

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO. 30 OF 2019**

M/s.Vishal Associate

...Applicant

Versus

M/s.Hindustan Constructions Co. Ltd.

...Respondent

Mr.Bharat Singh with Akshit Jain I/b. R.V.Legal, for the Applicant.
Ms.Meenakshi Iyer and Mr.Rashmi Shah I/b. Advaya Legal, for the
Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 25th April, 2019

P.C.:

1. Leave to amend to incorporate a reference of Sections 14 and 15 of the Arbitration and Conciliation Act,1996 (for short 'the Act') in the cause title of the petition. Amendment be carried out forthwith.

2. Heard the learned Counsel for the applicant and the learned Counsel for the respondents. This is an application filed under the Arbitration and Conciliation Act,1996 (for short 'the Act') praying for appointment of a substitute arbitrator in view of the arbitrator earlier appointed having terminated the arbitral proceedings as set out in the communication dated 21 May 2015. The communication is required to be noted which reads thus:-

“

I regret, I do not find the proceedings practicable or possible the way I have experienced the same during last many months. I therefore, hereby under section 32(2)(c) of the Arbitration and Conciliation Act,1996 issue this order of termination of arbitral proceeding before this Tribunal. Without prejudice to any other legal fallout or implication

hereof, I declare parties are free to look for alternative forum or remedy under law.”

3. Disputes and differences had arisen between the parties under work order dated 21 September 2010 which was issued by the respondent in favour of the petitioner which pertains to a work of excavation and blasting. The case of the petitioner is that in view of certain situations which had arisen in January 2011 and March 2011, the entire operation of the project was required to be stopped. It is not necessary to delve into the other issues in regard to the contractual disputes which have arisen between the parties, suffice it to observe that on 24 September 2012 the respondent had appointed a sole arbitrator to adjudicate the disputes and differences between the parties. The learned arbitrator had entered a reference. As noted above after the arbitral proceedings had commenced, however referring to the conduct of the parties, the learned arbitrator has terminated the arbitral proceedings and declared that the parties are free to look for alternative forum or remedy in law.

4. It is not in dispute that the parties had agreed that the jurisdiction for the arbitral proceedings would be at Mumbai. The arbitral proceedings were also conducted at Mumbai. The arbitral tribunal terminated the arbitral proceedings at Mumbai. However, something very peculiar transpired inasmuch as the petitioner was advised to approach the Jharkhand High Court for filing an application for appointment of a substitute arbitrator. These proceedings were numbered as Case No.AAPPL/5/2015 (page 669 of paperbook) and were dismissed for non prosecution by an order dated 24 June 2016 passed by the Court. The petitioner therefore,

moved an application for restoration of the proceedings which came to be dismissed for default, however, after a delay of 329 days. By an order dated 6 April 2018 passed by the Hon'ble Acting Chief Justice, the said application was dismissed in terms of the following order:-

I.A.No.6294 of 2017

1. This interlocutory Application has been preferred under Section 5 of the Limitation Act, for condoning the delay of 329 days in preferring this C.M.P.No.178 of 2017.

2. Having heard Counsel for the applicant and looking to the reasons stated in para-4 of this Interlocutory Application, I see no reasonable reason for condoning the delay in preferring this Civil Miscellaneous Petition. Hence, this Interlocutory application is hereby dismissed.

C.M.P.No.178 of 2017

1. This Civil Miscellaneous Petition is hereby, disposed of, as the delay is not condoned.”

5. The peculiarity continues, the petitioner was thereafter advised to approach the Supreme Court to challenge the orders dated 24 June 2016 and 6 April 2018 passed by the Jharkhand High Court dismissing the proceedings for default and refusal to restore the application by dismissing the delay condonation application. The Supreme Court by an order dated 27 July 2018 passed in Special Leave Petition (Civil) Diary No.22374 of 2018 dismissed the Special Leave to appeal on the ground of delay as well as on merits. The petitioner thereafter approached this Court in a petition filed under Section 34 of the Act being under an advice that said proceedings were appropriate proceedings. The learned Single Judge of this Court by an order dated 30 October 2018 passed on the said proceedings permitted the petitioner to withdraw the notice of motion as also the arbitration proceedings with liberty to adopt such remedy as permissible in law. The order is required to be noted which reads thus:-

“ After the matter is heard at some length, learned Counsel for the Petitioner/Applicant seeks leave to withdraw the Notice of Motion and the Arbitration Petition and prays for liberty to seek such remedy as he may have in law in view of the termination of the arbitration proceedings by the Sole Arbitrator under sub-section (2) of Section 32 of the Arbitration and Conciliation Act, 1996. The Notice of Motion and the Arbitration Petition are disposed of as withdrawn with liberty as prayed.”

6. It is in the above circumstances the petitioner is finally before this Court in the present proceedings making the following prayers:-

- “A. Allow the present application and Constitute New Arbitral Tribunal to settle the dispute between M/s.Vishal Associates and M/s.Hindustan Construction Company Ltd; and
- B. Pass such other and further order or orders as this Hon'ble Court may deem fit and proper in the fact and circumstances of the case.”

7. I have heard the learned Counsel for the petitioner and the learned Counsel for the respondent. Learned Counsel for the petitioner submits that the proceedings which were initiated by the petitioner before the Jharkhand High Court for appointment of substitute arbitrator, were invalid proceedings and have no legal consequence whatsoever. He submits that admittedly considering the facts of the case, when the arbitral proceedings were held at Mumbai, when the Mumbai Court has jurisdiction, the petitioner was totally in an error in accepting an advice to approach the Jharkhand High Court. It is submitted that the proceedings before the Jharkhand High Court were nullity as the said High Court had no jurisdiction. It is submitted that no relevance whatsoever can be regarded to those proceedings. It is submitted that this is a clear case where the mandate of the arbitral tribunal has come to an end by a communication dated 21 May 2015 of the learned Arbitrator so

appointed and hence, it is imperative that a substitute arbitrator is appointed. It is submitted that the petitioner cannot be rendered remediless and cannot be made to suffer on account of ill-advice as received by the petitioner to approach the Jharkhand Court. It is submitted that the petitioner has substantive rights under the contract in question and those rights are required to be espoused and enforced in the arbitral proceedings which actually commenced and later on terminated. It is thus submitted that this Court should appoint an arbitrator.

8. On the other hand, learned Counsel for the respondent submits that this application is not maintainable. The principal bone of contention as urged on behalf of the respondent is that the petitioner had approached Jharkhand High Court and filed a proceedings praying for appointment of substitute arbitrator. It is submitted that these proceedings being dismissed for non prosecution and even the restoration petition being dismissed on delay by the Jharkhand High Court and these orders being upheld by the Supreme Court by dismissing the Special Leave Petition on delay and on merits, thus the petitioner is not entitled for any relief in the present proceedings.

9. However, in making this submission, learned Counsel for the respondent would not dispute that the Jharkhand High Court had no jurisdiction to entertain the application to appoint a substitute arbitrator. Learned Counsel for the respondent would also not dispute that the parties have conferred jurisdiction on Mumbai Court in regard to any disputes which may arise between the parties under the contract in question. Learned Counsel for the respondent would also not dispute that the arbitral proceedings initially had

commenced at Mumbai when they were terminated by the arbitrator so appointed by the respondent. Learned Counsel for the respondent would also not dispute that the proceedings before the Jharkhand High Court were a nullity and therefore would have no legal consequence.

10. Having heard the learned Counsel for the parties and having perused the record, in my opinion, the petition would be required to be granted by appointing a substitute arbitrator. This for the reason that it is not in dispute that the arbitral tribunal was already constituted by the respondent appointing a sole arbitrator. The parties were already before the arbitral tribunal till the mandate of the arbitral tribunal came to be terminated by the sole arbitrator for the conduct of the parties and not solely for the conduct of the petitioner.

11. Considering the facts and circumstances of the case, learned Counsel for the petitioner would be correct in his contention that the proceedings initiated by the petitioner before the Jharkhand High Court were nullity inasmuch as the Jharkhand High Court had no jurisdiction whatsoever to entertain such an application which could have been filed only before this Court considering the clear agreement between the parties and more particularly when the arbitral proceedings itself were terminated being conducted at Mumbai and terminated at Mumbai and in accordance with the arbitration agreement between the parties.

12. It is, however, unfortunate that the petitioner was advised to file the proceedings in a Court which had no jurisdiction. However,

all this cannot be counted against the petitioner to render the petitioner remediless. The petitioner was already before the arbitral tribunal and was espousing its claim under the contract in question. In this situation if the present application is rejected, it would result into a *fait accompli* and an injustice would be meted out to the petitioner by rendering petitioner forum-less in regard to the claims and the dispute in that regard which the petitioner was pursuing before the arbitral tribunal so appointed by the respondent. I am therefore not persuaded by the arguments as urged on behalf of the respondent to contend that this petition be dismissed. The order passed by the Supreme Court is required to be considered in the context and in the nature of the proceedings which were filed and being considered by the Supreme Court. The proceedings were filed challenging the order passed by the Jharkhand High Court dismissing the petitioners application under Section 15 for non-prosecution. The respondent also does not dispute that the Jharkhand High Court had no jurisdiction. The order passed by the Supreme Court thus cannot be interpreted to mean that the Supreme Court by the said order has set at rest the entire cause of the petitioner qua the arbitral proceedings or that the petitioner was not permitted to pursue the arbitral proceedings or pray for appointment of an arbitrator before the Court having jurisdiction. Such interpretation as made by the respondent cannot be accepted.

13. In the above circumstances, the petition is required to be allowed. It is accordingly allowed by the following order:-

ORDER

(I) Mrs.Justice Roshan Dalvi (Retd.) is appointed as a Sole

substitute Arbitrator to arbitrate the disputes and differences between the parties.

(II) The learned prospective sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

(III) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date and time which may be mutually fixed by the prospective sole arbitrator;

(IV) The learned Sole Arbitrator who is so appointed shall endeavour to dispose of the arbitral proceedings as expeditiously as possible and in any event within the time as prescribed and provided under Section 29A of the Arbitration and Conciliation Act, 1996.

(V) All contentions of the parties are expressly kept open.

(VI) The above application is accordingly disposed of in the above terms. No costs.

(VII) Office to forward a copy of this order to the learned Arbitrator on the following address:

“202, Siddhant Madhusudan Kalelkar Road, Kalanagar, Bandra (E.), Mumbai – 400 051.

E-mail: roshandalvi@hotmail.com/roshandalvi@gmail.com.”

[G.S.KULKARNI, J.]

