

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

Present :

Hon'ble Justice Moushumi Bhattacharya

AP-COM 11 of 2023

Multiplex Equipments and Services Private Limited

vs

Bagzone Lifestyles Private Limited

And

AP-COM 12 of 2023

Vidyut Electricals and Electronics Private Limited

vs

Bagzone Lifestyles Private Limited

And

AP-COM 13 of 2023

Forum Mall Management Services Private Limited

vs

Bagzone Lifestyles Private Limited

And

AP 747 of 2023

Funtail Enterprise

vs

Bagzone Lifestyles Private Limited

For the petitioner	:	Mr. Jishnu Chowdhury, Adv. Mr. Aritra Basu, Adv. Mr. S.K. Singhi, Adv. Ms. Riti Basu, Adv.
--------------------	---	---

Ms. Piyali Pan, Adv

Mr. Sayan Banerjee, Adv.

For the respondent : Mr. Prathamesh Kamat, Adv.
Mr. Ratul Das, Adv.
Mr. Ayethesham Thaver, Adv.
Mr. Dwip Raj Basu, Adv.

Last heard on : 22.12.2023

Delivered on : 09.01.2024

Moushumi Bhattacharya, J.

1. The petitioners in all the 4 matters have filed applications for extending the mandate of the learned Sole Arbitrator for concluding the reference and alternatively, for appointment of a substitute arbitrator for conclusion of the arbitral reference arising out of an arbitral agreement dated 1st August, 2018. Since all the 4 applications involve identical points of law, namely, termination of the arbitrator's mandate and substitution of a new arbitrator, the Court proposes to dispose of the applications in the following manner.

2. The facts presented to the Court are that the petitioner invoked the arbitration clause in terms of an arbitration agreement contained in a Agreement to License dated 1st August, 2018. The respondent accepted the petitioner's nomination of arbitrator but disputed the significance of the letter dated 9th May, 2020 by which the arbitral reference was commenced.

The respondent questioned the jurisdiction of the learned arbitrator in an application filed under section 16 of The Arbitration and Conciliation Act, 1996. The petitioner on the other hand claimed license fees which remained due and payable by the respondent. The petitioner is the claimant in the arbitration.

3. The admitted facts are also that the Statement of Claim was filed on 15th September, 2020; the Statement of Defence on 5th December, 2020 and the Rejoinder was filed on 23rd November, 2021. The parties continued with their arguments till 29th August, 2023 and filed their respective notes of arguments on that date.

4. According to learned counsel appearing for the petitioner/claimant, the period of 12 months expired on 22nd November, 2022 after which the parties agreed to extend the time. The learned arbitrator however omitted to record the same. Learned counsel appearing for the respondent says that the 12 months came to an end on 4th December, 2021 and the respondent did not expressly agree to extend the time thereafter.

5. Whatever be the correct position in terms of dates, the fact remains that further extension of the arbitrator's mandate would be required under section 29A(4) of the 1996 Act for the arbitral reference to continue. Admittedly, both parties overlooked the stipulated time frames under section 29A and proceeded in the arbitration till 24th July, 2023, which was the last date of hearing. The parties filed their notes of arguments on 29th August, 2023.

6. Counsel appearing for the petitioner submits that the arbitration is pending as on date and has not been terminated under section 32 of the Act and that the petitioner has a statutory right to seek appointment of a substitute arbitrator within 3 years under Article 137 of the Schedule to the Limitation Act, 1963. According to counsel, the petitioner does not have any other statutory option for seeking such relief after exhausting the time lines under section 29A of the 1996 Act.

7. Learned counsel appearing for the respondent takes a point of jurisdiction in that application under section 29A would have to be filed before a “Court” as defined in section 2(1)(e) of the Act. Counsel submits that the Calcutta High Court does not have territorial jurisdiction to entertain the present application. Counsel further submits that section 15 of the Act would not be applicable after expiry of the mandate of the arbitrator and hence the application under section 29A is not maintainable. Counsel urges that section 15 in any event cannot be applied after enactment of section 29A of the Act. According to counsel, the petitioner’s remedy lies in section 29A itself for substitution of the arbitrator. Counsel submits that section 15 of the Act will also not be applicable since the arbitrator has not withdrawn from office.

The statutory blockades before the petitioner/claimant under the 1996 Act

8. The petitioner seeks substitution of the existing arbitrator on the ground that after termination of mandate, the petitioner does not have any approach-routes to the Court save and except through section 15 of The Arbitration and Conciliation Act, 1996. The petitioner’s case is hence built

on the alternative; under section 29A for extension of the mandate and alternatively for substitution of the learned arbitrator under section 15 of the Act. The respondent, on the other hand, takes several objections to the maintainability of the application on the ground that the petitioner can only come under section 29A for extension of the mandate and not under section 15 since no grounds have been made out under the latter.

9. The factual position, good, bad or indifferent (in terms of statutory sensibilities) is that the mandate of the learned arbitrator ended on 22.11.2022 /4.12.2021 under section 29A(1) of the Act. For the sake of clarification, section 29A(1) limits the time for making of the arbitral award within 12 months from the date of completion of pleadings as defined under section 23(4) of the Act. The prescribed time limit is for non-international commercial arbitrations. Section 29A(3) allows for an extension of 6 months (after 12 months) for making of the award subject to consent of the parties. Section 29A(4) permits the Court to extend the period for making of the award provided the mandate of the arbitrator subsists at the time of making of the application.

10. The construction given to section 29A(4) by the Court in *Rohan Builders (India) (P) Ltd. vs. Berger Paints India Ltd.*; 2023 SCC OnLine Cal 2645 is now pending before the Supreme Court in a Special Leave Petition filed by the petitioner therein. The Court is informed that the Supreme Court has stayed the operative order on 6.11.2023 but not the judgment. Whatever be the final fate of *Rohan Builders* or more precisely the construction of section 29A(4), the fact remains that the arbitrator's

mandate terminated on and from 4.11.2021 or 22.11.2022 depending on the commencement of 1 year from the rejoinder or the statement of defence. It is also undisputed that both the parties proceeded in the arbitration, notwithstanding the termination, until 24.7.2023 and filed their respective notes of arguments on 29.8.2023.

11. The question which now arises is whether the Court can proceed to appoint a substitute arbitrator in view of the erstwhile arbitrator's mandate having come to an end.

12. The answer to that question would emerge, significantly from the statutory blockades which the petitioner is presently confronted with.

13. First, section 29A(4) of the 1996 Act confers the Court with the power to extend the mandate of the arbitrator if the award is not made within 12 + 6 months as provided under section 29A(1) and (3) respectively, provided the mandate subsists at the time of making such application. As stated above, this was the construction given by the Court in *Rohan Builders* which is presently under consideration before the Supreme Court. Therefore, pending a final decision on the correctness of the view, the petitioner is precluded from seeking extension of the arbitrator's mandate post-termination under section 29A(4).

14. Second, the route under section 29A(6) is also closed for the same reason. Section 29A(6) empowers the Court to substitute 1 or all of the arbitrators while extending the period for making of the award under section 29A(4). However, since 29A(4) contemplates extension of the period for

making of the award only where the mandate of the arbitrator is subsisting as on the date of the application, the Court cannot invoke the power under section 29A(6) where the mandate has admittedly terminated.

15. Third, section 14 provides for substitution of an arbitrator if the mandate of the erstwhile arbitrator has terminated on the grounds provided under section 14(1)(a) and (b), namely when the arbitrator becomes *de jure* and *de facto* unable to perform his/her functions or withdraws from office or where the termination is by consent of the parties. Section 14(2) gives the option to a party, unless the parties decide otherwise, to apply to the “Court” to decide on the termination of the mandate. This avenue is open to a party where there is controversy on the *de jure* or *de facto* inability of the arbitrator to perform his/her functions or on the ground of inordinate delay.

16. The difficulty in this case is presented by the forum – “Court” referred to in section 14(2) in the context of “Court” as defined in section 2(1)(e) of the Act. Section 2(1)(e) defines “Court” to mean the principal Civil Court of Original Jurisdiction in a District and includes the High Court in exercise of its Ordinary Original Civil Jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit.

17. In the present case, the parties agree that the High Court is not the 2(1)(e) Court. The petitioner does not dispute that the learned District Judge at Alipore is the “Court” under section 14(2) of the Act but seeks the urgent intervention of the Court to resume the arbitration.

Does the petitioner have any recourse available under the 1996 Act?

18. Although section 14(2) requires the “Court” to be the jurisdictional Court under section 2(1)(e), section 15 is telling-ly indifferent to such forum-designation. Moreover, section 15 covers any situation where the mandate of an arbitrator shall terminate since it draws both from sections 13 or 14 besides a situation where the arbitrator withdraws from office or does so with the agreement of parties. Therefore, the scenarios of termination would also include the arbitrator becoming *de jure* or *de facto* unable to perform his/her functions or where there has been inordinate delay in the performance of the functions.

19. In this case, the arbitrator’s mandate terminated on 4th December, 2021/22nd November 2022. The Act does not conceive of a situation where the arbitrator can continue to perform his/her functions after termination of mandate. Hence, the condition under section 14(1)(a) of *de jure* or *de facto* inability applies with full force to the present facts.

20. Section 15(2) provides for a seamless transition from termination to substitution and harks back to the rules which were applicable to the appointment of the arbitrator who is being replaced. The smooth transition after the termination of the mandate (of the earlier arbitrator) to the substitution of a new arbitrator is reinforced by section 15(3) which provides for repetition of hearings but only at the discretion of the Tribunal. Section 15(2), by implication, takes the parties to section 11 for appointment of arbitrator and more specifically to section 11(5) and (6) where the High

Court has been conferred with the exclusive power to make the appointment.

21. The petitioner has admittedly issued a notice on 9th October, 2023 to the respondent under section 15 of the Act nominating its substitute arbitrator. The respondent however refused to agree with the nomination by its reply issued on the same date. This exchange of letters is akin to the procedure envisaged under section 11(5) of the Act since the respondent expressed its disagreement with the petitioner's choice within 30 days (in fact on the same date) under the said provision.

22. The parties would hence revert to a section 11 situation where the power of appointment is only with the Chief Justice of a High Court or his/her Designate. It follows that the power to substitute an arbitrator under section 15 flows from the power to appoint under section 11. Ref: *Amit Kumar Gupta vs. Dipak Prasad*; (2021) 1 CAL LT 278 where the word "Court" in section 29A was held to take the characteristic of the appointing authority prescribed in section 11 of the Act.

The question is, is the petitioner statutorily-barred from doing so?

23. The Court finds substance in the petitioner's contention that the precedential value of the judgment in *Rohan Builders* would continue to be binding till it is set aside by the Supreme Court; Refer: *Pijush Kanti Chowdhury vs. State of West Bengal*; (2007) 3 CHN 178. A Division Bench of this Court held in that decision that the authority of a decision as a

precedent is not undermined by interim orders *inter parties* unless the decision is set aside by the superior Court.

24. Undoubtedly, the petitioner has an indefeasible right to have an arbitrator appointed. This view is buttressed by the fact that the arbitration has remained in suspension from 29th August, 2023. The arbitrator's mandate has terminated and the parties have lost their chance to have the mandate extended under section 29A of the Act. The defeatist approach to the vagaries of the law does not comport with the object with which The Arbitration and Conciliation Act, 1996 was brought into effect. The object is to ensure that arbitrations are not kept in limbo for an indefinite period of time. The Court must, in these circumstances, take a proactive approach to hold that the arbitration must resume without any further delay. This proactive stance would of course be within the parameters of the statute and not beyond it.

25. The Court is accordingly of the view that the petitioner's recourse lies through section 15 for substitution of the learned arbitrator on grounds which are covered by section 14 including that of *de jure* or *de facto* inability to perform the functions. The inability arises out of the fact that the learned arbitrator could not have proceeded with the arbitration once the mandate terminated.

26. The petitioner may have an alternative recourse available to it under section 29A if the judgment in *Rohan Builders* is set aside by the Supreme Court. Till then, the petitioner, as the claimant in the arbitration, cannot be left without a remedy. The parties have already filed their notes of

arguments as long back as in 29th August, 2023 and the arbitration cannot be kept in suspension. The respondent's conduct of clutching at technicalities in order to prevent resumption of the arbitration is reflective of the respondent's attempt to frustrate the arbitration which commenced from 9th May, 2020 and almost reached completion on 29th August, 2023 - at least of the hearing process. The respondent's resistance to the arbitration is in effect a resistance to the petitioner's claim for unpaid license fees including for Amenities Service Charges and Common Area Maintenance Charges. The respondent intends to make the petitioner wait for the Supreme Court's verdict on *Rohan Builders*. The Court cannot sanction such conduct.

27. *Swadesh Kumar Agarwal vs. Dinesh Kumar Agrwal; (2022) 10 SCC 235* is not relevant since the petitioner has conceded that the Calcutta High Court is not the Court as defined under section 2(1)(e) of the Act. *Raj Chawla and Co. Stock and Share Brokers vs. Nine Media and Information Services Limited; 2023 SCC OnLine Del 520* is on the applicability of section 29A to pending arbitration. This Court is however of the view that section 29A(6), that is the power of the Court to substitute the arbitrator/s while extending the period under section 29A(4), presumes existence of the arbitrator's mandate at the time of invoking such power.

28. AP 747 of 2023, AP(COM) 11 of 2023, AP(COM) 12 of 2023 and AP(COM) 13 of 2023 are accordingly allowed for the above reasons.

29. Ms. Hasnuhana Chakraborty, counsel, is appointed as the substitute Arbitrator for continuing and concluding the arbitration arising out of the

arbitration agreement dated 1st August, 2018. The learned arbitrator will be at liberty of taking a decision on whether to repeat the hearings previously held by the erstwhile learned Arbitrator. Ms. Chakraborty shall communicate her consent in the prescribed format to the Registrar, Original Side of this Court within 3 weeks from this judgment. The petitioner shall communicate this order to the learned arbitrator within 3 days from the date of this judgment with the requisite details of the petitioner.

30. All the 4 arbitration petitions are disposed of in terms of the above.

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

(Moushumi Bhattacharya, J.)