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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.54 OF 2019

Behram Hoshang Bakht	..Petitioner
Vs.	
M/s.New York Stores and Restaurant & Ors.	..Respondents

Mr.Jaideep Mitra with Ms.Vijaya Ingule and Mr.Rupesh Mandhare i/b.
Sean Wassoodew for Petitioner.

Mr.Kishore Jain with Ms.Priyal Chheda i/b. Divya Jain & Ms.Priyal
Chheda for Respondent Nos.1 and 2.

CORAM : G.S. KULKARNI, J.

DATE : 2nd APRIL, 2019

P.C.:

1. Heard learned Counsel for the petitioner and learned Counsel for respondent Nos.1 and 2.

2. This is a petition filed by the petitioner under Section 32(2)(c) and 14(2) of the Arbitration and Conciliation Act, 1996 (for short, "the ACA") praying for appointing a substitute arbitrator in view of the termination of the arbitral proceedings by the sole arbitrator who was appointed under an order passed by this Court.

3. At the outset, the order passed by the arbitral tribunal terminating the proceedings in the minutes of the meeting dated 14 June 2016 are

required to be noted which read thus:-

“MINUTES OF THE MEETING DATED 14TH JUNE, 2016

1. In the above matter, today the meeting was held at 3.00 p.m. when Ms.Shweta Jain, Ld. Advocate for Respondent Nos.1 and 2, stated that this matter is adjourned from time to time under the pretext that the Claimant is awaiting the order from the Hon'ble High Court about appointment of Chartered Accountant. The Claimant himself is not remaining present for no. of occasions. The Claimant has also not cared to make the payment towards the Arbitrator's fees. It is very clear that the Claimant is not interested in proceeding with the matter.
2. Ms.Jain, Ld. Advocate for Respondent Nos.1 and 2, is under the circumstances, justified in her submission that the present proceedings may be terminated in view of the attitude adopted by the Claimant.
3. Under the circumstances, I pass the following order.

ORDER

The present proceedings are terminated.”

4. The petitioner is one of the partners in a partnership firm in the name and style of M/s. New York Stores and Restaurant-respondent No.1. Respondent Nos.2 to 7 are the partners of the said firm registered under a deed of partnership dated 8 September 1994.

5. Disputes and differences have arisen between the petitioner and the other partners. By an order dated 23 September 2011 passed by the learned Single Judge of this Court in arbitration application No.159 of 2011, Shri S.R. Shah, Advocate and Former Judge of the Bombay City Civil Court, was appointed as an arbitrator to adjudicate the disputes and differences between the parties. It is not in dispute that the arbitrator so appointed entered a reference. An application under

Section 17 of the ACA was also moved on behalf of the petitioner which came to be adjudicated by the learned sole arbitrator. An appeal under Section 37 of the ACA was preferred by the petitioner challenging the interim orders passed by the learned arbitrator which also came to be disposed of by this Court.

6. The record indicates that the learned sole arbitrator from time to time adjourned the proceedings for the reason that the petitioner was not depositing the fees of the learned sole arbitrator. A reply affidavit as filed on behalf of the respondents would indicate that the meetings dated 20 June 2014, 03 November 2014, 13 November 2014, 27 January 2015, 5 March 2015, 29 January 2016, 11 March 2016, 7 April 2016 and 14 June 2016 held by the learned sole arbitrator clearly recorded that fees of the learned arbitrator were not being deposited, ultimately the arbitral proceedings came to be terminated by the said order passed by the arbitral tribunal on 14 June 2016.

7. Soon after the termination of the arbitral proceedings, the petitioner moved an application (Exhibit "T", page 110 of the paperbook) before the arbitral tribunal praying for setting aside the order dated 14 June 2016, whereby the learned sole arbitrator had terminated the arbitral proceedings. In the said application, the

petitioner stated that he was in financial difficulties and it was difficult for him to arrange for the amounts to be deposited towards the fees of the learned arbitrator. The relevant averments in this application are required to be noted which read as under:-

“4. I say that I am managing to earn my livelihood by doing the odd jobs and as such I am not having any fixed source of income. I say that my wife is working with a private firm on megere salary. I further say that I am also not getting any share of profit from the business carried out by the respondents. This has left me in a cache 22 situation where I am trying hard to meet the both ends.

5. I say that inspite of trying my level best, I could not manage to gather the amount to be deposited with Lordship and hence could not attend the proceedings on 14.06.2016.

6. I say that on 14.06.2016 my advocate was also busy before other court and hence he also could not remain present before you Lordship and on 14.06.2016 by an order of even date your Lordship terminated the Arbitration Proceedings pending before your Lordship for non compliance of the earlier orders and directions.

.....

10. I further undertake to pay remaining Rs.15,000/- within 4 weeks.

11. I say that if the above Arbitration Application is not restored back to its file I may suffer grave and irreparable loss which cannot be compensated in monetary terms.”

8. Pursuant to the above application of the petitioner, a notice dated 17 June 2016 of the Advocate for the petitioner came to be issued to the respondents, which indicates that the learned sole arbitrator had placed the said application for hearing on 24 June 2016. This application as filed by the petitioner could not be considered by the learned sole arbitrator as before the same could be taken up for hearing, the learned sole arbitrator expired in the month of June 2016. The petitioner in this

situation approached this Court by filing an arbitration application No.245 of 2016. By an order dated 24 November 2016 passed by this Court (S.J. Kathawalla, J.), the said application was directed to be numbered as a petition under Section 34 of the ACA. The said application being converted into arbitration petition No.1274 of 2016 (under Section 34 of the ACA) was adjudicated by the learned Single Judge of this Court by an order dated 26 November 2018 whereby the learned Single Judge observed that the order passed by the learned sole arbitrator terminating the proceedings under Section 32(2) of the ACA was not an award and hence, cannot be challenged under Section 34 of the ACA. The petitioner was accordingly permitted to withdraw the said petition with liberty to the petitioner to file such proceedings as permissible in law. The said order passed by the learned Single Judge of this Court (S.C. Gupte, J.) is required to be noted which reads thus:-

“ Heard learned Counsel for the parties.

2 This arbitration petition challenges an order of a sole arbitrator, by which the arbitrator has terminated the proceedings on the ground of having found the continuation of the proceedings to have become impossible. An order terminating proceedings under Section 32(2) of the Arbitration and Conciliation Act, 1996 is not an award and hence, cannot be challenged under Section 34. This position is not disputed by learned Counsel for the Petitioner. Learned Counsel, however, submits that he may be allowed to convert this petition into a petition under sub-section (2) of Section 14. When asked if instead this petition may be withdrawn simplicitor, in which case, the Petitioner may have liberty to adopt such proceedings as may be permissible to him in law, learned Counsel for the Petitioner agrees to do so. The petition is, accordingly, dismissed as withdrawn with liberty to the Petitioner to adopt such proceedings as may be permissible to him in law.”

9. It is on this background, the petitioner is before this Court praying for appointment of a substitute arbitrator. The following are the prayers as made in this petition:-

“(a) that this Honourable Court be pleased to declare that the mandate of the Ld. Arbitrator did not terminate by virtue of the order dated 14th June 2016 as the Ld. Arbitrator had neither become de jure or de facto unable to perform his functions;

(b) that this Honourable Court be pleased to appoint a substitute arbitrator in place of the Ld. Arbitrator who expired in or about June 2016 to continue the arbitral proceeding from the point where they were concluded by the Ld. Arbitrator.”

10. Mr.Mitra, learned Counsel for the petitioner, referring to the documents on record, on the facts of the case as noted above, submits that in the situation as the petitioner stands, the prayers for appointment of a substitute arbitrator are required to be granted. He submits that the consequence of the order dated 14 June 2016 passed by the learned sole arbitrator would clearly attract the provisions of Section 14(1)(a) and (b) as also the provisions of Section 15 of the ACA though the petition is not filed under Section 15 of the ACA. However, his contention is that the provisions would also become relevant in view of the termination of the arbitral proceedings, considering the provisions of Section 32 sub-section (2)(c) of the ACA. Mr.Mitra would submit that inability of the petitioner to proceed before the arbitral tribunal earlier appointed was bonafide. As also this reason is clearly set out in the

application for setting aside the order dated 14 June 2016 on the said application considered by the arbitral tribunal. However, due to the sad demise of the learned arbitrator in June 2016, the said application remained to be adjudicated. It is his submission that this is another factor which would clearly attract the provisions of Section 14 of the ACA and the petitioner would be entitled for reliefs as prayed in the petition. To support his contention Mr.Mitra has placed reliance on the decision of **Lalitkumar V. Sanghavi (Dead) through LRs Neeta Lali Kumar Sanghavi and Another vs. Dharamdas V. Sanghavi & Ors.**¹ to contend that in a situation as in the present case, it would be permissible for the petitioner to invoke the jurisdiction of this Court under Section 14 of the ACA as the mandate of the arbitrator stood terminated within the meaning of Section 32(2) of the ACA.

11. On the other hand, Mr.Jain learned Counsel for respondent Nos.1 and 2, would have objection to the prayers as made in the petition. Mr.Jain would contend that provisions of Section 14 and 15 are not applicable in the facts of the present case. This for the reason that the petitioner was never interested to pursue the arbitral proceedings which according to Mr.Jain is clear from the several orders passed by the arbitral tribunal between June 2014 to 14 June 2016 when the arbitral tribunal decided to terminate the arbitral proceedings. It is submitted

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that it was the petitioner who was responsible for the proceeding being terminated. It is submitted that the petitioner never had an intention to pay the fees of the arbitral tribunal. Pointing out several documents on record, Mr.Jain would contend that conduct of the petitioner in the present proceeding is glaring and thus, the Court could not exercise its jurisdiction under Sections 14 and 15 of the ACA in the present proceedings.

12. Having heard learned Counsel for the parties and having perused the record, some facts which are not disputed, are required to be noted. Admittedly, on an application filed “by the petitioner” under Section 11 (arbitration application No.159 of 2011), the disputes between the parties were referred for adjudication by appointing a sole arbitrator as noted above. The learned sole arbitrator so appointed had entered reference as also undertook adjudication of a Section 17 application as filed by the petitioner. The petitioner being aggrieved by the said order of the learned sole arbitrator on the Section 17 application filed an arbitration appeal (No.2 of 2014) before this Court. The said appeal came to be disposed of by this Court in terms of the minutes of consent order passed by this Court on 16 April 2014.

13. These proceedings clearly show that the petitioner was very much interested in pursuing the adjudication of the disputes, as at the behest

of the petitioner, the arbitral tribunal came to be constituted as also arbitral tribunal had proceeded to adjudicate the interim application and further proceedings were pursued by the petitioner before this Court when minutes of consent order came to be tendered. All this had taken place from 2011 to 2014.

14. It appears that thereafter the petitioner had some financial difficulties as the petitioner had pointed out before the arbitral tribunal and was not in a position to pay the fees of the learned sole arbitrator and this situation persisted for quite some time. As noted above, the arbitral tribunal for want of fees to be deposited by the petitioner, adjourned the proceedings, which is one of the major contentions as urged by Mr.Jain. However, the Court cannot be oblivious of the situation that it was the petitioner who appears to be a minority partner in the partnership firm initiated proceedings in the year 2011 seeking an appointment of an arbitrator. The petitioner pursued his interim application before the arbitral tribunal and thereafter assailed the interim orders passed by the arbitral tribunal by approaching this Court which was disposed of in terms of the minutes of the order. The petitioner himself having initiated all these proceedings, it cannot be accepted that unless the petitioner had some financial difficulties, (the reasons for which are not a concern in this proceeding) prevented the

petitioner from depositing the fees of the learned sole arbitrator and eventually learned sole arbitrator by the said order dated 14 June, 2016 terminated the proceedings. The petitioner immediately approached the learned sole arbitrator by an application noted above requesting for setting aside the said order and the said application clearly set out the financial difficulties and that he was willing to deposit the fees of the learned sole arbitrator. The learned sole arbitrator had in fact placed that application for adjudication on 24 June 2016 however, before it could be taken up, the learned sole arbitrator expired and eventually the petitioner approached this Court by filing application No.245 of 2016 and arbitration petition No.1274 of 2016 as noted above. Having so permitted by this Court to file the present petition, he is before the Court.

15. In these facts and circumstances, I am not inclined to accept the submissions of Mr.Jain that the provisions of Section 14(1) and/or Section 15 are not attracted. It is clear that the arbitral proceedings stood terminated not only by virtue of the order passed by the arbitral tribunal on 14 June 2016, but also now it is required to be accepted that it is deemed to be terminated in view of the demise of the learned sole arbitrator before the application of the petitioner for setting aside of the order terminating the proceedings was considered. The provisions of

Section 14 provides for mandate of an arbitrator being terminated on failure or impossibility to act, to be substituted by another arbitrator in situations as provided in sub-clause (a) and (b) of sub-section (1) namely when the arbitrator so appointed becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and secondly, when he withdraws from his office or the parties agree for termination of his mandate. In the present case, the learned sole arbitrator so appointed had terminated the arbitral proceedings and declared that he is unable to proceed with the arbitration for the reason which he has set out in the order dated 14 June 2016 (supra) terminating the arbitral proceedings. Sub-section (2) of section 14 would confer authority and jurisdiction on the Court to decide on any controversy which would concern as to whether the mandate of the arbitral tribunal as falling under sub-clause (a) of section 1 stood terminated. In the facts of the case, I have no manner of doubt that the arbitral proceedings stood terminated and thus it would be permissible for the petitioner to move the Court to exercise jurisdiction under Section 14(1) of the ACA and seek appointment of a substitute arbitrator. The provisions of Section 15(1) are required to be read in conjunction with Section 14 as Section 15 provides for additional circumstances to the circumstances as referred to in Section 13 or Section 14 in regard to the termination of the mandate of the arbitral

tribunal for appointment of a substitute arbitrator. Considering the order dated 14 June 2016 passed by the sole arbitrator it certainly can be said, that the arbitral tribunal had refused to proceed which can also be considered to be a circumstance falling under Section 14(1) of the ACA. Thus necessarily the mandate of the arbitral tribunal so appointed for all these reasons stood terminated and once the mandate stood terminated, the provisions of Section 14 and 15 of the ACA become available to the parties to seek an appointment of a substitute arbitrator.

16. Mr.Mitra, learned Counsel for the petitioner, would be correct in placing reliance on the decision of Supreme Court in **Lalitkumar V. Sanghavi (Dead) through LRs Neeta Lali Kumar Sanghavi and Another vs. Dharamdas V. Sanghavi & Ors.** (supra). In the facts which are akin to the facts of the present case, the Supreme Court held that it would be permissible for the party to invoke jurisdiction under the provisions of Section 14 read with Section 32 of the ACA and permitted the petitioners therein to approach the High Court in appropriate proceedings. The observations in that regard can be seen in paragraph 12 of the said decision which reads thus:-

“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)”.

17. In view of the above discussion, the present petition is required to be allowed. It is accordingly allowed by the following order:-

ORDER

- (i) Mr.Rohaan J. Cama, Advocate of this Court, is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties, subject matter of the present proceeding, in substitution of the arbitral tribunal as appointed earlier.
- (ii) The learned sole prospective 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 petition with a copy to be forwarded to both the parties;
- (iii) Learned sole prospective arbitrator shall continue the proceeding from the stage as reached before earlier sole arbitrator.
- (iv) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

(v) All contentions of the parties on merits of the matter are expressly kept open;

18. Mr.Mitra on instructions submits that his client would extend co-operation in the conclusion of the arbitral proceedings as also there shall be no default in making payment of the learned sole arbitrator.

19. The learned arbitrator so appointed shall conclude the arbitral proceedings as expeditiously as possible and in any event within a period of time as prescribed under Section 29A of the ACA.

(vi) The petition is 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:

address: Room 17-18, Islam Building, V.N. Road, Fort,
Mumbai – 400 001.

Contact Nos. 9821067945 / 022-22870883.

[G.S. KULKARNI, J.]