

Judgment

AP/482/2019

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

SENBO ENGINEERING LTD.

Versus

HOOGHLY RIVER BRIDGE COMMISSIONERS

.....

BEFORE:

The Hon'ble JUSTICE ARINDAM SINHA

Date:21.12.2020.

Appearance:

Mr. S. N. Mitra, Sr. Adv.

Ms. Suparna Mukherjee, Adv.

Mr. Arik Banerjee, Adv.

Mr. Niloy Sengupta, Adv.

Ms. Swati Agarwal, Adv.

..for petitioner.

Mr. Kishore Datta, Advocate General.

Mr. Jishnu Chowdhury, Adv.

Mr. Sarvapriya Mukherjee, Adv.

Mr. Sandip Dasgupta, Adv.

Mr. Ayan De, Adv.

..for respondent.

The Court :-The arbitration petition for extension of time has been heard. Petitioner is claimant in the reference and has petitioned for extension of time to conclude it. Mr. Datta, learned senior advocate, Advocate General appeared on behalf of respondent and argued, the petition is misconceived because section 29A in Arbitration and Conciliation Act, 1996 allows a once only approach to Court for the purpose.

Mr. Datta submitted, there is deliberate intention of Parliament, manifest by omission of the words "from time to time" in section 29A, used in section 28 of repealed Arbitration Act, 1940 regarding extension of time for making the award. Section 29A was inserted by amendment on

consideration of report of the Law Commission on Arbitration (Amendment) Bill, 2001. He referred to paragraphs 2.21.1, 2.21.4, 2.21.5, 2.42 and paragraph 27 in the report. He submitted, the recommendation also had the words but Parliament acted otherwise in omitting them. In that context he relied on following judgements on interpretation of statutes:

- i. **Sri Ram Saha vs. State of West Bengal** reported in **2004(11) SCC 497**, paragraphs 19 to 24;
- ii. **Abdur Rahim vs. Mahomed Barkat Ali** reported in **55 Indian Appeals 96**, page 103 for the passage quoted below:

"It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may be founded; but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended. For this reason it becomes necessary to consider how the

law stood prior to the enactment of s.92 of the Code of Civil Procedure of 1908."

- iii. **LMJ International Ltd. vs. Swiss Singapore Overseas Enterprises PTE Ltd.** reported in (2016) 4 CHN 486, page 4, which carries reference to five judgements of English Courts, Supreme Court and this Court.

On consequences of a reference becoming abortive after exhausting recourse to provisions in section 29A, his contention being that Court can only extend time once, he submitted, for thereafter resolution of the dispute, Court has to be moved. The litigant can avail of exclusion of time provided under section 14 in Limitation Act, 1963. This exclusion by the section has been expanded to apply to quasi judicial proceedings. He relied on judgments of Supreme Court.

- i. **Srei Infrastructure Finance Ltd. V. Tuff Drilling(P) Ltd.** reported in (2018) 11 SCC 470, paragraphs 13, 14 and 26 for arbitration reference being a quasi judicial proceeding;
- ii. **M.P. Steel Corporation V. Commissioner of Central Excise** reported in (2015) 7 SCC 58, paragraphs 1 to 3, 11, 21, 34 and 35 for declaration of law expanding application of section 14, Limitation Act, 1963 to beyond Courts; and

iii. **A.P. Power Coordination Committee V. Lanco Kondapalli Power Ltd.** reported in **(2016) 3 SCC 468** in following **M.P. Steel Corporation** (supra).

Mr. Mitra, learned senior advocate appeared on behalf of petitioner. On facts he referred to order dated 27th September, 2018, of this Bench, to demonstrate that thereby there was first extension of time for mandate. Subsequently by order dated 3rd January, 2019, passed by coordinate Bench, there was second extension of time for mandate. That such was extension stands admitted by respondent in paragraph 16 of their affidavit in opposition affirmed on 3rd September, 2019. There is clear averment that order dated 3rd January, 2019, was passed under section 29A(6). Respondent's submission, thereafter in 66th sitting of the reference, was recorded as follows:-

"After withdrawal of the cease work call, the next hearing was held on June 15, 2019 when it was submitted on behalf of the Respondent that going by the order of the Hon'ble High Court the time to conclude the hearing within four months had expired. Hence, the parties should go before the High Court for further extension of time."

As such, respondent now cannot obstruct there being extension of time to conclude the reference.

He then drew attention to provisions in the Act of 1996, regarding interference by Court. Section 5 limits extent of

judicial intervention as confined to, intervention where provided in part one. Section 34, dealing with setting aside of award, has in it sub-section (3) limiting time, in which Court can entertain an application, being three months and thirty days but not thereafter. Section 37 limits orders, from which appeal would lie. He submitted, there is no limit, on approach to Court, provided in section 29A.

On cases cited by respondent he submitted, **order dated 31st July, 2019 in AP 337 of 2019 (Hindustan Construction Co. Ltd. versus Kolkata Metropolitan Development Authority)** was brought to notice of respondent by Court but was not distinguished, as not applicable to its contention. He submitted further, view taken therein has not been interfered with till date.

He then referred to **Sri Ram Saha** (supra), to paragraph 24. He submitted, the Supreme Court found that the High Court had expanded scope and application of section 4A in West Bengal Land Reforms Act, 1955. In entertaining repeated plea for extension of time the High Court would not be expanding scope or application of section 29A. He reiterated, there is no limitation in the provision akin to those provided in sections 5, 34 and 37 of the Act of 1996. On **Abdur Rahim** (supra) he submitted, section 29A was incorporated by amendment. The decision would not apply to it inasmuch as this was not amendment made of an existing

provision, to cause substantial change to it. The provision is a subsequent incorporation by amendment and as such the decision does not go in aid of respondent's contention.

Mr. Mitra drew attention to report of the Law Commission, in particular paragraphs 2.21.4 and 2.21.5. Recommendation was that it be left to Court to fix upper limit regarding the time of extension, in context of situation contemplated, of whether the extension should be capped at 24 months or allowed to be more. It was reported that proposal was to see that an arbitral award is ultimately passed even if the delays have taken place. Mr. Mitra also submitted, section 14 in Limitation Act, 1963 is not applicable for the purpose of parties being compelled to approach Court on termination of mandate since the reference could not be said to have proceeded before the Tribunal, on it having suffered from defect of jurisdiction or other cause of a like nature.

Mr. Datta, with reference to sub-section (1) in section 14 of the Limitation Act, emphasized on three phrases in the sub-section, being 'civil proceeding', 'Court of first instance' and 'defect jurisdiction or other cause of a like nature'. According to him, Arbitral Tribunal would be included in 'Court of first instance', subject matter of the reference being indisputably 'civil proceeding'. When, Arbitral Tribunal loses its mandate, on exhausting time provided under the Act, at the first

instance and on extension by the one approach to Court, the phrase 'defect of jurisdiction' becomes applicable to it and the civil proceeding thereafter cannot be prosecuted before the Tribunal. He relied on judgements of the Supreme Court.

(i) **P. Sarathy Vs. State Bank of India** reported in **(2000)5 SCC 355**, paragraphs 8 to 15.

(ii) **Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation** reported in **(2009) 8 SCC 646** paragraphs 86 and 89.

With regard to his client's conduct in the reference regarding record of submission made on its behalf, he submitted that without going into correctness of it, same cannot be construed as consent or even if it is, it cannot confer jurisdiction to this Court to entertain repetitive petition for extension of time.

In dealing with the judgements noted in last preceding paragraph, Mr. Mitra relied on judgement of the Supreme Court in **Md, Army Welfare Housing Organisation vs Sumangal Services (P) Ltd.** reported in **(2004) 9 SCC 619**, paragraph 43 for said Court's view on Arbitral Tribunal not being Court. The paragraph is extracted below:-

"43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the

being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

He concluded by pointing out that in **Nahar Industrial Enterprises Ltd.** (supra), the Supreme Court said following in paragraph 67, extracted below:-

"67. The terms "tribunal", "court" and the "civil court" have been used in the Code differently. All "courts" are "tribunals" but all "tribunals" are not "courts". Similarly all "civil courts" are "courts" but all "courts" are not "civil courts." It is not much in dispute that the broad distinction between a "court" and a "tribunal" is whereas the decision of the "court" is final the decision of the "tribunal" may not be. The "tribunal", however, which is authorised to take evidence of witnesses would ordinarily be held to be a "court" within the meaning of Section 3 of the Evidence Act, 1872. It includes not only Judges and Magistrates but also persons, except arbitrators, legally authorised to take evidence. It is an inclusive definition. There may be other forums which would also come within the purview of the said definition."

This petition with prayer for extension of time to conclude the reference is not the first approach to Court.

Hence, requirement for adjudication of respondent's contention. Similar contention was raised before this Bench in **AP 337 of 2019 (Hindustan Construction Company Ltd. vs. Kolkata Metropolitan Development Authority)**, dealt with by **order dated 31st July, 2019**. During course of hearing, on recollection of having taken a view therein, same was brought to notice of respondent. Petitioner relied on it. The view expressed is reproduced below:

"It is clear that intention of Legislature in inserting this provision regarding time limit for arbitral award is with object of expeditious resolution of disputes. Where there is arbitration agreement between parties, their disputes must be addressed and adjudicated by reference. Interference of Court is limited. That means the disputes cannot be adjudicated by Court. Therefore, if in a situation mandate of a Tribunal is terminated by expiry of the period, what will happen to adjudication of the disputes? Respondent in contending Court can extend only once, this being prayer for second extension by Court, cannot ask for recourse to sub-section (6), which provides for substitute arbitrator being appointed, to

continue with the reference. On considering stage of proceedings and conduct of it on pleadings submissions, Court is not convinced recourse to sub-section (6) is to be had. Mr. Mitra's argument is also of substance since, if Court extends the time by substituting arbitrator, it can do so on a finding in terms of proviso under sub-section (4). As such, Court is convinced its discretion is not circumscribed to be exercised only once in the matter of extending the time."

So it was that respondent submitted regarding subsequent step to obtain remedy of adjudication from Court, upon getting excluded time spent in the reference.

The Act of 1996, on enactment, did not have provision limiting time for arbitral award. Section 29A was incorporated by amendment. The provision requires award to be made within 12 months from the date the Arbitral Tribunal enters upon the reference. 6 months extension of the period can be had on consent of parties, after which mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after expiry of the period, extended it. The extension by Court may be on the application of any of the parties. The ground may be only for sufficient cause and on such terms and conditions as may be imposed by the Court.

The power of Court to grant extension of time is attended by several other things that Court can do in the matter. Proviso in sub-section (4) says that while extending the period, if Court finds the proceedings have been delayed for reasons attributable to the Tribunal, then it may order reduction of fees of arbitrator(s) by not exceeding 5 per cent for each month of such delay. On approach to Court, either upon expiry of the 12 months period or said period extended by further 6 months on consent of parties, a finding on delay caused in aforesaid periods is possible. This indicates it to be a first step in regulating procedure adopted by the Tribunal dealing with the reference in the prescribed time period. Then there is provided in sub-section (6) that it shall be open to the Court to substitute one or all of the arbitrator(s) and sub-section (8) provides that it shall be open to the Court to impose actual or exemplary cost upon any of the parties, under the section.

Whether extension of time to conclude the reference can be had from Court on a once only approach can be answered by analyzing provisions in the section. Provision for Court's attendant powers, to reduce fees of arbitrator(s) or substitute them, have been made by successive separate sub-sections. The incorporated sub-section (1) said, the period of 12 months commences from

the date the arbitral Tribunal enters upon the reference. By the newly substituted sub-section, the commencement date was pushed back to be date of completion of pleadings under sub-section (4) of section 23, brought in by amendment of 2019. Also by amendments of 2019 was incorporated, inter alia, the proviso in sub-section (4). Further included incorporated proviso under sub-section(4) mandates for the arbitrator to be given opportunity of being heard before the fees is reduced, obviously indicating that an enquiry on causes of delay may result in finding that the delay was not caused by the Tribunal. Amendments of 2019, to the section, are with effect from 30th August, 2019. This petition was filed on 24th July, 2019. Even adjudicating the question raised in the petition on basis of amendments of 2015, view taken by this Bench in **Hindustan Construction Company Ltd.** (supra) appears to find support from the Legislature's manifest intention, for the reference being concluded.

Sri Ram Saha (supra) was relied upon by Mr. Datta on submission that phrase 'time to time' stands omitted from the provisions in section 29A, which phrase cannot be imparted into it by analogy, on supplying the omission of engrafting on it or introducing in it, under the guise of interpretation. To do so would be entrenching upon the preserves of the Legislature. The

Supreme Court, in dealing with a case where the High Court had extended scope of application of section 4A in West Bengal Land Reforms Act, 1955 to areas in State of West Bengal other than the specified area, being three subdivisions of Darjeeling district, had referred to its this earlier decision. Also in the context **Abdur Rahim** (supra) was relied upon for that when it is contended the Legislature intended, by any particular amendment, to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment, to see whether the words used in the statute can be taken to effect the change that is suggested as intended. These guides of interpretation cannot be employed in aid of respondent's contention. Substantial change in arbitration law was brought about by the Act of 1996. Arbitration Act, 1940 had section 28 providing for extension of time to conclude the reference, as could be made by Court from 'time to time'. The 1996 Act did not have in it a provision for extension of time to conclude the reference. Interpretation on this can well be that the Legislature thought fit to do away with procedure of repeated approach to Court for extension of time, to leave the Tribunal to conclude the reference without limitation of period, in which to do it. Instead, the omission would

have to be taken into consideration for purpose of interpreting section 29A, later incorporated by amendment of 2015 with further amendments made to it. Such consideration does not lead to conclusion that approach to Court for extension of time can be only once.

Consequent upon view taken above, the other legal issues of, 'defect of jurisdiction or like nature' or whether 'Arbitrator' is 'Court' are not required to be answered.

There will be extension of time to conclude the reference. The extension will be up to 30th June, 2021. As parties did not invite Court to adjudicate on causes of delay, no direction is being made in respect thereof.

The petition is allowed as above.

(ARINDAM SINHA, J.)