

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
(COMMERCIAL DIVISION)

AP-COM/616/2024

M/S ZAMIL STEEL BUILDINGS INDIA PVT LTD
VS
M/S JKS INFRASTRUCTURE PVT LTD.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 2nd September, 2024.

Appearance:
Mr. Mrinal Beri, Adv.
...for the petitioner.

Mr. Debnath Ghosh, Adv.
Mr. Soumava Mukherjee, Adv.
Mr. Biswaroop Mukherjee, Adv.
Ms. Shreejita Sen, Adv.
...for the respondent.

The Court: Affidavit-in-opposition filed in Court today be kept on record.

The petitioner seeks an extension of the mandate of the learned Arbitrator under Section 29A of the Arbitration & Conciliation Act, 1996.

It is argued that during pendency of the proceeding, the respondent took out a challenge under Section 16 of the said Act before the learned Arbitrator, inter alia, on the grounds that there is no existence of any arbitration clause and on the ground of bias of the learned Arbitrator.

The said challenge was turned down, upon which a revisional application was preferred. However, the revisional Court left it open for the respondent to

take the said point in a challenge, if preferred, under Section 34 of the 1996 Act against the final award.

Learned counsel submits that in view of the materials on record and keeping in view the stage of the proceedings, the mandate ought to be extended.

Insofar as the issue of whether the order dated April 15, 2024, whereby the evidence of both parties were treated to be closed, was valid is concerned, learned counsel for the petitioner argues that although the statement of defence was filed by the respondent on March 29, 2023, the same was accepted by an order dated April 20, 2023. As such, as on April 15, 2024, the learned Arbitrator's mandate was still subsisting. Hence, the said order is valid in the eye of law.

Learned counsel appearing for the respondent vehemently opposes the prayer for extension and contends that even if the mandate is extended, there should be a substitution of the learned Arbitrator on the ground of palpable bias.

Learned counsel for the respondent takes the Court through several orders passed by the learned Arbitrator in support of his contention.

In particular, although the learned Arbitrator had exhausted his mandate as on March 28, 2024, that is, on the expiry of one year after the closure of pleadings, and in spite of the same having been pointed out to the learned Arbitrator by the respondent in writing, the learned Arbitrator went on to take up the matter on April 15, 2024, when the mandate had already expired, and also to close the evidence of both parties. It is contended by learned counsel for the respondent that even if the respondent could not be present on the said date, at best the cross-examination of CW-1 could be closed. However, there was no occasion for the learned Arbitrator to close the evidence of the respondent as well

without granting a further opportunity to the respondent to adduce such evidence.

It is argued that such approach of the learned Arbitrator itself shows the bias with which the learned Arbitrator is proceeding against the respondent.

Insofar as the other objection is concerned, learned counsel for the respondent places reliance on the purported arbitration clause. The said clause merely stipulates that the jurisdiction for any arbitration is limited to Kolkata. However, thereafter, it is stipulated that any legal dispute, if arises, will be limited to Kolkata jurisdiction. In case of any litigation under the contract, the Courts of law in the city of Kolkata are only to have jurisdiction. Hence, no intention to refer the dispute to arbitration is expressed in the said clause at all.

Learned counsel for the petitioner, in reply, points out that insofar as the expiry of one year after the closure of pleadings is concerned, the relevant date should be taken to be April 20, 2023, when the statement of defence was accepted, and not March 29, 2023, when the same was filed.

Heard learned counsel.

Insofar as the ground of lack of jurisdiction of the learned Arbitrator is concerned, the same has been turned down by the learned Arbitrator under Section 16 of the 1996 Act.

In consonance with the *kompetenz-kompetenz* principle, it is not for this Court, sitting in jurisdiction under Section 29A of the 1996 Act, to reopen such adjudication. The remedy, if any, for the respondent is to take a ground on such count as well, in a challenge under Section 34, if preferred ultimately against the award.

With regard to bias as well, the same principle as above applies and it is not for this Court to reopen the issue of bias otherwise.

However, the element of alleged bias also acquires importance in the context of the power of this Court to extend the time under Section 29A.

The respondent has argued that even if the mandate is extended, fact remains that as on April 15, 2024, when the evidence of the respondent was closed along with the right of the respondent to cross-examine the claimant's witness, the learned Arbitrator did not have the charter to do so, his mandate having already expired prior thereto.

In such context, a comparison of the language of Section 23(4) in conjunction with that of Section 29A of the 1996 Act is necessary. Whereas Section 29A speaks about "date of completion of pleadings" to be the reference point for the purpose of counting twelve months, the said expression is qualified by the phrase "under Sub-section (4) of Section 23".

Sub-section (4) of Section 23 is not a stand-alone provision but has to be read in the context of the preceding sub-sections of the said Section.

Sub-section (4) of Section 23 provides that the statement of claim and defence under the said Section shall be completed within a period of six months from the date the Arbitrator or all the Arbitrators, as the case may, receive notice, in writing, of their appointment. Although the expression "the statement of claim and defence... shall be completed" has been used, the completion of such statements has to be read in the context of Sub-section (2) of Section 23. Sub-section (2) provides that the parties may "submit with their statement" all

documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Hence, on a comprehensive reading of Section 23 of the 1996 Act, it is clear that it is the submission of the statements which is the relevant reference point for the purpose of calculating the period of twelve months as contemplated in Section 29A of the 1996 Act. There is no scope for deviation from the date and/or counting the commencement of the twelve months from a subsequent date when a statement of claim/defence is “accepted” by the learned Arbitrator. Seen in such context, the relevant date for calculating the twelve months period is March 29, 2023, when the statement of defence was filed by the respondent, and not April 20, 2023, when the same was “accepted”. Hence, the argument of the petitioner cannot be accepted to the extent that on April 15, 2024, the learned Arbitrator still had a subsisting mandate.

More importantly, the respondent had categorically clarified to the learned Arbitrator in writing that his mandate had already expired, much before April 15, 2024. Without considering such objection or there being any reflection thereof in the order dated April 15, 2024, the learned Arbitrator proceeded on the premise that as none was present on behalf of the respondent, the tribunal had no other alternative but to close the evidence of the CW-1 as well as went one step further in closing the evidence of the respondent as well.

As already discussed above, as on April 15, 2024, there was no occasion for the learned Arbitrator to pass any order, since his mandate had already expired on April 28, 2024.

Thus, even if the mandate of the learned Arbitrator is extended now, the same stood terminated on March 28, 2024. Any order passed in the interregnum, cannot be held to be valid.

This Court, while holding as above, is aware of the provisions of Section 29A. Sub-section (6) of Section 29A provides that while extending the period referred to in Sub-section (4), it shall be open to the Court to substitute one or all of the Arbitrators and if one or all of the Arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record.

However, for the present purpose, such stage has to be read as till March 28, 2024 and not thereafter.

Again, in Sub-section (4) of Section 29A of the 1996 Act, it is provided that if the award is not made within the period specified in Sub-section(1), the mandate of the Arbitrator *shall terminate* unless the Court has, either prior to or after the expiry of the period so specified, extended the period.

In the second proviso to Sub-section (4), it has been stipulated that where an application under Sub-section (5) is pending for extension of the mandate, the mandate of the Arbitrator shall continue till the disposal of the said application. The legal fiction embodied in the second proviso cannot be incorporated in the present case, since the application for extension of mandate has been filed after the expiry of the mandate.

Thus, there was no occasion for the mandate to automatically be treated to be extended till disposal of the said application.

Hence, the orders passed by the learned Arbitrator after March 28, 2024 cannot be regularized automatically merely by virtue of extension of the mandate, even if extended by this Court.

Upon a careful consideration of the arguments of the parties and a perusal of the orders of the learned Arbitrator, this Court, however, is not inclined to accept the allegation of bias and/or adjudicate on the issue as to whether the learned Arbitrator had jurisdiction in view of there being allegedly no arbitration clause between the parties. Since such question has been decided at the first instance by the learned Arbitrator under Section 16 of the 1996 Act, a second look can now only be taken by the Court at the stage of intervention, if any, under Section 34 of the 1996 Act against the award which is finally passed. Thus, there is no scope of substituting the learned Arbitrator at this stage on the allegation of bias and/or lack of jurisdiction.

However, in terms of the observations made above, the extension which is intended to be granted by this Court shall operate on and from this day, and not from March 29, 2024, that is, the date immediately after when the mandate of the Arbitrator expired in the first place (March 28, 2024) and any order passed by the learned Arbitrator in the interregnum till this date shall be treated to be a nullity, having been passed by the learned Arbitrator without having any mandate.

In such view of the matter, AP-COM/616/2024 is disposed of by extending the mandate of the learned Arbitrator for a period of six months from this date.

It will, thus, be deemed that the orders passed by the learned Arbitrator in the interregnum, between March 29, 2024 and today, stand automatically

cancelled on the ground of nullity. The learned Arbitrator shall now continue the arbitral proceeding from the stage where it stood on March 28, 2024.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)