

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION No. 626 of 2017

Neeta Lalitkumar Sanghavi & Anr ..Petitioners.

v.

Bakulaben Dharmadas Sanghavi & Ors ..Respondents.

Mr. Sanjay Jain a/with Mr. Atul Daga and Mr. Niranjan M. Deshpande I/by Yatin R. Shah, Advocate for Petitioners.

Mr. Nimay Dave a/with Mr. Prakash R. Shah & Mr. Hiren G. Shah I/by Prakash & Co. for Respondent No.1.

Mr. Rahul Raut I/by N.N. Vaishnawa & Co. for Respondent No.2.

Mr. Ashish Gohil I/by Makrand Bakore for Respondent No.3.

CORAM : B. P. COLABAWALLA, J.

Reserved on : 22nd January, 2019

Pronounced on : 12th February, 2019

JUDGEMENT:-

1. In this Arbitration Petition the petitioners seek to challenge the order dated 20th July, 2017 (for short “**the impugned order**”) passed by the Arbitral Tribunal. By the

impugned order, the Arbitral Tribunal dismissed the application filed by the petitioners herein (dated 27th February, 2017) for bringing themselves on record in the arbitration proceedings as the heirs of the original claimant - Lalitkumar Vanmalidas Sanghavi.

2. In the averments in the petition and more particularly paragraph 20 thereof, it is stated that the petitioners were advised to challenge the impugned order under Section 14 as also under Section 37 by way of an Appeal from Order under Section 16 of the Act as well as by way of an application under Section 34. When this matter was first argued before me, I had enquired from the petitioners as to under which provisions they are challenging the impugned order. It was thereafter stated on behalf of the petitioners that this petition be treated as a petition under Section 14 and more particularly under Section 14 (2) of the Arbitration and Conciliation Act, 1996 (for short "**the Act**"). It is on this basis that I have proceeded to hear the parties.

3. To understand the controversy, it would be necessary to set out some basic facts. It is not in dispute that the subject

matter of the arbitration proceedings are disputes relating to the Partnership Firm known as “**Sanghavi Brothers**” (for short “**the Firm**”). Since disputes arose between the partners of the said Firm, the original claimant (i.e. the father of the petitioners) approached this Court under Section 11 of the Act for constitution of an Arbitral Tribunal for the purpose of adjudicating the disputes relating to the said Firm. This application was allowed by this Court by an order dated 21st February, 2004 and the Arbitral Tribunal was constituted comprising of (i) Justice H. Suresh (Retd), (ii) Justice I. G. Shah (Retd) and (iii) Mr. Suresh Payak (for short “**the three-Member Tribunal**”) for adjudicating the disputes in relation to the said Firm. Once the Arbitral Tribunal was constituted, the original claimant (the father of the petitioners) filed his statement of claim before the three-Member Tribunal. The respondents also filed their statement of defence. It is the case of the petitioners that several hurdles were created by the respondents and/or their predecessors in the progress of the arbitration proceedings. In view of the delays and due to the non-cooperation on the part of the respondents and/or their predecessors, the three-Member Tribunal passed an order dated 29th October, 2007 stating that the Arbitration Proceedings stand

terminated.

4. In view of the aforesaid order of the three-Member Tribunal, the original claimant (the father of the petitioners) filed another application under Section 11 of the Act for constitution of a fresh Arbitral Tribunal. This application was dismissed by this Court vide its order dated 24th September, 2010 inter alia holding that the remedy of the original claimant was to file a writ petition. After the passing of this order no further steps were taken by the original claimant who expired on 7th August, 2012 leaving behind the present petitioners as his only heirs and legal representatives.

5. Thereafter, the petitioners in their capacity as the heirs and legal representatives of the original claimant, filed a Special Leave Petition (**SLP**) before the Supreme Court of India challenging the order of this Court dated 24th September, 2010. In the said SLP, the petitioners also filed two interim applications, (i) seeking condonation of delay of 717 days in filing the SLP and (ii) seeking substitution of the petitioners being the heirs and legal representatives of the original claimant. The Supreme Court by its order dated 4th March, 2014 condoned the delay of 717 days in

filing the SLP and also substituted the petitioners in place of the original claimant being the heirs and legal representatives of the said deceased original claimant. By the very same judgment and order, the Supreme Court also granted leave and converted the said SLP into an appeal and thereafter proceeded to hear the appeal. The Supreme Court examined whether this Court's opinion that the remedy of the petitioners lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution of India was correct. The Supreme Court observed that this opinion or view of the High Court was not in accordance with the law declared by the Supreme Court in **SBP & Co. vs. Patel Engineering Limited [(2005) 8 SCC 618]**. After holding so, the Supreme Court further went to hold that this, however necessarily would not mean that the application such as the one which was under consideration would be maintainable under Section 11 of the Act. The Supreme Court thereafter referred to Sections 14 and 32 of the Act and whilst dismissing the SLP granted liberty to the petitioners (the heirs of the original claimant) to approach the appropriate court for determination of the legality of the termination of the mandate of the Arbitral Tribunal as was passed by the three-Member Tribunal on 29th

October, 2007. In other words, the petitioners were granted liberty to challenge the order passed by the three-Member Tribunal dated 29th October, 2007 under which it terminated its mandate. I must mention that this judgement of the Supreme Court is reported in **(2014) 7 SCC 255**.

6. In view of the liberty granted by the Supreme Court, the petitioners filed a petition in this Court invoking the provisions of Section 14 of the Act. This Court, after condoning the delay in filing the petition, by its judgment and order dated 12th August, 2015 set aside the order of the three-Member Tribunal dated 29th October, 2007 and restored the Arbitral proceedings to the file of the said Tribunal and directed it to proceed with the arbitral proceedings and render an award expeditiously. I must mention that this order dated 12th August, 2015 was subjected to challenge not only before the Division Bench of this Court but also before the Supreme Court without any success.

7. Be that as it may, the petitioners communicated the said order of this Court dated 12th August, 2015 to the very same

three-Member Tribunal and requested for fixing a meeting for passing further directions in the matter. It is the case of the petitioners that despite this, the Arbitral proceedings did not proceed further. Even though fresh meetings were conducted by the three-Member Tribunal, on 16th November, 2015, 13th January, 2016 and 3rd February, 2016 no effective work was done as one Member or the other of the three-Member Tribunal remained absent. Thereafter on 24th February, 2016 the three-Member Tribunal had a meeting when all members were present. In the said meeting the respondents, once again, stated that they will not pay the Fees of the three-Member Tribunal. In these circumstances, the said Tribunal once again, vide its minutes of meeting held on 24th February, 2016, recorded that *“The Respondents have made it clear that they will not be able to pay the fees of the Arbitration. In view of this, as far as the Tribunal is concerned, reference of this Arbitration comes to an end”*.

8. In these circumstances, the petitioners were once again compelled to approach this Court under Section 14 read with Section 11 of the Act praying for a constitution of a fresh Arbitral Tribunal. This arbitration Petition was numbered as

Arbitration Petition No.855/2016. In this arbitration petition, a consent order was passed on 23rd November, 2016 appointing Mr. Salil M. Shah (an advocate of this Court) as the **sole Arbitrator**. The sole Arbitrator was directed to continue with the arbitration proceedings from the stage at which the same was before the three-Member Tribunal. Thereafter, once the new Tribunal was constituted (the sole arbitrator), the petitioners made an application to formally bring themselves on record in the arbitration proceedings in place of the original claimant. It is in this application that the impugned order dated 20th July, 2017 has been passed.

9. In the impugned order, the sole arbitrator has taken note of all the facts as well as the submissions made on behalf of the petitioners herein as well as the respondents. The findings of the sole arbitrator can be found in Paragraphs 20, 21 and 22 of the impugned order. To put in a nut-shell, the sole arbitrator came to a finding that the application seeking substitution was not filed within the time permitted under the law. Further, no prayer for condonation of delay had been made. Since there was a lack of any explanation by the petitioners for condoning the delay, the

sole arbitrator dismissed the application filed by the petitioners for bringing themselves on record as the heirs of the original claimant. Ironically, in the very same order, after dismissing the application of the petitioners for substitution, the sole arbitrator allowed the application for bringing the legal heirs of respondent no.1 on record and directed that the amendment shall be carried out within a period of three weeks from the date of the said order.

10. In this factual backdrop, Mr. Dave, the learned Counsel appearing on behalf of the respondents, raised a preliminary objection that the present petition is not maintainable under Section 14 and has to be dismissed. He submitted that the order impugned in this petition partakes the character of an arbitral award and would therefore necessarily have to be challenged under Section 34 of the Act. After bringing to my notice the provisions of Section 14, Mr Dave submitted that the present petition would not lie under Section 14 of the Act as the arbitrator's mandate had not terminated due to him becoming *de jure* or *de facto* unable to act. Neither did the parties agree to the termination of his mandate. In the present case, Mr Dave submitted that the proceedings had come to an end on account of

his findings that the application filed by the petitioners to bring themselves on record (in place of the deceased original claimant) was at a very belated stage without explaining the cause for delay and therefore the proceedings had abated. He therefore submitted that this petition would not lie under Section 14 of the Act but the impugned order would necessarily have to be challenged under Section 34 of the Act. In support of this proposition, Mr. Dave relied upon a decision of the Delhi High Court in the case of **Joginder Singh Dhaiya vs. MA Tarde through LRs [2017 SCC OnLine Del 12559]**.

11. As far as the merits of the matter are concerned, Mr. Dave submitted that in any event, the challenge to the impugned order was not a valid challenge as the same did not suffer from any infirmity. He submitted that the petitioners had approached the sole arbitrator for being impleaded as parties at a very belated stage. He submitted that the original claimant had expired as far back as on 7th August, 2012. He submitted that before the original claimant expired, he had filed an application under Section 11 for appointment of the fresh arbitral tribunal in view of the earlier tribunal having terminated its own mandate (vide its order dated

29th October, 2007). That application of the original claimant was dismissed by this Court vide its order dated 24th September, 2010. This order of the High Court (dated 24th September, 2010) was belatedly challenged by the petitioners before the Supreme Court. Though the Supreme Court converted the said SLP into a civil appeal it thereafter dismissed the same vide its order and judgment dated 4th March, 2014 and granted liberty to the petitioners to file appropriate proceedings under Section 14 before the appropriate court. Accordingly, the petitioners filed an application under Section 14 and this Court vide its order dated 12th August, 2015 restored the arbitral proceedings before the same three-Member Tribunal. On being reconstituted, the three-Member Tribunal thereafter held meetings on 16th November, 2015, 13th January, 2016, 3rd February, 2016 and 24th February, 2016 respectively. That three-Member Tribunal once again terminated its mandate vide its order dated 24th February, 2016 and therefore the petitioners filed another petition before this Court for substitution of the arbitral Tribunal. In the second petition filed by the petitioners herein, this Court, with the consent of all parties, appointed Mr. Salil Shah as the sole Arbitrator vide its order dated 23rd November, 2016. It is only

thereafter on 1st March, 2017 that the petitioners filed their application for bringing themselves on record. All this, according to Mr. Dave, clearly established that the application filed by the petitioners for bringing themselves on record in the arbitration proceedings was seriously belated. This is for the simple reason that the deceased original claimant expired on 7th August, 2012 and the petitioners being the heirs of the original claimant were fully aware as to when he had expired. He therefore submitted that in any event even on the merits of the matter the sole arbitrator was not wrong in passing the impugned order and therefore requires no interference.

12. On the other hand, Mr. Jain and Mr. Daga, learned Counsels appearing on behalf of the petitioners, submitted that there is absolutely no merit in the contentions canvassed by Mr. Dave. As far as the preliminary issue is concerned, the learned Counsel submitted that if one reads Section 32 with Section 14 it is clear that the present petition would be maintainable under Section 14 of the Act. They submitted that Section 32(2)(c) deals with a situation where the Tribunal finds that the continuation of the proceedings for any other reason has become unnecessary or

impossible. They submitted that the use of the words “for any other reason” are of wide import and would include a situation which does not fall within Section 32(2)(a) and/or 32(2)(b). According to the learned Counsel, Section 32(3) was also crucial to note and which states that the mandate of the Tribunal shall be terminated with the termination of the Arbitral proceedings. The use of words “the mandate of the arbitral Tribunal shall terminate” in Section 32(3) and the use of the exact words in the opening part of Section 14(1) clearly show that in a situation such as the one contemplated under Section 32(2)(c) would be covered by Section 14(1) and therefore an application under Section 14(2) is always maintainable. They both submitted that an order passed by the Tribunal which is not an Award but at the same time puts an end to the mandate of the Tribunal and in turn results in termination of the Arbitral proceedings will have to be considered under Section 14(2). They submitted that in the facts of the present case, the impugned order effectively put an end to the mandate of the Tribunal and in turn terminated the Arbitral proceedings. This being the case, the Arbitral Tribunal had *de facto* and *de jure* become unable to perform its functions and therefore the petition was clearly maintainable under Section

14(2) of the Act.

13. It was then submitted by Mr. Jain as well as Mr. Daga that the impugned order can never be considered as an award as there has been no adjudication of any claims of the parties to the present lis. They submitted that it is not in dispute that even the trial in the matter had not commenced when the impugned order was passed. They submitted that for the impugned order to be challenged under Section 34, it has to partake the character of an arbitral award. Section 34 cannot be invoked to challenge an order or is inapplicable when no arbitral award is passed by the Tribunal. In the present case, they both submitted that the impugned order can never be characterized as an award. This is for the simple reason that the lis between the parties was admittedly never decided. The arbitration proceedings stood terminated by virtue of the fact that the original claimant had expired on 7th August, 2012 and his heirs were not brought on record. This being the case, this order could never be construed as an arbitral award which can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996, was the submission. For all these reasons, the learned counsel submitted that the

preliminary objection raised by the respondents be overruled.

14. As far as the merits of the matter are concerned, the learned Counsel appearing on behalf of the petitioners submitted that there was no delay in bringing themselves on record at all. They submitted that all through out from the time when the SLP was filed before the Supreme Court, way back as in 2014 till the new Tribunal was constituted (i.e. the sole Arbitrator), the petitioners were prosecuting all the proceedings as the heirs and legal representatives of the original claimant. In fact, the last Arbitration Petition No.855/2016 (and which was filed to constitute the new Tribunal i.e. the sole Arbitrator) was preferred by the petitioners themselves in which a consent order was passed constituting the new Tribunal. Once the sole Arbitrator was appointed, they immediately made an application for bringing themselves on record and therefore there was no delay at all. This application was only formal in nature and which ought to have been allowed by the sole Arbitrator especially considering that he was appointed at the instance of these very petitioners and with the consent of the respondents. At the time when the sole Arbitrator was appointed, no argument was ever canvassed

that the arbitral proceedings had abated or that arbitration petition No.855/2016 could never be filed by the petitioners in view of the fact that the petitioners were not brought on record in the arbitration proceedings. For all the aforesaid reasons, the learned Counsel submitted that the petition be allowed and the sole Arbitrator be directed to bring the petitioners on record as the heirs and legal representatives of the original claimant. In support of the aforesaid propositions, the petitioners relied upon the following decisions:-

- 1) **Lalitkumar V. Sanghavi (dead) through L.Rs. Neeta Lalit Kumar Sanghavi and Anr Vs. Dharamdas V Sanghavi & Ors [(2014) 7 SCC 255].**
- 2) **M/s U.P. Designers and Decorators through Sole Proprietor and Anr Vs. M/s. Bengal Chemicals and Pharmaceuticals Ltd. & Ors [2014 SCC OnLine ALR 15634].**
- 3) **Rangubai Kom Sankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe & Ors [AIR 1965 SC 1794].**
- 4) **N. Jayaram Reddy & Anr Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool [(1979) 3 SCC 578].**

15. I have heard the learned Counsel for the parties at

length and I have perused the papers and proceedings in the present petition, including the impugned order dated 20th July, 2017.

16. Considering that the respondents have raised a preliminary objection with reference to the maintainability of this petition, I shall deal with this issue first. As mentioned earlier, the present petition has been filed invoking the provisions of Section 14 read with section 32 of the Act. Section 14 of the Act reads as under:-

“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.”

17. What Section 14 inter alia provides is a situation where there is a “failure or impossibility to act” by the Arbitral Tribunal/Arbitrator. Section 14 (1) stipulates that the mandate of an Arbitrator shall terminate 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. Section 14 (2) stipulates that 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.

18. Section 32 of the Act deals with the termination of proceedings. It reads thus:-

“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.”

19. Section 32 (1) stipulates that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2). Sub-section (2) of Section 32 provides that 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 recognizes 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. Section 32 (3) stipulates that 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.

20. As far as order impugned in this petition is concerned, the sole Arbitrator, by the said order has dismissed the application filed by the petitioners to bring them on record in the arbitral proceedings as the legal heirs and representatives of the original claimant. By doing this, in effect, the sole Arbitrator has terminated the arbitration proceedings because, admittedly, there was only one claimant when the arbitral proceedings were initiated and on his expiring and the heirs not being brought on record, the arbitral proceedings cannot continue. This is, more so in the facts of the present case, considering that no counter-claim has been filed by the respondents. This being the factual situation in the present case, it is clear that the termination of the arbitral proceedings has not taken place by virtue of a passing of any final arbitral award [as stipulated under Section 32 (1)] but because it is impossible for the Arbitral Tribunal to continue with the arbitral proceedings [as contemplated under Section 32(2)(c)]. The reason why I say this is because once the Arbitral Tribunal refused to bring the heirs of the deceased original claimant on record, it is impossible for the Arbitral Tribunal to proceed with the arbitral proceedings and give an award on merits. This being the case, I find that clearly an application under section 14(2)

would be maintainable before this Court. This, in fact, is quite clear from the opening words in section 14(1). Section 14(1) stipulates that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if inter alia he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. In the facts of the present case, once the impugned order was passed by the sole Arbitrator he was *de facto* unable to perform his functions as there was nobody on behalf of the claimant to prosecute the arbitral proceedings. In such a situation, Section 14 (2) provides a remedy to apply to the Court to decide a controversy concerning any of the grounds referred to in clause (a) of sub-section (1) of Section 14 (which deals with the arbitrator becoming de jure or de facto unable to perform his functions).

21. Looking at the opening words "*the mandate of an arbitrator shall terminate*" appearing in Section 32 (3) and the use of the exact words in the opening part of Section 14(1) would also indicate that in a situation where such as the one contemplated under Section 32(2)(c) would be covered by Section 14(1) and therefore an application under Section 14(2) would be maintainable. I find considerable force in the argument

canvassed on behalf of the petitioners that an order which is not an award, but at the same time puts an end to the mandate of the Tribunal as well as termination of the arbitral proceedings, would fall within Section 32(2) and would have to be considered under Section 14(2).

22. In taking this view, I am supported by a decision of the Supreme Court (passed in this very matter) in the case of **Lalitkumar V. Sanghavi (supra)**. Though the factual situation before the Supreme Court was slightly different, in inasmuch as in the facts at that time, the Arbitral Tribunal had terminated its mandate on the ground that the fees of the Arbitral Tribunal were not paid by the respondents. It is in these facts, that the Supreme Court analyzed and interpreted the provisions of Section 14 as well as Section 32 of the Act and thereafter gave its findings in paragraphs 10.3, 11 and 12 which read thus:-

10.3. Section 14 declares that “the mandate of an arbitrator shall terminate” in the circumstances specified therein. They are—

“14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate 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.”

Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in clause (a) then an application may be made to the Court — “to decide on the termination of the mandate”.

*11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. [“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.”] 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)”.”

23. What this decision clearly lays down is that having regard to the scheme of the Arbitration and Conciliation Act, 1996 and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the Arbitrator was legally terminated or not, can be examined by the Court as provided under Section 14 (2). In that case also the Supreme Court held that by virtue of the order dated 29th October, 2007 passed by the Tribunal terminating the arbitral proceedings could only fall within the scope of Section 32(2)(c), namely, that the continuation of the proceedings had become impossible. I find that this decision clearly supports the view that I have taken above. This being the case, I am unable to agree with the submissions made on behalf of the respondents that the present petition is not maintainable.

24. To counter this argument, Mr. Dave submitted that the

impugned order passed by the sole Arbitrator was in the nature of an Award and therefore could only be challenged under Section 34 of the Act. I am unable to agree with this submission. To my mind, an Award is passed by the Arbitral Tribunal, interim or final, when it decides the lis between the parties. There has to be some adjudication on the merits of the claim or part thereof (which may include limitation) for the order passed by the Tribunal to be termed as an Award. It is not as if every order passed by the Tribunal and which terminates the Arbitral proceedings can be termed as an Award. This is quite clear on reading Section 32 itself which contemplates that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2) of Section 32. This would clearly indicate that merely because the arbitral proceedings are terminated by an order of the Arbitral Tribunal would not necessarily make it an award. It would partake the character of an award if the lis between the parties on any issue is finally decided by the Arbitral Tribunal. In the facts of the present case, admittedly, the lis between the parties has not been decided at all. In fact, as mentioned from the narration of facts set out earlier, this litigation has a very checkered history. The

impugned order rejected the application of the claimant to be formally brought on record. Having passed such an order, naturally the sole Arbitrator could not proceed any further with the arbitral proceedings, especially considering that the original claimant had expired on 7th August, 2012 and his heirs were not brought on record. There was no one to prosecute the arbitral proceedings. This order can never be termed as an arbitral award as understood under Section 34 of the Act. I must mention that the Delhi High Court in the case of **Joginder Singh Dhaiya (supra)** appears to have taken a view that where the arbitrator holds that the proceedings have abated because of not bringing the legal heirs on record, the same would amount to an arbitral award which can be challenged under Section 34 of the Act. With great respect, I am unable to agree with the reasons of the learned Single Judge of the Delhi High Court. Though the decision of the Supreme Court in the case of **Lalitkumar V. Sanghavi (supra)** was brought to the attention of the Delhi High Court, it was sought to be distinguished by stating that in the facts of that case the Tribunal had terminated the arbitration proceedings as the claimant had taken no interest in the matter and it is in these circumstances that the Supreme Court held that such an order

would be falling under Section 14 and 32(2)(c) of the Act and hence the remedy would be under Section 14 (2). The Delhi High Court proceeded on the basis that the apparent distinction between an order and an award lies in the fact whether the decision of the Arbitral Tribunal affects the rights of the parties, concluding the dispute as to the specific issue and has finality attached to the same. The Delhi High Court held that since the order of the Tribunal had resulted in termination of the arbitration proceedings and would bar the petitioners from re-agitating the same in any other proceedings, the said order would partake the character of an award since it has finality attached to it and determined the vital rights of the parties. I am unable to agree with the reasoning given by the Delhi High Court for the simple reason that Section 32 of the Act provides for the termination of arbitral proceedings. It provides that the arbitral proceedings shall stand terminated by pronouncement of the final arbitral award or by an order of the arbitrator under sub-section (2) of Section 32. In the facts of the present case, the Arbitral Tribunal has terminated the proceedings by virtue of not bringing the petitioners on record in the arbitral proceedings. There is no pronouncement of a final arbitral award in the facts of the present

case as stipulated under Section 32(1). Every order of the Tribunal terminating the arbitral proceedings can never be terms as an award. This is clear from an ex-facie reading of section 32.

25. Furthermore, Section 34 of the Act provides for an application to be made to the Court for setting aside the arbitral award. The very heading of the above provision reflects that recourse to Section 34 is permissible only for setting aside the arbitral award on the grounds mentioned therein. It is not applicable where there is no award. As mentioned earlier, every order that terminates the arbitral proceedings would not amount to an award. There may be several situations and which are difficult to exhaustively set out, under which the Arbitral Tribunal may terminate the arbitration proceedings, as well as its mandate for reasons that this is impossible to continue with the arbitral proceedings. That would not mean that every such order would partake the character of an award. An award to my mind would be one which would decide the lis between the parties and which would have finality attached to it (subject, of course, to challenge under Section 34 of the Act). I am of the considered view, that the decision of the Supreme Court in the case of

Lalitkumar V. Sanghavi (supra) would clearly cover the issue raised before me. I am therefore unable to agree with the reasoning of the Delhi High Court and therefore overrule the preliminary objection.

26. Having dealt with the preliminary issue, I shall now deal with the impugned order and whether the sole Arbitrator was justified in rejecting the application filed by the petitioners for bringing themselves on record in place of the original claimant who expired on 7th August, 2012. In this regard, it would be necessary to advert to the facts, in brief, once again.

27. As mentioned earlier, the three-Member Tribunal was constituted pursuant to an order dated 21st February, 2004 passed by this Court under Section 11 of the Act. At that time, the original claimant was very much alive. Before the three-Member Tribunal, the original claimant filed his statement of claim and the respondents filed their statement of defence. Thereafter, for the reasons recorded by the three-Member Tribunal in its order dated 29th October, 2007, it terminated the arbitration proceedings before it. In view of the aforesaid order dated 29th October, 2007 passed by the three-Member Tribunal, the original

claimant once again filed an application under Section 11 for constitution of a new Tribunal. This application was dismissed by this Court by its order dated 24th September, 2010. Thereafter, the original claimant expired on 7th August, 2012 leaving behind the present petitioners as his only heirs and legal representatives. The present petitioners, in their capacity as the only legal heirs and representatives of the original claimant, filed a Special Leave Petition before the Supreme Court of India in which the petitioners also filed two interim applications, (i) seeking condonation of delay of 717 days in filing the SLP and (ii) seeking a substitution of the petitioners (in place of the original claimant) being heirs and legal representatives of the original claimant. The Supreme Court by its order dated 4th March, 2014 condoned the delay and also allowed the petitioners to be substituted in place of the original claimant. In the very same judgment/order dated 4th March, 2014 and which is a reported judgment **[(2014 7 SCC 255)]**, the Supreme Court dismissed the SLP but observed that the petitioners had a remedy to challenge the order dated 29th October, 2007 by approaching this Court under Section 14 read with Section 32 of the Act. It is in this light that the petitioners approached this Court under Section 14. This Court by its order

dated 12th August, 2015 set aside the order of three-Member Tribunal dated 29th October, 2007 and restored the arbitration proceedings to the file of the same Tribunal and directed it to proceed with the arbitral proceedings and render an award expeditiously. It is important to note that this order was passed in a petition that was filed by the present petitioners themselves as the heirs and legal representatives of the original claimant. Thereafter, this order was communicated to the three-Member Tribunal by the petitioners and a meeting was fixed by the said Tribunal for preliminary directions on 16th November, 2015. Similarly, meetings before the said Tribunal were held thereafter on 13th January, 2016 and 3rd February, 2016 and 24th February, 2016 respectively. It is undisputed that in three meetings, namely on 16th November, 2015, 13th January, 2016 and 3rd February, 2016 respectively, there was no coram as one or the other Member of the three-Member Tribunal was always absent. Thereafter, on 24th February, 2016 when all three members were present, they once again passed an order terminating arbitration proceedings and ending their mandate. The petitioners were therefore constrained to file another petition under Section 14 read with section 11 praying for constitution of a fresh arbitral

tribunal. This arbitration petition filed by the petitioners (under Section 14 read with section 11) was disposed of by this Court vide its order dated 23rd November, 2016, wherein the three-Member Tribunal was now substituted by the sole Arbitrator – Mr Salil Shah. This order was passed by the consent of all the parties. It is admitted fact that once this order was passed, the sole Arbitrator (Mr. Salil M. Shah) held the first meeting on 9th December, 2016. Thereafter, the petitioners filed their application for bringing themselves on record dated 27th February, 2017 and which was received by the sole Arbitrator on 1st March, 2017. These are admitted facts.

28. Looking to these admitted facts, I find that the petitioners are fully justified in contending that there was no delay in filing the application for bringing themselves on record in the arbitration proceedings. As far as the three-Member Tribunal is concerned, they could not have filed any application before the said Tribunal either on 16th November, 2015, 13th January, 2016 and/or 3rd February, 2016, as admittedly, one member of the said Tribunal was absent and therefore there was no validly constituted tribunal at all as the coram was absent.

29. The Petitioners probably could have filed their application (to bring themselves on record) on 24th February, 2016 before the three-Member Tribunal but on that date the said Tribunal terminated the arbitration proceedings and ended its mandate. There was therefore no occasion for the Petitioners for filing any application before the said Tribunal on that date. After that, the new Tribunal (the sole Arbitrator) was constituted only pursuant to an order of this Court dated 23rd November, 2016. The sole Arbitrator held the first meeting admittedly on 9th December, 2016. The application filed before the newly appointed Tribunal (Mr. Salil Shah), even if taken as 1st March, 2017, was within a period of 90 days from the date when the first meeting was held and therefore there was no question of any delay. I find that the Tribunal has completely gone wrong in considering dates of 16th November, 2015, 13th January, 2016 and 3rd February, 2016 as being the dates on which the application could have been filed. One must not lose sight of the fact that the Arbitral Tribunal is not a court and under normal circumstances applications are filed before the Tribunal when they hold meetings and pass directions as to how the arbitration is to proceed. This being the

case, the calculation of delay by the Tribunal, in my opinion, is not correct. Even otherwise, it is recorded in the impugned order that there was a delay of 139 days in filing the application for bringing the petitioners on record (in the arbitration proceedings) in place of the original claimant. Looking at the checkered history of this matter and the facts narrated above, the same ought to have weighed heavily with the sole Arbitrator to condone the delay, even if there was any, and he ought not to have taken such a hyper-technical approach to non-suit the petitioners. It was not a delay of such a nature that would in any way defeat an indefeasible right that had accrued in favour of the respondents. By rejecting the application of the petitioners, the Arbitral Tribunal has in fact non-suited the petitioners without deciding the lis between the parties on merits. Such a hyper technical approach ought not to have been taken by the Arbitral Tribunal.

30. This apart, it is not disputed that the sole Arbitrator was appointed at the behest of these very petitioners who made an application to bring them on record. It is in their application that the new Tribunal (the sole Arbitrator) was constituted and that too with the consent of the respondents. If, in fact, it was the

case of the respondents that the arbitration proceedings had already abated, the question of consenting to this substitution would not have arisen at all or at least the said contention would have been expressly kept open by the Court while passing its order dated 23rd November, 2016. Such is not the case. This is another reason why I think that the sole Arbitrator took a very hyper technical approach in dismissing the application filed by the petitioners for bringing themselves on record in place of the original claimant.

31. What is also interesting to note is that the even though the arbitral tribunal dismissed the application of the petitioners for bringing themselves on record, on behalf of the original claimant and which effectively terminates the arbitral proceedings, it allowed application to bring the legal heirs of respondent no.1 on record. This application also was filed by the petitioners. I fail to see why such an application was allowed when the petitioners themselves were not allowed to be brought on record which resulted in the termination of the arbitration proceedings.

32. In view of my findings above, I have not dealt with the other submissions made on behalf of the petitioners based on the judgment of the Supreme Court in the case of **Rangubai Kom Sankar Jagtap V. Sunderabai Jedhe [AIR 1965 S.C. 1794]** and the other judgments that were relied upon on the similar issue.

33. For all the aforesaid reasons and in view of the discussion above, the impugned order dated 20th July, 2017 passed by the sole Arbitrator in so far as he rejects the application of the petitioners for bringing themselves on record is set aside and the sole Arbitrator is directed to substitute the petitioners as the claimants in place of the original claimant Shri Lalitkumar Vanmalidas Sanghavi and thereafter proceed with the arbitration and pass a final award as expeditiously as possible.

34. The Arbitration Petition is disposed of in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)

35. At this stage, Mr. Dave, learned Counsel appearing on behalf of respondent No.1, prays that the operation and implementation of this order be stayed for a period of four weeks from today. Mr. Daga, learned Counsel appearing on behalf of the petitioners, has strongly opposed this request. Considering the checkered history of the present arbitration proceedings and the fact that they have been pending since February, 2004, I am not inclined to accede to the request of the respondents. In these circumstances, the request for stay of the operation and implementation of this order is rejected.

(B.P. COLABAWALLA, J.)