

381 FAO NO:4692-2004 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**FAO NO:4692-2004 (O&M)
Date of decision: 08.04.2019.**

M/S. NITYA NAND & SONS

...Appellants

Versus

UNION OF INDIA AND OTHERS

...Respondent

CORAM: HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr.Sunish Bindlish, Advocate for the appellants.

Mr.Vivek Gupta, Advocate with
Mr.Ashwinie K. Bansal, Advocate for the respondents.

JAISHREE THAKUR, J.

1. This is a first appeal that has been filed seeking to challenge the order of the District Judge, Jalandhar dated 12.04.2004, dismissing the objections of appellant under Section 34 of the Arbitration and Conciliation Act, 1996.

2. A few brief are facts required to be noticed for the proper adjudication by this Court. An agreement bearing No.CE-WAC-18/93-94 was entered into between the appellant and respondent No.1, for “*Provision of Technical Accommodation at Sirsa*” by appellant. It is a case of the appellant that the contract was terminated by the respondent No.1 in a most high handed, illegal and arbitrary manner

vide order dated 02.03.1995 by invoking condition No.57 of the agreement. On account of the said termination, the appellants requested for an appointment of an Arbitrator in accordance with the condition No.70 of the said agreement. As no arbitrator was appointed, the appellants filed an application under Section 8 and 11 of the Arbitration and Conciliation Act, 1996 before the Civil Judge (Senior Division), Jalandhar and thereafter, Sh. M.K. Chitkara was appointed as a sole Arbitrator. Sh. M.K. Chitkara entered upon the reference but was not able to give the award within time. He resigned as an arbitrator on 12.10.2000, and the appellants again approached the Civil Court with a prayer for substitute appointment of the Arbitrator in terms of Section 15 of the Arbitration & Conciliation Act, 1996. Subsequently, by an order dated 27.04.2001 a fresh Arbitrator was appointed with the direction to submit his award within a period of 04 months. The new Arbitrator namely Sh. Krishan Kumar entered upon the reference vide letter dated 28.01.2001. As per the direction of the Court, he was to publish his award on or before 27.11.2001 i.e. within a period of 04 months and if one was to refer to condition No.70 of the agreement, the award was to be published within a period of 06 months i.e. on or before 27.01.2002.

3. No award was published by the respondent no 2 within the stipulated period of 04 months as directed by the Civil Judge, Jalandhar or within the 06 months period as stipulated under Clause 70 of the

agreement. The appellant wrote to the Arbitrator bringing this fact to his knowledge by letter dated 02.02.2002. After receipt of the said letter, the Arbitrator by telegram dated 8.2.2002 required the parties to attend the hearing before him on 15.02.2002. The appellants informed the Arbitrator that as the period for publishing the award had expired he had become *functus officio*. However, the Arbitrator proceeded to decide the dispute and passed an ex-parte award on 18.02.2002 which copy was received by the appellants by registered post on 26.02.2002. This award was challenged by the appellants herein under Section 34 of the Arbitration and Conciliation Act, 1996 on the ground that the award is prima facie illegal as the Arbitrator had become *functus officio* as the award had been made beyond the period allowed by the Court ; the Arbitrator had proceeded against the appellants ex-parte despite being aware that the period for passing the award had since expired.

4. The District Judge, Jalandhar taking into account the arguments raised dismissed the objections on the ground that there is no provision in any of the Clauses under Section 34(2) of the Act which would specify that the Arbitrator must give his award within a period of 04 months. It was also held that that sufficient time had been given to the appellants herein to file their claim and once they did not file their claim , the Arbitrator had no option but to pass an ex-parte award.

5. Mr. Sunish Bindlish learned counsel appearing on behalf of the appellants herein argues that the order dismissing the objections and

upholding the award is liable to be set aside by contending that the Arbitrator had become *functus officio* as the award was not passed within the specified time of 04 months or within a period of 06 months as stipulated in condition No.70 of the agreement. It is argued that Sh. Krishan Kumar, Arbitrator was appointed by the Civil Judge, Jalandhar vide order 27.04.2001 and he was directed to submit his award as expeditiously preferably within a period of 04 months whereas condition No.70 of the agreement stipulates:-

“The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.”

6. Per contra, Mr Ashwinie Bansal learned counsel appearing on behalf of the respondent submits that the award as passed by the Arbitrator is well reasoned and cannot be interfered with until and unless the appellant herein is able to bring his case within the four corners of section 34(2) of

the Arbitration and Conciliation Act, 1996 which lays down the framework and the circumstances under which an award of an Arbitral Tribunal can be set aside.

7. The sole question that needs to be addressed at the first instance is whether the Arbitrator has become *functus officio* since the award was passed after a period of 04 months/ 06 months, as argued by the counsel for the appellants?

8. It is not in dispute that initially, the Arbitrator had been appointed to settle the dispute between the parties which had arisen on account of the termination of the contract which had been entered into between the parties for, “Provision of Technical Accommodation at Sirsa”, in contract agreement being No. CE WAC – 18 of 93-94 . Initially Sh. M.K. Chitkara had been appointed as an Arbitrator who settled the dispute who ultimately resigned on 12.10.2000. His resignation was on account of the fact that the appellant herein had not agreed to enlarge his time for publication of the award. A new Arbitrator was appointed by the Court with a direction that the award was to be published expeditiously and possibly within 04 months. The Arbitrator entered into reference on 28.07.2001 and called upon both the parties to confirm submission of documents with an aim to finalize the proceedings, statement of case was to be furnished by 8.9.2001, pleadings in defense by 10.09.2001, rejoinder if any within 20 days. No documents were submitted by the appellants . Thereafter, the Arbitrator by taking into account that proceedings that had

been entered into before the earlier Arbitrator, addressed a letter to the appellants seeking confirmation as to whether the statement and claims submitted before the earlier Arbitrator should be taken as pleadings in the instant matter. However, the appellant did not furnish any response, though the respondent confirmed that the earlier submissions were to be treated as submissions before the present Arbitrator. The Arbitrator then fixed a hearing for 06.12.2001 but postponed the hearing as he received a letter from the contractor- the appellant herein dated 28.12.2001 stating that they had filed a review petition, which necessitated the Arbitrator to ask for a copy of the review petition and also asked him to forward his claims by 25.01.2002. The Arbitrator received a copy of the review petition but not the statement of the claimant. Fresh dates were fixed for 15.02.2002 and since the appellants were not present, the Arbitrator proceeded against the appellant ex-parte and allowed, the claim of the respondent.

8. Clause No.70 of the Arbitration Agreement has clearly specified that the award is to be passed within a period of 06 months from the date of his entering into the reference or within the extended time as the case may be. Further, all claims referred to him are to be decided individually. However, the time to make and publish the award could be enlarged with the consent of both the parties but not exceeding one year. In the instant case, the Arbitrator came to be appointed on 27.04.2001 and as per the said order the award had to be passed within a period of 04 months

of the reference taking the date as 04 months i.e. by 27.11.2001 and at best by 27.01.2002 if relying on condition 70 of the agreement. It is not in dispute that the award only came into effect on the 18.02.2002, that is beyond the period of 06 months. There is also a letter available on the record dated 28.12.2001 addressed by the appellant asking the Arbitrator not to hurry with the proceedings on the ground that the review petition had been filed, but there is also a telegram dated 29.11.2001 available on the record which is from the respondent itself, stating that the period for publishing the award shall expire on 27.01.2002 as reference has been entered into 28.07.2001.

9. Thus taking it to be an admitted fact that the award was not passed within the stipulated period and there was no extension of time either sought for by the Arbitrator or allowed by the parties, the Arbitrator had become *functous officio* and any award rendered by him would be *nonest*.

10. The Arbitrator is a creation of the statute/ the agreement entered into between the parties and is bound by the terms and conditions specified in the agreement. If the agreement specifies the period within which the award has to be passed, the Arbitrator is duty bound to comply with the same and he does not have the power or the mandate to extend the time *suo moto*. In **Housing and Urban Development Corporation Vs. DSA Engineers (Bombay) and others 2002 (1) Arb.LR 384 (Delhi)** it

has been held as under :-

“24. No party including the Arbitrator can be allowed to travel beyond the arena of the agreement as terms of the agreement have almost a statutory force and do not admit waiver or acquiescence or any of the terms either through the conduct of the party or conduct of the arbitrator in holding the proceedings. Not only the parties but the arbitrators are bound by the terms of the agreement. Conduct of the proceeding and parties and for that purpose of arbitrator by no stretch of imagination can render the terms of the agreement between the parties nugatory or tantologous.”

Reliance can also be placed upon the judgments rendered in **N.B.C.C. Ltd. Vs. J.G. Engineering Pvt. Ltd., 2010 (1) SCC (Civil) 416; Teltech Instrumentation Pvt. Ltd. Vs. Bharat Petroleum Corporation Ltd., 2012 (3) BCR 743; B.K. Gopakumar Vs. National Film Development Corporation Ltd 2011(1), BCR 12, M.D. Army Welfare Housing Organization Vs Sumangal Services Pvt. Ltd. 2003(4) RCR (Civil) 767.**

11. In **Shyam Telecom Ltd. vs Arm Ltd 2004 (3) ARBLR 146 (Delhi)** the High Court at Delhi while dealing in a similar situation held:

“15. In the opinion of this Court, the expression "de jure" is amply wide so as to cover a situation like the case in hand. This view is based on the settled legal position that Arbitration agreement is the fountain head of the Arbitrator's power and

authority and the parties as well as the Arbitrator are governed and controlled by the terms of the said Arbitration agreement. Unless parties agree to the contrary, the terms of Arbitration agreement must operate in full. The consequence of the Arbitrator not concluding the proceedings and rendering the Award within the period prescribed under the Arbitration agreement as in the present case would uncloth the Arbitrator of his legal authority to continue with the proceedings unless the parties agree to extend the period of making the Award or a party waives his right to such an objection. It must, therefore, be held that expiry of the prescribed period for making the Award, would render the Arbitrator 'de jure' unable to continue with the proceedings and has the effect of termination of the mandate of the Arbitrator within the meaning of [Section 14](#) of the Act.”

12. Moreover in the judgement rendered by Apex Court in **Oil & Natural Gas Corporation Limited Vs. SAW Pipes Limited, 2003 (5) SCC 705**, it has been held that the Court can set aside an Arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that *“If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.”*

13. In the instant case, the ex-parte award passed is clearly beyond the period as prescribed within the agreement and, therefore, any award passed would not be sustainable. Moreover there is nothing available on the record to suggest that the arbitrator had sought the consent of the parties to enlarge the time to make the award or that the time was enlarged. The arbitrator clearly could not go beyond the terms of condition 70 of the agreement or even the time as stipulated by the court. In fact, he was made aware by the contesting respondent to ensure that the award is passed his time to do so would expire on the 27.1.2002.

14. In view of the above, the appeal is allowed and award is set aside. However should the parties so choose to appoint an arbitrator they are at liberty to invoke the provisions of the Arbitration and Conciliation Act 1996.

Dated:08.04.2019.
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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned	Yes/No.
Whether reportable	Yes/No.