

ORDER SHEET

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

AP/632/2022

ADITYA BIRLA FINANCE LTD
-VS-
MCNALLY BHARAT ENGINEERING CO LTD AND ORS

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: April 28, 2023.

Appearance:

Mr. Rohit Das, Adv.
Mr. Dwaipayan Basu Mallick, Adv.
Mrs. Suchismita Ghosh Chatterjee, Adv.
Mr. Abhishek Kisku, Adv.
Mr. Pranshu Paul, Adv.
Mr. Subhankar Das, Adv.
...for the petitioner

Mrs. Pubali Sinha Chowdhury, Adv.
Mr. A. Kothari, Adv.
...for the respondent nos. 2 & 4 to 8

The Court: Affidavit-of-service filed in Court is taken on record.

None appears on behalf of the respondent nos. 1 and 3.

AP/632/2022 is an application for extension of the period of time for completion of the arbitration by the learned Arbitral Tribunal.

The mandate of the learned arbitrator expired on September 1, 2022.

Learned advocate for the respondent nos. 2 and 4 to 8 opposes such prayer and submits that as talks of compromise are going on, the application should not be taken up. Learned advocate further submits that a proceeding had been initiated for termination of the mandate of the learned

Arbitrator under Section 14 of the Arbitration and Conciliation Act, 1996. Such application was rejected and some of the respondents are planning to prefer an appeal therefrom.

The submissions of learned advocate for the respondents appear to be mutually destructive. If talks of compromise are going on, the question of preferring an appeal by challenging the order passed by the Co-ordinate Bench, would not arise.

In any event, the issue as to whether some of the respondents would prefer an appeal challenging the order of the Co-ordinate Bench or compromise the matter, is beyond the scope of this application.

The claimant appointed an Arbitrator in terms of the arbitration agreement. During the pendency of the proceeding, the mandate of the learned arbitrator expired. Consequently, the application has been filed for extension of time for completion of the arbitration proceeding. Such application is allowed.

However, the contention of the respondents is taken note of. In the event of any compromise or in the event any further orders are passed in any appeal or by any competent court, the respondents will be at liberty to approach the learned Arbitrator for appropriate orders.

As this is simplicitor an application for extension of time to enable the learned Arbitrator to complete the arbitration proceedings, this Court finds that there is no reason to protract the matter by passing a direction for affidavit-in-opposition as the allegation of the respondent nos.2 and 4 to 8 against the arbitration proceedings has been put to rest by the judgment and order passed by a Co-ordinate Bench in AP/106/2020. The said judgment is a matter of record.

The relevant portion of the judgment of the Co-ordinate Bench is quoted below:

“57. The present case is of a unilateral appointment which is factually distinguishable (as in the decisions cited) from an arbitrator whose eligibility is compromised by any one or more of the Entries in the Seventh Schedule. There is an obvious difference - and so the decisions say - between an arbitrator who is disqualified under the Seventh Schedule and an arbitrator who himself is a party to the dispute. The two situations are different in fact, in logic as also in the decisions shown to the Court. The arbitration clause in the present case belongs to the first category since the Arbitrator was appointed by the respondent no. 1.

58. The petitioner filed an application under section 13 of the Act challenging the Arbitrator's appointment on 11.2.2020 which is 10 months after the dispute had arisen between the parties and 7 months after the petitioner had obtained consent orders pursuant to Statement of Defence/affidavit filed by it. The petitioner sought for a fresh disclosure from the Arbitrator despite being fully aware that the Arbitrator had made such disclosure much earlier on 12.5.2019.

59. The petitioner bombarded the arbitration with multiple applications filed before different forums: a) the section 13 application before the Arbitrator; b) an application under section 14 for termination of the Arbitrator's mandate; c) a section 34 application for setting aside the Award passed by the Arbitrator on 30.6.2020 and d) an SLP before the Supreme Court challenging the order of the High Court dated 4.8.2020 whereby the petitioner was directed to secure an additional amount of Rs. 40 crores. The petitioner did not secure this amount and filed the SLP. The petitioner however withdrew the SLP after 2 years on 2.5.2022 without complying with the order of the High Court with regard to furnishing of security.

60. It is also significant to note that the petitioner raised an issue of bias against the Arbitrator without waiting for the Arbitrator to decide on the application filed under section 13 of the Act (challenging the appointment of the Arbitrator) and without waiting for the respondent no. 1 to file their response to the application.

61. The petitioner has obtained the benefit of the consent orders dated 15.7.2019 based on the statements made by the petitioner in the Statement of Defence/affidavit whereby the respondent no. 1 had given up the security prevailing at the time. The petitioner therefore persuaded the respondent no. 1 to alter its position and obtained consent orders while failing to comply with the directions passed by the High Court on furnishing of security.

62. The petitioners' actions amount to a clear and unambiguous agreement, express and in writing, under the proviso to section 12(5). Any other construction would encourage a context-aborrent construction of the Act of 1996.

IV. Finally and for the above reasons;

63. Section 14 of the Act provides for two instances whereby the mandate of an arbitrator shall terminate. The dispute is not with regard to the Arbitrator withdrawing from his office or the parties before the Court agreeing to the termination of his mandate or the Arbitrator acting with undue delay. The controversy is whether the Arbitrator has become de jure or de facto unable to perform his functions by reason of the statutory bar under section 12(5) of the Act.

64. After discussing the import of section 12(5) read with the proviso, this Court finds and accordingly holds that section 12(5) is not applicable to this case since the alleged disqualification does not breach any one or more of the conflict-protections in the Entries of the Seventh Schedule. Even if it is assumed that the Arbitrator became ineligible by reason of the

Seventh Schedule, the petitioners waived such disqualification by their express writings, conduct and agreement as envisaged under the proviso to section 12(5) of the Act.

65. Therefore, there is no material disclosed in the petition for terminating the mandate of the Arbitrator. The law does not support the petitioners' case.

66. AP 106 of 2020 is accordingly dismissed without any order as to costs."

Under such circumstances, there are no grounds for not allowing the prayer for extension of time to enable the learned arbitrator to complete the proceeding and publish the award. The prayer for termination of the mandate has been disallowed by a competent forum.

The Court directs that the learned Arbitrator shall complete the entire proceeding and publish the Award in accordance with law, within a period of six months from the date of communication of this order.

The application is disposed of.

All the parties are directed to act on the basis of the server copy of this order.

(SHAMPA SARKAR, J.)