

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

A.P. COM 41 of 2024

Praxair India Pvt. Ltd.

vs

Steel Authority of India Ltd.

For the petitioner : Mr. S.N. Mookherjee, Sr. Adv.
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Shatanshu Panda, Adv.
Mr. Dipendra Nath Chunder, Adv.
Ms. Urmila Chakraborty, Adv.
Mr. Shubrojoyoti Mookherjee, Adv.

For the respondent : Mr. L.K. Gupta, Sr. Adv.
Mr. T.K. Banerjee, Adv.
Mr. Sauvik Nandy, Adv

Last heard on : 19.01.2024

Delivered on : 22.02.2024.

Moushumi Bhattacharya, J.

1. This is a composite application for extension of the mandate of the arbitral tribunal under section 29A (4) and (5) of The Arbitration and Conciliation Act, 1996 and for exclusion of the time period from 14.07.2023 to 10.01.2024 for the purpose of determining whether the

application has been made within the prescribed period under the 1996 Act.

2. The significance of these dates would be clear from the facts narrated after this. The parties have not disputed the dates.

3. The petitioner is the claimant in the arbitration. The mandate of the tribunal was extended by the consent of parties under section 29A(3) for six months till 14.07.2023. The order recording the consent given by the respondent under section 29A(3) is part of records. The order passed by the arbitral tribunal on 16.01.2023 records the respondent's consent to extension of the mandate under section 29A(3) of the Act. The next order of the arbitral tribunal dated 1.05.2023 records the stand taken by the parties in the matter of filing an application before the appropriate forum for extension of the mandate.

4. The petitioner made an application before the Ld. District Judge, Asansol for extension of the mandate on 14.07.2023 pursuant to the direction dated 01.05.2023. The Ld. District Judge, Asansol, transferred the case to the Ld. Additional District Judge by an order dated 18.11.2023. The matter was thereafter transferred to the Ld. Judge, Commercial Court at Asansol by an order dated 14.12.2023. The Ld. Commercial Court renumbered the case on 15.12.2023 and finally rejected the application as non-maintainable by an order dated 09.01.2024.

5. The order dated 09.01.2024 was uploaded on the Court's website on 10.01.2024 and the certified copy of the order was made available on 11.01.2024. The present application was filed before this Court on

11.01.2024. The petitioner however cured a defect in one of the annexures (being illegible) on 15.01.2024. The application was finally filed on 15.01.2024.

6. Learned counsel appearing for the petitioner relies on section 14 of the Limitation Act, 1963 and argues that the delay in filing the petition should be condoned under section 5 of the said Act. Counsel urges that the mandate continued from 14.07.2023 to 10.01.2024 and that delay, if any, is also condonable under sections 5 and 14 of the Limitation Act, 1963.

7. Learned counsel appearing for the respondent argues that the mandate first terminated on 14.07.2023 and thereafter on 9.01.2024 i.e after the extension given under section 29A(3) of the 1996 Act and the order passed by the Asansol Commercial Court rejecting the petitioner's application for extension of the mandate, respectively. Counsel submits that the Court cannot extend the mandate after 09.01.2024.

8. Counsel makes an alternative argument of the Calcutta High Court lacking jurisdiction for entertaining the present application. Counsel relies on the definition of "Court" under section 2(1)(e) of the 1996 Act and also says that the Calcutta High Court cannot re-appoint the same arbitrator post-termination but can only "substitute" the arbitrator.

9. The mandate of the arbitral tribunal under section 29A(1) of The Arbitration and Conciliation Act, 1996 starts from the date of completion of the pleadings and continues for 12 months from that date for non-international commercial arbitrations. The mandate continues for a

second run under section 29A(3) where the parties consent to extending the period for making of the award for a further period of 6 months from the end of the first window of 12 months under section 29A(1). Sections 29A(4) and (5) contemplate a third extension of the mandate subject to an application made by one of the parties to the Court and the Court extending the mandate for sufficient cause and on terms imposed by the Court. The second *proviso* to section 29A(4) envisages an automatic extension of the mandate where the parties have applied to the Court under section 29A(5) till disposal of the application.

10. The mandate of the arbitral tribunal, hence, is a thread which transitions seamlessly from one stage of section 29A to the next, unless the thread is broken either by the parties not consenting to extend the mandate under section 29A(3) or the parties failing to make an application to the Court for extension. The mandate, unless extended before exhausting the available windows under section 29A(1), (3), (4)/(5), terminates and the tribunal is rendered *de jure* ineligible to perform its functions.

11. The Court can step in to continue the arbitration provided the Court receives an application under section 29A(4)/(5), on the contemplation that the arbitration will continue from the stage at which the application was filed.

12. It is also relevant to locate section 29A(1) in the timeline of the amendments brought into The Arbitration and Conciliation Act, 1996. Section 29A was inserted in 2016 with effect from 23.10.2015 and sub-section (1) to section 29A was inserted in 2019 with effect from

30.8.2019. Even if not strictly relevant, it would be worthwhile to compare the pre-amendment (the 2019 amendment) position prior to 30.8.2019.

13. Section 29A(1) previously required that the award be made within a period of 12 months from the date of arbitral tribunal entering upon the reference with the explanation that the tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator/s received notice in writing of their appointment. In that sense, the amended section 29A(1) enlarges the time for the arbitral tribunal to make the award.

14. In the present case, the Court has been called upon to determine whether the mandate was broken, that is, whether the mandate irrevocably terminated before the petitioner filed the present application.

15. The undisputed dates which are relevant for this determination would show that the mandate had a smooth run from its commencement that is from the date of completion of the pleadings till 14.7.2023 factoring in the 6 months extension under section 29A(3). The petition was made on 14.7.2023 itself before the mandate could trip. The mandate was thereafter lobbed from one Court to the next and then to the Court of the Commercial Court at Asansol on 14.12.2023. The Commercial Court renumbered the case on 15.12.2023 and finally rejected the application for extension on 9.1.2024 as not being maintainable. This order was uploaded on the Court's website on the next day i.e 10.01.2024 and the certified copy was made available on 11.01.2024. The mandate was therefore prevented from tripping and

falling by continuation of the proceedings from 14.7.2023 till 11.01.2024 under section 14 of the Limitation Act, 1963.

16. The respondent, through learned counsel, admits to the facts being amenable to section 14 of the Limitation Act. There is no doubt that the petitioner is entitled to reap the benefit of section 14 on the *bona fide* prosecution of the civil proceeding before the Asansol District Court and thereafter in the Asansol Commercial Court till 11.01.2024. Section 14(2) provides that the time during which the applicant has been prosecuting another proceedings with due diligence against the same party for the same relief shall be excluded, where the proceeding is in good faith and the Court is unable to entertain the proceeding for defect of jurisdiction.

17. *Explanation (a)* to section 14 includes the day on which that proceeding was instituted and the day on which the proceeding ended for the purpose of extension of the time during which the earlier civil proceeding was pending. Hence, both 14.7.2023 as well as 10.1.2024 would be included for determining the time-band which is to be excluded under section 14(2) of the Limitation Act.

18. It is now settled that section 14 of the Limitation Act would be applicable to The Arbitration and Conciliation Act, 1996 : Refer *M/s. Consolidated Engineering Enterprises v. The Principal Secretary (Irrigation Department)*. The petitioner herein fulfils all five of the criteria set-down in paragraph 21 of the Report, namely,

- (i) Both the prior and later proceedings are civil in nature,
- (ii) The prior proceeding was done with due diligence and in good faith,

- (iii) The failure of the prior proceeding is due to a defect of jurisdiction,
- (iv) Both the proceedings relate to the same matter in issue,
- (v) Both the proceedings are in a court of law.

19. The petitioner thereafter successfully picked up the thread of the mandate on 11.01.2024 from the date when the certified copy of the order of the Asansol Commercial Court was made available to the petitioner to the day when the petitioner filed the present application in this Court. The petitioner however deemed it necessary, and with good reason, to cure the defect in one of the annexures to application on 15.01.2024. The Court's papers indicate that the application was filed on 11.01.2024. Even if 15.01.2024 is taken as the date of filing, the petitioner appears to be twice-blessed (or is it thrice?) with the mandate continuing its unbroken run from 11.01.2024 to 15.01.2024 for the reason as follows.

20. 12.01.2024 - 14.01.2024 would be excluded as 12.01.2024 was a notified holiday in the State of West Bengal including in the Calcutta High Court. 13.01.2024 and 14.01.2024 was Saturday and Sunday, respectively.

21. Therefore, the delay, if any, would be condoned under section 5 of the Limitation Act, 1963 as the Court has found that there was sufficient cause for not making the application within the prescribed period. The Section 5 reasoning is buttressed by the attending circumstances including the petitioner receiving necessary documents from Asansol and instructions from Bangalore but managing to file the

present application in the course of a day. This would constitute “sufficient cause” under section 5 read with section 14 of the Limitation Act, 1963. The Supreme Court in *J. Kumaradasan Nair v. IRIC Sohan;* (2009) 12 SCC 175 held that sections 5 and 14 of the Limitation Act and principles analogous thereto are applicable to all proceedings even if those sections are not applicable *per se*.

22. The above factors persuade the Court to hold that the petitioner successfully held up the mandate from 14.7.2023 to 11.01.2024 - if not 15.01.2024 - without break, termination or interruption. Contrary to the stand taken on behalf of the respondent, the mandate did not terminate at any stage in this time frame.

23. Section 29A of The Arbitration and Conciliation Act, 1996 is not about cookie-cutter interpretations where the Court lurks in the shadows and catches the applicant unawares to slash the mandate on the slightest slip. Section 29A is about the arbitral tribunal acting in concert with the stakeholders to ensure that the award is made within the prescribed timeliness. The section is only to guard against tardy arbitrators and forgetful / indifferent parties where the making of the award is put on the back burner.

24. The present case takes on an entirely different complexion on the learned arbitrator informing the parties by mail dated 15.12.2023 that the award will be pronounced on 21.12.2023 at 6.30 p.m. This fact is recorded in the Minutes dated 19.12.2023. This means that the award was ready to be published as on 21.12.2023 with the parties being put on notice thereof. Hence, apart from the question of the mandate

continuing till 11.01.2023/15.01.2023, there is no further room for the respondent to argue that the arbitration needs to commence *de novo* upon the mandate terminating on 9.01.2024. The respondent's argument would amount to a most unnatural reading of section 29A where the Court directs commencement of the arbitration from the very beginning despite the tribunal giving a date for pronouncing the award. Section 29A is for preserving arbitral efficacy and should not be made out to be a monster.

25. The second point raised by the respondent is on the jurisdiction of this Court or more precisely, the lack of jurisdiction, for deciding the extension of the mandate. The respondent says that the application should be filed before the Commercial Court at Asansol. Counsel relies on section 11(6) of The Arbitration and Conciliation Act, 1996 in the context of the definition of "Court" under section 2(1)(e) of the said Act. Counsel also relies on section 29A(6) of the Act to argue that the Court can only "substitute" an arbitrator but not re-appoint the same arbitrator in an application of the present nature.

26. The above contention cannot be accepted for the following reasons.

27. In the order dated 09.01.2024 the Ld. Commercial Court at Asansol specifically held that it did not have jurisdiction to extend the mandate under section 29A of the Act. The Commercial Court considered the definition given under section 2(1)(e) of the 1996 Act and also the import of sections 11 and 29A in coming to this view. A Coordinate Bench judgment of this Court in *Amit Kumar Gupta v. Dipak*

Prasad; 2021 SCC OnLine Cal 2174 answered this issue on the view that the word “Court” used in section 29A partakes the character of the appointing authority as prescribed under section 11 of the Act and therefore can only be the Court which has the power to appoint an arbitrator under section 11. The Court is informed that the appointment of one of the arbitrators in the present case was made by this Court under section 11 of the Act by an order dated 22.7.2019.

28. The decisions relied on for the purpose of divesting this Court of jurisdiction do not take the respondent’s case forward - *Nimet Resources Inc. vs Essar Steels Ltd*; 2009 17 SCC 313 and *State of West Bengal vs. Associated Contractors*; 2015 1 SCC 32 were delivered prior to 2015 before the insertion of section 29A to the 1996 Act. *Nimet Resources* was also concerned with an application under section 14(2) of the 1996 Act for substitution of arbitrators where the allegation was of the arbitrator delaying the arbitral proceedings. *State of Jharkhand v. Hindustan Construction Company Limited*; (2018) 2 SCC 602 was concerned with the term “Court” as used in sections 2, 14 and 31 of the Arbitration Act, 1940 as opposed to the 1996 Act. The decision of this Court in *Multiplex Equipments & Services Pvt. Ltd. v. Bagzone Lifestyles Pvt. Ltd.*; AP - COM 11 of 2023 was on the question whether the Court can proceed with a substitute arbitrator in view of the arbitrator’s mandate having come to an end. There was a specific finding in that decision of the mandate having come to an end on 22.01.2022. The decision of this Court in *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Limited*; 2023 SCC OnLine Cal 2645 was on the premise that the application under section

29A(4) and (5) was made after termination of the mandate. In that case, the respondent had also not consented to the extension of the mandate under section 29A(3) of the Act. *Rohan Builders*, in any event, is under challenge before the Supreme Court. Therefore, *Rohan Builders* cannot be a fetter on the Court for the aforesaid reasons.

29. Substitution or re-appointment is only warranted where the mandate has come to an end and the Court prods the arbitration to proceed to its logical conclusion, i.e. an award. It is indeed curious as to why the respondent, after having participated in the arbitration and consented to the extension of the mandate, is now keen to resist publication of the award.

30. The Court is thus inclined to reject the objection to the present application. The Court proposes to extend the mandate on the sufficiency of cause shown by the petitioner. The Court's view would be evident from the reasons as stated above.

31. AP COM 41 of 2023 is accordingly allowed and disposed of by extending the mandate of the arbitral tribunal for 3 weeks from the date of pronouncement of this judgment.

Later

32. Having regard to the law discussed and the fact that the Award was ready to be published on 21.12.2023, the prayer for stay is considered and refused.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)