

rajshree

Digitally
signed by
RAJSHREE
KISHOR
MORE
Date:
2023.07.17
14:42:13
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.472 OF 2021

Sheil Properties Private Limited] .. Petitioner
vs.
Dani Wooltex Corporation & Ors.] .. Respondents

Mr.T.N. Subramanian, Senior Advocate a/w Rubin Vakil, Sahil Gandhi, Nupur Desai, Sharvari Joshi i/b M/s.Markand Gandhi & Co. for the Petitioner.

Mr.Aspi Chinoy, Senior Advocate with Mr.Sharan Jagtiani, Senior Advocate a/w Gaurav Mehta, Trupti Shetty, Vikrant Shetty and Kush Shah i/b Dhruve Liladhar & Co. for Respondent Nos.1, 1(a) to 1(e).

CORAM : BHARATI DANGRE, J

DATE : 03th July, 2023.

JUDGMENT :

1] The Arbitration Petition filed under Section 14 of the Arbitration and Conciliation Act, 1996, seek relief of setting aside the impugned order passed by the Arbitrator on 01.12.2020, thereby, allowing the Application filed by the Respondent under Section 32(2)(c) of the Act of 1996 and terminating the arbitral proceedings by concluding that it is unnecessary and impossible to continue the same.

2] Heard the learned senior counsel Mr.Subramanian for the Petitioner and learned senior counsel Mr.Aspi Chinoy alongwith senior counsel Mr.Sharan Jagtiani, for the Respondent.

Before I come to the impugned order, it would be necessary for me to glean the facts from the Petition, giving rise to an Application preferred by the Respondent before the Arbitrator, which prompted him to pass the impugned order, terminating the arbitral proceedings.

3] The Petitioner, Sheil Properties Private Limited (hereinafter referred to as 'Sheil'), a Private Limited Company incorporated under the Companies Act is engaged in real estate development, focusing on construction and development of residential and commercial projects.

Respondent No.1, Dani Wooltex Corporation (hereinafter referred to as 'Wooltex') is a Partnership Firm with Respondent Nos. 2 to 5 being its partners, who are the owners of land in village Kole Kalyan, Taluka Andheri, Mumbai, whereas, Respondent No.6 is a company engaged in the business of fast moving consuming goods

Respondent No.1 Dani Wooltex Corporation, is entitled to four parcels of land situated at village Kole Kalyan, Taluka Andheri, Mumbai Suburban, admeasuring 17,568.3 sq. mtr. of land under the Development Agreement executed on 11.08.1993. Sheil was permitted to develop 35000 sq. ft on Plot A and B as indicated in the plan annexed to the Development Agreement. In pursuance thereof, Sheil constructed a building of 31519 sq. ft on plot A.

Somewhere in the year 2004 the Respondent No.6 Marico approached Wooltex to acquire a portion of larger property to construct an office building and this resulted in a Memorandum of Understanding (MOU) executed between Wooltex and Marico, where the former agreed to sale to the later, a plot of land 3,773,24 sq. mtr. located in south east corner of larger property to enable them to construct a building with total FSI/TDR 69,128.56 sq.ft.

After executing the MOU, Marico issued a public notice inviting objections and Sheil raised an objection to the MoU, by asserting that since Sheil was developing a portion of the said larger property by utilizing the FSI /TDR as per the Agreement entered with Respondent No.1 and as such any proposed transaction by Marico with Respondent no.1 in respect of the larger property, would be subject to the rights of Sheil, as set out in the Agreement entered between them on 11.08.1993.

In or around March, 2006, Sheil decided to construct one building on portion of plot B and entered into an agreement appointing a co-developer for the purpose of undertaking the development.

Since Sheil had raised an objection to the notice by Marico, all the three parties concerned came together and mutual understanding was arrived between them, where it was agreed that the larger land shall be divided into 7 portions and as per the proposal it was agreed that Sheil would carryout further construction on Plot E and I instead of plot B by utilizing total FSI not exceeding 45090.87 sq. ft, which would include the balance FSI available under the Development Agreement as well as TDR to the maximum extended to 35000 sq. ft as well as FSI and TDR on plot H.

In the wake of the consensus between the parties, it is the claim of Sheil that its right was neither diluted nor any additional right was created, but the land on which the balance FSI/TDR was made available in terms of Agreement dated 11.08.1993 and FSI of the Sheil's Plot to be utilized, was agreed to be used in Plot E and I, instead of Plot H.

4] It is the case of Sheil that it agreed to convey and/or transfer Plot H to Respondent No.1 against Plot E and I.

The above understanding was reduced into writing in form of “Consent Terms” and the parties agreed to exchange/transfer portions of the larger property for development on consideration and on terms set out therein.

Sheil make a grievance that despite repeated requests and reminders, no steps were taken to carry out its obligations in terms of the Agreement executed in its favour, which stood modified by the Consent Terms entered between the parties.

This constrained Sheil to institute Suit No.2541/2006 for specific performance of the Agreement modified by the Consent Terms arrived between the parties.

Even Respondent No.6 filed a Suit before this Court being Suit No.2116/2011 against Wooltex, in which even the Petitioner was impleaded as Defendant. Respondent No.6 also took out a Notice of Motion seeking ad-interim reliefs.

5] During the course of hearing of the Notice of Motion, once again a consensus was arrived between the trio, to refer all their disputes and differences which were staked in two distinct suits, before the Arbitrator, as a consequence of which, both the Suits filed by Sheil and Respondent No.6 came to be disposed off, by referring the parties to a Sole Arbitrator.

6] While disposing off the Suit filed by the Sheil, the Court on 17.11.2011 permitted it to prefer an Application under Section 17 of the Act of 1966, seeking interim measures.

On 08.11.2011 a preliminary meeting was held before the Arbitrator and timeline for filing of Statement of Claim (SOC) and reply to the same was set out.

Sheil who was impleaded as Respondent No.2, was also permitted to file its Statement of Claim (SOC) and the parties were permitted to file their reply to the Statement of Claim, within a time bound manner. Even Respondent No.1 was directed to complete their pleadings within a period of 4 weeks and within a period of 2 weeks thereafter, it was directed that the parties shall file their written arguments/opening statements and the Arbitrator declared, that further directions will be given thereafter.

7] The arbitration proceeded ahead in respect of two claims, one filed by Marico against Wooltex and another filed by Sheil against Wooltex.

Sheil filed its claim on 24.01.2012, alongwith an Application under Section 17 of the Act of 1966. Respondent Nos.1 and 6 filed their statement of defence in the claim of Sheil.

It is pertinent to note that Sheil, in its claim sought a declaration that the Agreement dated 11.08.1993 as modified by the Consent Terms is valid, subsisting and binding on the parties and a direction was sought to the Respondents, to specifically perform the said Agreement as modified by the Consent Terms.

On the other hand, Respondent No.6, Marico sought an Award declaring that the Agreement as set out in the Memorandum of Understanding executed with Wooltex as modified by the Consent Terms, is valid, subsisting and binding and Respondents shall be directed to specifically perform the terms of the Agreement as modified by the Consent Terms and execute all necessary writings as required for performing the Agreement, set out in the Memorandum of Understanding alongwith the Consent Terms.

I need not exhaustively deal with the claims and defence set out by the respective parties before the Arbitrator and the narration can be completed by stating that arbitration proceedings filed by Marico were taken ahead as it is evident from the Minutes of Order dated 02.04.2012, 09.07.2012, 18.12.2012, 09.04.2013 and 20.06.2013.

Ultimately the claim filed by Respondent No.6, Marico before the Arbitrator resulted in passing of an Award on 06.05.2017, where the Sole Arbitrator held that the Consent Terms between the parties were not valid and binding and hence the relief of specific performance of the MoU as sought by Marico which is modified by Consent Terms, was declined. The Arbitrator though allowed part of the claim by granting relief of specific performance of the MoU.

8] By this time, the proceedings before the Arbitrator in the claim filed by Sheil remained dormant and did not progress further and there are two versions for the same, as according to the learned senior counsel Mr. Subramanian, the Arbitrator did not take it further, as there was understanding that, after Marico's claim is decided, its claim would be taken up for consideration, whereas as per Mr.Chinoy, never such an understanding was reached between the parties, as sought to be projected and according to him, to the contrary, Sheil itself chose to remain dormant and did not take any steps, all the while when Marico's claim was being proceeded and even after the Award was passed by the Arbitrator in Marico's claim on 06.05.2017, it failed to take an aggressive steps, by either challenging the Award which ultimately even impacted it, nor were any steps taken to take his claim ahead.

9] This quiescent approach on the part of Sheil resulted in the Respondent No.1 addressing communication to the Tribunal on

25.11.2019 and subsequently on 07.01.2020 requesting the Tribunal to dismiss the claim on the ground that 'Sheil' had abandoned the arbitration.

In response, the Tribunal fixed a meeting on 11.03.2020 and it is the version of Sheil that it became aware of the said meeting after it was held and it is evident from the minutes of the meeting, which recorded its absence. The minutes also recorded that the proceedings are now scheduled before the Arbitrator on 18.03.2020.

Since pandemic grappled the whole nation, and nothing moved ahead, the meeting could be held only on 12.08.2020, when the Tribunal directed Wooltex, to file a formal application and also granted time to Sheil to file its reply and scheduled the application for hearing on 09.09.2020.

As directed, Wooltex, filed an Application on 27.08.2020 seeking dismissal of claim of Sheil and termination of proceedings under Section 32(2)(c) of the Act of 1996, on the ground that it is no longer necessary to continue the proceedings.

10] The Application filed by Wooltex proceeded on a footing that Sheil has abandoned its claim by taking no steps for last 8 years, after filing of its Statement of Claim in the proceedings before the Arbitrator. It was also premised on the ground that no steps were taken by Sheil from 2012 to 06.05.2017, when reference in the case of Marico was decided and since it was never and is not diligent in prosecuting its claim, it be considered unnecessary to continue the proceedings and if the proceedings are continued, grave loss shall be caused to Wooltex.

On 19.09.2020, Sheil filed its Affidavit and specifically asserted that the grounds sought to be urged may be apt after termination of arbitration proceedings under Section 25 of the Arbitration and

Conciliation Act, on account of default by a party, but no case is made out under Section 32(2)(c) of the Act of 1966 for termination of the arbitral proceedings. It was also specifically pleaded that there was consensus/understanding between the parties that in view of the reliefs claimed by the Marico, Marico reference be heard and disposed off first as findings may be useful in deciding, Sheil's reference and it would narrow down the controversy.

Apart from this, the specific plea was raised that the letter dated 25.11.2019 and 07.01.2020 addressed to the Tribunal for disposal of Sheil's claim are not received by it. A sort of misunderstanding which was created as Sheil suggested, that the Affidavit of evidence was filed, but it was clarified that the senior partner of the firm passed away on 01.05.2018 and as such the progress of the proceedings before the Arbitrator could not be ascertained with certainty. In any case, it was submitted that the evidence affidavit was ready to be filed, reflecting that Sheil was ready to proceed with its claim.

Both the parties filed compilation of documents.

11] On 01.12.2020, the Arbitrator passed impugned order purportedly invoking Section 32(2) of the Act of 1966, in the wake of the Application preferred by Wooltex, the Respondent No.1 and after making reference to the Judgment of Calcutta High Court in ***NRP Projects Pvt. Ltd. vs. Hiral Mukhoopadhyay***,¹, the tribunal concluded as under :

"In my opinion, considering Section 32(2) of the Act, it is clear that termination of the arbitral proceedings are provided for in two specific cases v.z withdrawal of the claim and a consensual termination of arbitral proceedings. Section 32(2)(c) of the Act is a residuary clause. It uses the expression "for any other reason". It is clearly suggestive of the fact that the reasons provided for in Section 32(a) and (b)

1 2012 SCC OnLine Cal. 10496

also rendered the continuation of arbitral proceedings unnecessary or impossible. However, sections 32(2)(a) and(b) may not exhaust the universe of 'unnecessary or impossible' given the myriad of circumstances possible. That appears to be the reason for the residuary section 32(2)(c). The only question that remains to be dealt with is whether the conduct of the Claimant and the attendant circumstances were such as to say that it is unnecessary or impossible to continue with the arbitral proceedings. If the answer is in the affirmative an order of termination of proceedings must follow, but if it is in the negative, the application of Respondent No.1 should be dismissed."

In the wake of aforesaid observations, the tribunal proceeded to examine whether the circumstances which existed would fall in the category to render continuation of arbitral proceedings, as unnecessary or impossible.

12] Dealing with the contention of the claimant Sheil, that it was always anxious to proceed with the claim and there was understanding that Marico arbitration would be decided first, so that the findings therein may be useful for narrowing the controversy, which claim was specifically denied by Wooltex, the Tribunal concluded that there is no record of this assertion.

The tribunal was also impressed by a submission advanced on behalf of the Respondent that during the arbitration, the claim was represented by one Mr.Datta, but behind the scenes it was M/s.Markand Gandhi and Company who were acting for the Claimant and the fact that the same, Mr. Datta had his office at M/s.Markand Gandhi & Company office and Ms.Nupur Desai was appearing for the claimant, being Advocate Assistant of M/s. Markand Gandhi & Company, clearly gave way to the fact that it was Markand Gandhi and Company who were really representing the Claimant.

This argument was countenanced by the learned counsel for the Claimant by submitting that only after Mr.Datta went out of the scene, M/s.Markand Gandhi & Company came into picture and even he passed away on 01.05.2018 and that is why there was inevitable delay and confusion in the matter of representation of the claimant.

13] On consideration of the rival contentions, the Sole Arbitrator recorded his conclusion in the following words :

“To my mind it appears that both Marico and the Claimant were of the view that a concluded agreement was arrived at between the parties in the Consent Terms and both Marico and the Claimant desired to pursue the Consent Terms in their respective claims. I find it difficult to believe that if the enforceability of the Consent Terms was refused in the Marico Arbitration, why was the Claimant herein not interested in defending the Arbitration Petition filed by Respondent no.1. According to Mr.Jagtiani, for whatever reason there might be, the Claimant appeared to have decided not to take any interest in its claim, Mr.Jagtiani submitted that even when the Marico Arbitration was heard, the Claimant absented himself from taking part in the hearings and despite being called upon to do so, by the Arbitral Tribunal, decided not to lead any evidence or to proffer any arguments in the Marico Arbitration. Mr. Jagtiani submits that he does not wish to bring the Marico Arbitration in the present claim, but it is only that these circumstances, are relevant only for purposes of showing that the Claimant was not interested in its claim.”

The tribunal recorded the observations by finding fault with the Claimant, as it never moved the arbitral tribunal, to hold a hearing and to get on with the matter and in fact remained inactive throughout the process.

With the aforesaid observations, the Sole Arbitrator arrived at a conclusion that it is unnecessary and impossible to continue with the arbitral proceedings and he terminated the same under Section 32 of the Act of 1966.

14] The question that arise for consideration is, whether the Arbitrator was justified in holding that the claim filed by Sheil was abandoned by it

and it had become necessary to terminate the proceedings, as its continuance has become unnecessary and impossible.

The background and the manner in which the proceedings were made over to the Sole Arbitrator are not in dispute. It is also not in dispute that two distinct suits, one filed by Marico and another filed by Sheil, were disposed off since the parties expressed consensus that the disputes in the Suits be referred to the Sole Arbitrator, being already appointed in the Suit filed by Marico.

While disposing off the Suit filed by Sheil, it was permitted to make an application under Section 17 of the Act of 1996 for interim measures.

The first meeting of the Arbitrator was held on 08.11.2011 and from the minutes, it is apparent that the two claimants, before him were directed to file Statement of Claims, first being Marico and second one being the Sheil. The Respondents to the Claims, were directed to file their response before the date set out by the Arbitrator, by blagging that further directions would be given after the pleadings are completed.

Marico reference chartered its course through various meetings conducted by the Arbitrator and the minutes of meeting placed on record, would be indicative of the fact that the claim of Marico moved ahead, though the Statement of Claim (SOC) was filed by Sheil and even the Statement of Defence (SOD) was filed by Wooltex in the month of March 2012 itself, the reference in case of Sheil was not taken ahead, despite the fact that an Award was passed in reference of Marico on 06.05.2017. By the Award, the arbitral tribunal held that the Consent Terms executed with Marico were tentative, but Marico was held entitled for specific performance of the MoU.

15] Wooltex challenged the Award by filing Arbitration Petition, which was ultimately, disposed off on 07.07.2021, since there was settlement entered between the two of them.

Admittedly, there was no reason why Sheil would challenge the Award in Marico's case when its own reference was pending before the Arbitrator.

16] The question therefore that deserve a consideration is, whether it can be said that Sheil had abandoned its claim or whether the Arbitrator who was positioned on the steering wheel, did not navigate its reference ahead.

The scheme of the Arbitration and Conciliation Act, 1996 provide the procedure to be followed by the Arbitrator, on being appointed in the wake of Agreement between the parties or on being appointed by the Court in exercise of its power under Section 11 of the Act.

Section 21 of the Act prescribe that arbitral proceedings in respect of a particular dispute shall commence on a date, on which the request for dispute to be referred to the arbitration is received by the Respondent, unless parties agree otherwise.

Section 23 of the Act prescribe the time limit for filing of the Statement of Claim and Statement of Defence and permitting the parties to submit all documents which they consider to be relevant or other evidence that they desire to place before the Arbitrator. The Respondent, in support of the case, can also submit a counter claim or plead a set off which shall also be adjudicated by the arbitral tribunal.

After the stage of filing of claim and statement of defence is over, Section 24 comes into picture which relate to the "Hearing and Written proceedings".

Sub-section (1) of Section 24, contemplate that the arbitral

tribunal shall decide whether to hold hearing for the presentation of evidence or for oral arguments or whether the proceedings shall be conducted on the basis of documents and other material.

Sub Section (2) of Section 24 then provide, that the parties shall be given sufficient advance notice of hearing or of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

Sub section (3) further stipulate that all statements, documents or other information supplied to, or application made to the arbitral tribunal by one party shall be communicated to the other party and any expert report or evidentiary document on which the tribunal would rely in making its decision, shall be communicated to the parties.

17] Section 25 of the Act of 1966 is a provision providing the consequences for default of a party and it reads thus :

“25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited];

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.”

Sections 26 and 27 are the two distinct provisions in form of the power available to the arbitral tribunal to appoint an expert to report to it on specific issues; or the Tribunal may direct a party to apply to the Court for assistance in taking the evidence.

18] The aforesaid provisions contained in Chapter V of the Act of 1996 governing the conduct of arbitral proceedings would clearly indicate that it is the Arbitrator, who is in charge of the Arbitration proceedings is in the seat of Authority and he shall hold the reins in his hand by steering the process by issuing appropriate directions to the parties, once the statement of claim and defence is filed, within the time indicated by the tribunal.

There is no merit in the submission that it is only the parties to the proceedings and specifically the claimant who shall take the lead and if he do not do so, then he is said to have abandoned the claim. The Arbitrator is expected to be alive to a situation that the reference has been made over to him and he should be equally involved in the entire process by taking the process ahead and answering the reference by passing an Award.

There are provisions in the enactment which permit him to terminate the proceedings, on noticing the default of a party as contemplated under clause (a) of Section 25, when the claimant fail to communicate the Statement of Claim and in case when the Respondent fails to communicate his statement of defence, when the Tribunal may continue the proceedings without treating failure in itself as admission of the allegation by the claimant and shall exercise its discretion to treat the right to file the statement of defence having being forfeited. Even if the party fails to appear at oral hearing before the tribunal or produce documentary evidence as directed, the tribunal may continue with the proceedings and pass an Award.

The Tribunal is, therefore, competent enough to charter the course of the proceedings before him, navigating it through appropriate stages, and by exercising the discretion, may deal with the default committed by either of the party before it.

19] The power exercised by the tribunal under Section 32 of the Act in terminating the proceedings, is permitted to be exercised only in the contingencies set out in the said Section and I reproduce the said Provision :-

“32. Termination of proceedings – (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) The claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

20] In the present case, on an application being filed under Section 32(2)(c) of the Act of 1966 by Respondent No.1, the Tribunal arrived at a conclusion that the continuation of the proceedings in the claim filed by the Petitioner has become unnecessary or impossible.

Reading of clause (c) of sub-section (2) of Section 32 indicate that the said power to terminate the proceedings can be exercised by the arbitral tribunal when it finds that continuation of the proceedings for any other reason, that is apart from the reasons stipulated in sub-section (2), has become unnecessary or impossible.

21] In the impugned order, the tribunal has held the Petitioner is responsible for being not interested in its claim and this conclusion is derived on the basis that even when Marico arbitration was in progress the Claimant absented himself from taking part in the hearing and decided not to lead any evidence or submit any argument.

In my opinion, non-participation of the Petitioner in the Marico arbitration cannot be said to be a ground to infer abandonment of his own claim.

It is very clear that two claims, that of Marico and of Sheil, are distinct in their nature and two distinct suits were instituted by each of them, while Sheil sought enforcement of its agreement dated 11.08.1993 with Respondent No.1, modified by Consent Terms, whereas Marico sought an Award declaring that the Agreement set out in the MoU to be valid, subsisting and binding and necessarily sought specific performance of the Agreement as set out in the MoU with Respondent No.1.

Hence, there is no gainsay in presuming that because the Petitioner did not participate in the proceedings of Marico, it has abandoned its claim.

As far as the Sheil's own claim is concerned, though I do not find any material justifying submission of Mr. Subramanian, that there was a consensus between the parties that Marico claim shall be decided first and thereafter the claim of Sheil would be taken up for consideration. It can be gathered from the Arbitration proceedings in Marico reference, where an Award was declared that Sheil did not get acted in whole, but it do not necessarily justify the blame of it not being active in taking its claim forward.

It is quite possible that the Sheil was awaiting the result of the reference of Marico which was steered ahead by the Arbitrator and in fact it was possible for the Arbitrator to proceed with the claims hand in hand by permitting common evidence/arguments to be lead as the parties to the two proceedings were the same, but instead the Arbitrator chose to take the Marico claim ahead and concluded the same by declaring the Award. After the Award was declared it was still

open to the Arbitrator to call upon the Claimant in the other reference to proceed ahead, but even the Arbitrator did not take any steps.

Therefore, can it be said that it is only the claimant who is to be blamed as it is not the case that the Arbitrator was not conscious of his appointment in reference of Sheil, at the hands of this Court and if the Claimant in the said claim was not coming forward as no date in the proceedings being fixed, it was within the discretion of the tribunal to take appropriate steps.

22] The conclusion of the tribunal that the claim has been abandoned by Sheil, do not seem to be justiciable conclusion as the word “abandon” convey a definite connotation to mean ‘left completely’ and no longer wanted.

The Cambridge dictionary define the term ‘abandon’ to mean ‘leave behind’ or ‘run away from someone or something’ or ‘to give up something’. The Merriam-Webster Dictionary define “abandon” to mean “to give up to the control or influence of another person or agent’ or ‘to withdraw’.

The Hon’ble Apex Court the case of **Godrej & Boyce Manufacturing Company Limited v. Municipal Corporation of Greater Mumbai and others**,², has construed the said term in examining whether there was any delay on part of the Appellants in instituting proceedings leading to an inference that the claim was abandoned. Their Lordship specifically recorded as under :

“15. The law of abandonment is based upon the maxim invito beneficium non datur. It means that the law confers upon a man no rights or benefits which he does not desire. In P. Dasa Muni Reddy v. P. Appa Rao, this Court held that “abandonment of right is much more than mere waiver, acquiescence or laches. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege”. In Para 13 of the said decision, this Court put the law pithly in the following words :

2 2023 SCC OnLine SC 592

"13.. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver."

.. There can be no legal presumption about the factum of abandonment of proceedings and abandonment has to be expressed or as even if it is to be implied, the circumstances indicating abandonment should be so strong and convincing that they may lead only to such an inference and no other view is possible.

23] In the present case, abandonment which is sought to be projected as implied one, and the tribunal has inferred that informal abandonment of the claim of the Sheil since it failed to remain present in the reference of Marico, is neither desirable nor a possible inference.

Merely because there was not a single letter addressed on behalf of the Claimant for a meeting, also would not lead to an inference that the Claimant was not interested in processing its claim, as the Arbitrator himself who was appointed to adjudicate the disputes, was equally responsible for not taking the claim ahead by fixing the timeline/schedule calling upon the claimant to proceed ahead once Statement of Claim and Statement of Defence was filed. The inaction attributed to the Sheil is, thus, assumed by the Tribunal, without it being expressly established.

24] In any case, the claim of Sheil deserve consideration on merit and though Mr. Chinoy would assertively submit that the fate of Sheil is sealed in the wake of the Award passed in the case of Marico reference, I do not think that tribunal has a reason for termination of the arbitral proceedings in the claim of the Sheil on this count. It was quite possible for the tribunal to conclude the proceedings in the event they

becoming unnecessary in the wake of Award of Marico, but the Tribunal has not chosen the said path, but terminated the arbitral proceedings of Sheil on the ground that he has abandoned the same, and has exercised discretion under sub clause (c) of sub section (2) of Section 32 of the Act of 1966.

For the reasons recorded above, I am unable to concur with the view expressed by the arbitral tribunal and therefore, I deem it appropriate to set aside the impugned order, leaving it open to the Sole Arbitrator to continue with the reference and conclude the proceedings therein within a time bound manner, and in any case, not later than 6 months from the date of passing of this order.

Arbitration Petition is made absolute in the above terms.

[BHARATI DANGRE, J]