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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.125 OF 2023

Mahaveer Realities & Ors.

...Petitioners

Versus

Shirish J. Shah

...Respondent

Mr. G.R. Agrawal with Mr. Ajinkya Udane and N.P Boraste for the
Petitioners.

Dr. Abhinav Chandrachud, Mr. Saurish Shetye and Prem Pandey for
the Respondent.

CORAM : R.I. CHAGLA J.
DATE : 21 JULY 2023.

ORDER :

1. By this Petition, the Petitioner is seeking the extension of
the time limit for passing of the arbitral award as provided under
Section 29A(1) (2) read with the provisions of Section 29 (4) and (5)
of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act")
for a period of six months / one year or for such period as deemed fit
in the interest of justice.

2. The learned Counsel for the Petitioner has taken this Court through the proceedings before the Arbitrator who had been appointed pursuant to order dated 19th September, 2018 passed by this Court. The first meeting was commenced by the Arbitrator on 29th September, 2018 and the Arbitrator had laid down the entire schedule of the proceedings in the Minutes. As per the schedule, the arbitral proceedings were for a period of 12 months with pronouncement of award on 30th September, 2019. As per the Minutes, the fees of the Arbitrator was fixed and the venue was to be communicated by the Arbitrator.

3. Thereafter, the Arbitrator held several meetings. It is necessary to note is that by a Joint Pursis dated 19th August, 2019, i.e. prior to the 12 month period expiring from appointment of the Arbitrator, the Claimant as well as the Respondent declared the extension of time and /or continuation of the Arbitral proceedings beyond the period of 12 months and which shall not be a ground of challenge. The parties endeavoured to complete the arbitral proceedings during the extension which as per the Section 29A (3) of the Arbitration Act would be for a further period not exceeding six months.

4. In view of the Joint Pursis filed by the parties, the completion of the Arbitral proceedings were to be by 17th June, 2020. However, it is further necessary to note that by an order passed by this Court on 11th December, 2020, this Court had extended the time for completion of the Arbitral proceedings till 31st March, 2020 as an exceptional case owing to the fact that the Covid 19 pandemic was prevailing at that time and liberty was granted to the Petitioner to seek further extension, if the arbitral proceedings could not be completed in that time.

5. The learned Counsel for the parties have agreed that taking into account the Covid 19 pandemic and the order of the Supreme Court in Re: Cognizance for extension of limitation order dated 10th January, 2022, the six month extension of mandate of the Arbitration would expire in May, 2022.

6. It is the contention of the learned Counsel for the Petitioner that after the six month extension period had expired, the proceedings were continued by the Arbitrator and a preliminary award was passed by the Arbitrator on 15th September, 2022. A perusal of the preliminary award would show that the Claim was

allowed and the Counter Claim dismissed with costs. The Arbitrator thereafter appointed a Chartered Accountant as Commissioner who was directed to take up accounts of the Partnership Firm in order to finally determine the assets and liabilities of the firm and ascertain the profits / losses, if any, and to further determine the receivables / liabilities of all the partners of the Firm. Directions were issued to both parties to render true and correct accounts of the firm to the Commissioner and supply copies of respective evidence of books of accounts filed on record in the present proceedings. Further, directions in preliminary award dated 15th September, 2022 were issued in so far as the Commissioner was concerned as to his fees and filling of report.

7. The learned Counsel for the Petitioner has submitted that thereafter, the Respondent had challenged the preliminary award before the District Judge - 2, Pune. An Order below Exhibit 5 came to be passed by the District Judge -2, Pune which rejected the stay Application of the preliminary award. He has submitted that in view of the proceedings having taken place after the mandate of the Arbitrator expired, these proceedings would require to be taken into account in considering the present Application for extension of time

limit for passing of the Arbitral Award. In the event this Court extends the mandate of the arbitration, the substituted arbitrator be directed to continue the proceedings from where it was left by the present Arbitrator.

8. The learned Counsel for the Petitioner has relied upon authorities in support of his contention that under Section 4 of the Arbitration Act, there is a waiver provided and the party to the Agreement who knowing that any requirement under the Arbitration Agreement or as any provision of part 1 of the Arbitration Act from which parties may derogate has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance shall be deemed to have waived his right to so object. He has submitted that under Section 29A, there is a time limit for the arbitral award. However, upon expiry thereof, if the party does not state his objection to the continuation of the arbitral proceedings after the expiry thereof, the party shall be deemed to have waived his right to so object.

9. The learned Counsel for the Petitioner has in this context relied upon the decision of the Supreme Court in *Union of India Vs,*

*Pam Development Private Ltd.*¹ wherein in the facts of that case, though the competence / jurisdiction of the Arbitral Tribunal was challenged in the Petition as a Sole Arbitrator had been appointed despite the Agreement providing for an Arbitral Tribunal of three Arbitrators, this objection had not been raised before the Arbitral Tribunal. Hence, the objection was held to be deemed to have been waived. He had also relied upon the decision of this Court in *Jayesh H. Pandya & Anr. Vs. Subhtex India Ltd. & Ors.*² However, he has upon being apprised of the fact that this order has been set aside by the Supreme Court in *Jayesh H. Pandya & Anr. Vs. Subhtex India Ltd. & Ors.*³ has not pressed this decision in support of his submissions.

10. The learned Counsel for the Petitioner has also relied upon the decision of this Court in *Union of India Vs. Ms. Maa Agency & Anr.*⁴, wherein this Court had held that a challenge on ground of patent lack of jurisdiction of Arbitral Tribunal cannot be taken up in Section 34 of the Arbitration Act when the Petitioner knowing the said objection proceeded with arbitration without stating his objection before the Arbitral Tribunal and thus would be

¹ (2014) 11 Supreme Court Cases 366.

² 2008 (5) Mh.L.J. 749.

³ (2020) 17 SCC 383.

⁴ 2003 (2) ALL MR 1003

deemed to have waived his right to so object. The learned Counsel for the Petitioner has accordingly submitted that in the present case, the parties to the arbitral proceedings knowingly proceeded before the Arbitrator even after the expiry of his mandate and thus would be deemed to have waived their right to object to the continuation of the proceedings after expiry of the mandate.

11. Dr. Abhinav Chandrachud the learned Counsel for the Respondent has submitted that under Section 29A (1) of the Arbitration Act, it is provided that the award in matters other than international commercial arbitration shall be made by the Arbitral Tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23. Further, the parties may under Sub Section 3 of 29A of the Arbitration Act, extend the period specified in sub-section (1) for making the award for a further period not exceeding six months. He has submitted that this statutory provision cannot be waived by the parties under Section 4 of the Arbitration Act.

12. Dr. Abhinav Chandrachud has submitted that in the present case, this Court by order dated 11th December, 2020 had

extended the mandate of the arbitration in exceptional circumstances until 31st March, 2022. Liberty was granted to the Petitioner to seek a further extension if the arbitration agreement cannot be completed in that time. However, this would necessarily require an application to be made to this Court as has been done by way of the present Application. He has referred to the Order of the Supreme Court which provided for extension of period of limitation till 28th February, 2022, in view of the Covid 19 Pandemic. He has further submitted that the Joint Pursis filed by the parties sought extension of the mandate of the Arbitrator beyond the period of twelve months but which period could in any event not extend beyond six months as per Sub Section 3 of 29A of the Act. However, in view of the said Supreme Court Order passed the extension of mandate expired in May, 2022. He has submitted that inspite of expiry of the mandate, arbitral proceedings continued.

13. Dr Abhinav Chandrachud has further submitted that though the Respondent participated during the proceedings continued by the learned Arbitrator, even after his mandate expired cannot amount to a waiver under Section 4 of the Arbitration Act. This would also apply to the Respondent's challenge to the

preliminary Award after the expiry of the mandate. Although the Award was termed as Preliminary, infact the Arbitrator allowed the entire claim of the Petitioner and set aside the counter claim of the Respondent and the directions contained therein are by way of execution of the Award. Dr. Abhinav Chandrachud has referred to the Minutes of the arbitral proceedings and has submitted that initially the Arbitrator was reluctant to provide copies of the said Minutes though being apprised of the fact that the Arbitration Petition had been filed under Section 29A of the Arbitration Act by the Petitioner for extension of the mandate and it is only upon judicial intervention by order dated 27th April, 2023 and the Petitioner being directed to provide the Minutes, that the Minutes were finally provided to the Respondent. He has submitted that from the said Minutes, the sole purpose for continuation of the arbitral proceedings by the Arbitrator is to serve his own interest and not consider the interest of the parties to the arbitral proceedings. He has submitted that the Respondent has lost all faith in the Arbitrator and that in the event this Court extends the mandate of the arbitration, a substituted arbitrator may be appointed.

14. Having considered the submissions, in my view, it is clear

from Section 29A sub Section 1 read with sub section 3 of the Arbitration Act, that the award is required to be made by the Arbitrator within a period of 12 months from the date of completion of pleadings and that the parties may by consent extend the period specified under Sub Section 1 for making award for a further period not exceeding six months. Thus, there can be no further extension of the mandate of the arbitrator beyond a period of six months from the expiry of one year for the passing of the award. Further, this provision is not derogable and hence Section 4 of the Arbitration Act has no application.

15. The decisions relied upon on behalf of the Petitioner are inapplicable. In facts of those cases, the Courts held that there was a waiver of the arbitration agreement and not of a statutory provision which is non derogable. Further, the decision initially relied upon on behalf of the Petitioner, namely the decision of this Court in ***Jayesh Pandya (Supra)*** has been set aside by the Supreme Court in the Appeal filed therefrom. The Supreme Court has held that the essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice

between the relinquishment and an enforcement of the right in question. It cannot be held that there has been waiver of valuable rights where the circumstances show that what was done was involuntary. The parties have to stand by the terms of contract including the arbitrator.

16. Having considered the said decision of the Supreme Court, it is clear that the Respondent had no choice but to participate in the arbitral proceedings which were continued by the Arbitrator. Thus, this cannot be considered to be a voluntary choice of continuation of the mandate of the Arbitrator. The proceedings after expiry of termination of mandate would be contrary to Section 29A of the Act and though there has been a Preliminary Award as well as a challenge to the Preliminary Award in the District Court, Pune that cannot be taken into account or considered to be a waiver of the non-derogable statutory provision. The mandate of the Arbitrator came to an end in May, 2022 by taking into account the Joint Pursis of the parties extending the mandate for a period of six months and the order of the Supreme Court in the Re: Cognizance for extension of limitation which had further extended the mandate. Thus, the further extension of mandate by this Court can only be from June, 2022. The

extension of mandate by this Court vide order dated 11th December, 2020 was till 31st March, 2022 and that considering the parties are ad idem that a substituted arbitrator be appointed, it would be appropriate to appoint a substituted arbitrator, by further extending the mandate.

17. In view thereof, the following order is passed:-

(i) The time limit for final arguments and passing of the arbitral award as provided in Section 29 A (1), (2) read with the Section 29A (4) and (5) of the Arbitration Act is extended by a period of six months from the date of this Order.

(ii) It is clarified that the proceedings will continue from the expiry of mandate of the erstwhile Arbitrator i.e. from June, 2022. The proceedings carried on by the erstwhile Arbitrator after the expiry of the mandate shall be disregarded by the Arbitrator appointed by this Order.

(iii) Yuvraj P. Narvankar is appointed as a Sole Arbitrator to decide the disputes between the parties.

- (iv) The venue of arbitration shall be in Pune.
- (v) Office to inform the Sole Arbitrator regarding his appointment.
- (vi) The Sole Arbitrator is requested to file his Disclosure Affidavit of Arbitration under Section 11(8)(i) of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of receipt of the notice issued by the Registrar Judicial-I and provide copies to the parties.
- (vii) Parties to appear before the Sole Arbitrator on the date fixed.
- (viii) Fees of the Sole Arbitrator will be payable in accordance with the Bombay High Court (O.S.) Rules, 2018.
- (ix) Arbitration Petition is disposed of in the above terms.
- (x) No order as to costs.

[R.I. CHAGLA J.]