner was recorded by the Arbitrator as under:-

“Another application is filed by the Claimant stating that it has filed a comprehensive Civil Suit on 30.05.2017 in the Delhi High Court, arraying Respondent No.2 also Respondent therein. The Ld. Counsel states that the matter may be adjourned till such time some appropriate order is passed in the said case.”

17. The application referred to in the above quoted order in paragraph 13 had made the following submissions on behalf of the petitioner before the Arbitrator.

“The bifurcation of the case in two parts - one part to be decided by the Arbitral Tribunal and other to be decided by the civil court is not permissible. There is no provision for splitting the cause of parties and splitting the parties. The bifurcation of the case between the parties who are parties to the arbitration agreement and other, who are not parties to the arbitration, is not possible. In view of the above, it is submitted that the continuation of proceedings has become unnecessary / impossible.”

18. The application filed by the petitioner before the Arbitrator had the following prayers:-

(i) The present proceedings are adjourned awaiting the decision of the Hon'ble High Court; and/or

(ii) The continuation of the proceedings has become impossible / unnecessary in the facts and circumstances of the case and /or ;

(iii) Pass such further / other order(s) as this Ld. Arbitrator may deem fit and proper.”

(Emphasis supplied)

19. The petitioner thereafter made yet another application before the Arbitrator on 10th July, 2017 making the following prayers:-

a) *Direct the Respondent to file the reply to the application filed by the Claimant on 01.06.2017 and arguments be heard on the application;*

b) *The application filed on 01.06.2017 be decided before the disposal of other applications and the present proceedings be adjourned till the decision of the Hon'ble High Court;*

c) *Without prejudice, time be given to the Claimant to examine the Revised Written Synopsis to enable the Claimant to make submission;*

d) *Pass such further order(s) as this Hon'ble Tribunal may deem fit and proper”*

(Emphasis supplied)

20. The petitioner filed yet another application dated 3rd August, 2017 making the following prayers:

a) *Keep the present proceeding in abeyance till the decision of the suit CS (COMM.) NO.505/2017.*

b) *Without prejudice to (a) no order be passed in all pending applications till the notice is issued to Respondent No.2 and Respondent No.2 is heard as per law.*

c) *Pass any further order (s) which this Hon'ble Tribunal deem fit and proper in the facts and circumstances of the present case.”*

(Emphasis supplied)

21. A perusal of the above applications would clearly show that the petitioner itself was claiming that the arbitration proceedings need to be terminated by the Arbitrator or at least adjourned to await the outcome of the civil suit filed by it before this Court. The petitioner having taken such a stand, and in fact abandoning the arbitration proceedings by filing

a civil suit, cannot now be heard to complain against the Arbitrator terminating the arbitration proceedings.

22. During the course of the hearing, I have also enquired from the counsel for the petitioner if he would like to continue with the arbitration proceedings in spite of the civil suit filed by him as both proceedings cannot continue at the same time. The answer of the counsel for the petitioner is that the petitioner would be agreeable to continue with the arbitration proceedings if the Arbitrator is substituted by this Court and not otherwise. This clearly shows that the grievance of the petitioner is really not to the termination of the arbitration proceedings but to the continuation of the Arbitrator in question.

23. In view of the above, the judgment cited by the petitioner would have no application as the Arbitrator has terminated the proceedings because he was faced with the situation where the petitioner, as a claimant, was clearly envisaging an intent not to proceed with the arbitration proceedings.

24. The question would arise as to what is the proper remedy available with the petitioner if he is aggrieved with the order impugned in the present petition. If the order is to be considered as one under Section 29A(1) of the Act, that is of a simplicitor termination of the mandate of the Arbitrator due to efflux of time, the remedy of the petitioner would not be in an application under Section 14 or 15 of the Act but under Section 29A (4) read with Section 29A (5) of the Act.

25. Sections 14 and 15 of the Act are reproduced herein below:-

“14. Failure or impossibility to act.—(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-]

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) Where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

26. A reading of Section 14 would show that it would apply only where the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay or withdraws from his office or the parties agree to the termination of his mandate. Counsel for the petitioner submits that as the time period prescribed for making of the award under Section 29A(1) of the Act has expired, the mandate of the Arbitrator shall terminate and he would become *de jure* or *de facto* unable to perform his functions. In my opinion, though the effect of the expiry of the period prescribed under Section 29A for making of the Arbitral Award leads to the termination of the mandate of the Arbitrator, the remedy is not under Section 14 of the Act as the Act has made specific provisions and vested the Courts with specific powers for dealing with the situation where the mandate of the Arbitrator is terminated because of non-making of the award within the period prescribed under Section 29A. These provisions are contained in Section 29A(3), (4), (5) and (6) of the Act, which are reproduced as under:-

“29A. Time limit for arbitral award.-

(1) xxxxx

(2) xxxxx

(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.*

(6) *While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.”*

27. A reading of the above provisions of the Act would show that in case the mandate of the Arbitrator terminates due to non-passing of the award within the period of 12 months from the date he enters upon the reference, the parties may by consent, extend the period for making of the award by a further period not exceeding six months. In case of failure of a party to give consent to such extension or where the arbitral award is

not made even after the expiry of the extended period, the Court may, on an application being made by any of the parties to the arbitration proceedings, grant further extension of the period for making of the award. While granting such extension, it shall be open to the Court to substitute one or all of the Arbitrators and to re-constitute the Arbitral Tribunal, which shall be deemed to be in continuation of the previously appointed Arbitral Tribunal and the proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record before the previously appointed Arbitral Tribunal. Therefore, there is a specific provision in form of Section 29A(6) of the Act, vesting power in a Court to substitute the Arbitrator or the Arbitral Tribunal due to non-making of the award within the prescribed period.

28. A settled principle of the interpretation of statute is contained in the latin maxim *Expressio unius est exclusion alterius*. Explanation of this principle is that, when statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. Section 29A(6) empowers the Court to substitute one or all of the arbitrators while extending the period for making of the award. Sub-section 4 of Section 29A gives an indication as to when the Court would exercise its powers for substituting the Arbitrator or Arbitrators. It is only when the Court finds that the proceedings have been delayed for the reasons attributable to the Arbitral Tribunal, under sub-section 4 of Section 29A, it may either order reduction of fees of the Arbitrator(s) or under sub-section (6) of Section 29A, substitute one or all of the Arbitrators.

29. In the presence of the specific provisions and powers of the Court in a situation where the mandate of the Arbitral Tribunal terminates due to non-making of the award within the prescribed time as contained in Section 29A of the Act, the Court cannot resort to Section 14 of the Act for substituting the Arbitrator or the Arbitrators. Section 14 of the Act, in my opinion, would have to be read along with Sections 12 and 13 of the Act and would, therefore, be applicable only in a case where there is a challenge made to a particular Arbitrator or Arbitrators and where due to such challenge, the arbitrator becomes *de jure* or *de facto* unable to perform his functions. Section 14 would have no application in a case where the mandate of the Arbitral Tribunal terminates due to the expiry of the time for making of the Award under Section 29A of the Act and, therefore, the present application under Section 14 read with Section 15 of the Act, would in fact not even be maintainable.

30. Counsel for the respondents has rightly contended that in the present case as the Arbitrator has terminated the proceedings with respect to the claim filed by the petitioner, it would in fact, amount to an Arbitral Award which can be challenged only by way of a petition under Section 34 of the Act. He places reliance on the judgment of this Court in ***The India Trading Company vs. Hindustan Petroleum Corporation Ltd.*** 2016 SCC Online Cal 479, wherein the Division Bench of this Court held as under:-

“13. There is a difference between a decision which puts an end to the arbitral proceedings and a decision whereby the arbitrator withdraws from the proceedings. Where the arbitrator withdraws from the proceedings, a substitute arbitrator may be

appointed in accordance with the procedure, applicable to the appointment of the arbitrator who is replaced, but where the arbitrator puts an end to the arbitral proceedings, the claimant cannot pursue his claim.

14. The decision of the arbitral tribunal to put an end to the proceedings is a final award which can only be challenged by way of an application for setting aside under Section 34 Sub-section (2) of the 1996 Act. Once the arbitral proceedings are terminated, the claimant cannot re-agitate the same claim by initiation of fresh proceedings since the claim would be hit by principles of constructive res judicata.”

31. In ***Joginder Singh Dhaiya vs. M.A.Tarde*** *Thr LRs* 2017 SCC Online Del 12559, this Court while dealing with an award dismissing the claim filed by the claimant on the ground of the proceeding having abated, rejected the contention that the order of abatement would not be an award within the meaning of Section 2(1)(c) and Section 31 of the Act.

32. I must of course while referring to the above judgments also mention that the Supreme Court in ***Srei Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd.*** 2017 SCC OnLine SC 1210, has held that where the Arbitrator terminates the proceedings due to failure of the claimant to file his Statement of Claim, the aggrieved party can approach the Arbitral Tribunal and on sufficient cause been shown, the Arbitral Tribunal can recall the order and recommence the proceedings. The Supreme Court, however, did not answer the issue as to whether the order passed under Section 25(a) of the Act terminating the proceedings is an award under the 1996 Act so as to be amenable to the remedy under Section 34 of the

Act. In the present case, though Section 25(a) of the Act would not apply, a reading of the impugned order shows that the Arbitrator has terminated the proceedings with respect to the claims of the petitioner on the ground that the petitioner is not proceeding with the arbitration proceeding. Such order would be akin to the dismissal of a suit, on a technical ground may be, of non-prosecution and, therefore, could have been challenged only in an application under Section 34 of the Act and can be assailed only on the limited grounds that are available to the aggrieved party under the said provision.

33. Reliance of the petitioner on the judgment of the Supreme Court in *Lalit Kumar V. Sanghavi (D) Th. LRs Neeta Lalit Kumar Sanghavi & Anr. vs. Dharamdas V. Sanghavi and Ors.* (2014) 7 SCC 255, is ill-founded. In the said case, the Supreme Court, was dealing with a situation where the Arbitrator had terminated the arbitration proceedings due to non payment of fees. The aggrieved party had even moved an application before the Arbitral Tribunal seeking recall of the said order and thereafter, filed an application under Section 11 of the Act before the High Court, seeking appointment of an Arbitral Tribunal. The said application was dismissed holding that the remedy of the applicant was by way of filing of a Writ Petition and not an application under Section 11 of the Act. The Supreme Court, in the above judgment, held that neither Section 11 of the Act nor a petition under Article 226 of the Constitution of India was maintainable against the order passed by the Arbitral Tribunal. The Supreme Court held that the order passed by the Arbitral Tribunal would in fact fall under Section 32 (2)(c) of the Act and

the remedy of the aggrieved party would be under Section 14(2) of the Act. In the present case, the Arbitrator has not terminated the proceedings due to non-payment of fee by the petitioner but for the reason that the petitioner has not been proceeding with diligence in the arbitration proceedings and, its conduct clearly showed that it is not interested in the continuation of the arbitration proceedings at all.

34. Recently, in *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*, (2018) 2 SCC 534, the Supreme Court, has held that an order dismissing the claim of the Claimant on the ground of limitation is an Award and can be challenged only under Section 34 of the Act and not under Section 37(2)(a) of the Act.

35. In my view, therefore, the present application under Section 14 and 15 of the Act would not be maintainable where the challenge is to an order passed by the Arbitrator terminating the arbitration proceedings due to the Claimant not prosecuting its claims.

36. In spite of my above findings on the maintainability of the petition, I shall also deal with the contentions of the petitioner on merit. Counsel for the petitioner has sought to contend that the Arbitrator has failed to act without undue delay in the conduct of the arbitral proceedings and, therefore, even otherwise, the application under Section 14 of the Act would be maintainable and the mandate of the Arbitrator would be deemed to be terminated and such Arbitrator should be substituted by this Court. I am unable to accept the above argument of the counsel for the petitioner.

37. A perusal of the various orders passed by the Arbitrator in the conduct of the Arbitral proceedings shows that the Arbitrator has been proceeding with the reference with expedition. In fact, it is the petitioner who is making repeated applications one after another before the Arbitrator, which consequently caused delay in making of the Arbitral Award. As noted above, the petitioner in fact, moved applications requesting the Arbitrator not to proceed with the reference and to await the outcome of the civil suit filed by the petitioner. Certainly, the petitioner cannot, therefore, claim that it is the Arbitrator who has failed to act without undue delay in the reference.

38. Section 15 of the Act, would also not have any application in the present case as the Arbitrator has neither withdrawn from the office nor have the parties agreed to the termination of his mandate.

39. Counsel for the petitioner has further argued that the Arbitrator should be substituted by this Court as the Arbitrator by his order dated 10th July, 2017 had fixed his fee not only in violation of the order dated 5th September, 2016 passed by this Court in Arbitration Petition no.442/2016 appointing the said Arbitrator, but also violating the mandate of Section 18 read with Section 38 of the Act.

40. This Court while appointing the Arbitrator vide its order dated 5th September, 2016, had directed that the fee of the Arbitrator shall be in terms of the Fourth Schedule of the Amended Act. The Arbitrator, vide his order dated 10th July, 2017, with the consent of the counsels appearing for the parties, directed that for each application, an additional fee of Rs.1 lac shall be payable by the applicant party. Counsel for the

petitioner submits that this order of the Arbitrator is in violation of the direction given by this Court in its order dated 5th September, 2016 constituting a sufficient ground for substituting the Arbitrator. I am unable to agree with the said submission.

41. This Court had directed that the Arbitrator shall charge fees in accordance with the Schedule appended to the Act i.e. the Fourth Schedule. The parties, during the arbitration proceedings, gave their consent for the Arbitrator to charge the additional fee for every application filed by them. As this was a consent order and is not in challenge before me, I would not go into the validity of the same. However, for the purpose of ordering the substitution of the Arbitrator, the party having given consent to charging of the additional fee by the Arbitrator, cannot thereafter, be allowed to use such order for seeking substitution of the Arbitrator. If the petitioner was aggrieved by the charging of such additional fee by the Arbitrator, the remedy for the petitioner was to either challenge the said order before the Arbitrator himself or in an appropriate proceeding.

42. In the present case, not only was the order dated 10th July, 2017 passed by the Arbitrator with the consent of the parties but also, the petitioner filed an application before the Arbitrator alleging that its consent with respect to some other portion of the order was recorded wrongly. However, at the same time, no such allegation of wrong recording of consent with respect to charging of such additional fee in the order dated 10th July, 2017 was made by the petitioner in the application.

43. As far as the order dated 10th July, 2017 being contrary to Sections 18 and 38 of the Act is concerned, I need not go into the said submission in detail as the order is not in challenge before me and also, as noted above, it had been passed with the consent of the parties.

44. It was lastly contended by the counsel for the petitioner that the Arbitrator has wrongly decided to continue with the arbitration proceedings with respect to the counter claim filed by the respondents. He submits that in terms of Section 29A(1), the time for making of the Arbitral Award even with respect to the counter claim stood expired with the passing of the period of 12 months from the date on which the Arbitrator entered upon the reference.

45. Relying upon the judgment of *State of Goa vs. Praveen Enterprises* (2012) 12 SCC 581, he submits that as no separate notice was required for the purpose of the filing of the counter claim, the period for making of an award even with respect to the counter claim would stand expired after a period of 12 months from the date when the Arbitrator entered upon the reference. He also relied upon the order dated 5th September, 2016 passed by this Court appointing the Arbitrator and granting liberty to the parties to file their respective claims and counter claims before the Arbitrator. He submits that this order would, therefore, amount to a reference of the counter claim as well and the Arbitrator cannot proceed with the counter claim after the expiry of 12 months from the date of entering the reference.

46. Counsel for the respondents, on the other hand, submits that as the limitation period for the purpose of the counter claim is to be considered

right till the date of the filing of counter claim itself, equally, for the purpose of counting 12 months period under Section 29A of the Act, the time of the actual filing of the counter claim should be considered as the date the Arbitrator enters upon the reference qua the counter claim.

47. I am unable to agree with the submission made by the counsel for the respondents.

48. In the present case, the order dated 5th September, 2016 expressly allowed both the parties to file their respective claims and counter claims before the Arbitrator. The respondent, therefore, was not obligated to wait for the petitioner to have filed its claim before making the counter claim. The object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings, however, once the mandate of the Arbitrator terminates under Section 29A of the Act, the same cannot be held to have terminated only in part or only with respect to the claim filed by the Claimant and not with respect to the counter claim. The mandate terminates for the entire proceeding before the Arbitrator. Therefore, the Arbitrator could not have decided to continue with the counter claim once his mandate had terminated under Section 29A of the Act on the expiry of 12 months from the date of his entering upon the reference.

49. This, however, would not be a ground for substituting the Arbitrator, as the question of substitution or otherwise would become relevant only if one of the parties files an application under Section 29A of the Act seeking extension of time for making of the Arbitral Award on the counter claims of the respondent. It would only be at that stage that

the Court would have to determine whether or not such time should be extended and if so, on what terms and/or whether with or without the substitution of the Arbitrator.

50. In view of the above, I find no merit in the present petition and the same is dismissed with cost quantified at Rs.50,000/-.

NAVIN CHAWLA, J

April 05, 2018
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