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Arb.O.P.(Com.Div.) No.22 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.03.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.22 of 2024

Pro Interactive Services India Private limited
31-32 Begumpur Park, Malaviya Nagar
New Delhi – 110 017.

... Petitioner

Vs.

Financial Software and Systems Private Ltd.,
"Saradha" Ground Floor
No.42, Third Main Road,
Gandhi Nagar, Ayar,
Chennai – 600 020.

... Respondent

Prayer: Petition is filed under Section 14(2) r/w. Section 15 of the Arbitration and Conciliation Act, 1996 to terminate the mandate and substitute of arbitrator Mr.K.P.Sivasubramanian and appoint a sole Arbitrator/s to adjudicate upon the differences and disputes between the parties under the Agreement dated 16.09.2011.

For Petitioner	: M/s.Meera Gnanasekar
For Respondent	: Mr.N.L.Rajah, Sr.Counsel for Mr.Abishek Jenasen



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ORDER

This petition has been filed under Section 14(2) and 15 of the Arbitration and Conciliation Act, 1997 to terminate the mandate of the learned Arbitrator and substitute the name of the another Arbitrator as prayed in the present petition which reads as under :-

“to terminate the mandate and substitute of arbitrator Mr.K.P.Sivasubramanian and appoint a sole Arbitrator/s to adjudicate upon the differences and disputes between the parties under the Agreement dated 16.09.2011.”

2. The petition is opposed by the respondent on the ground that there is a suppression of facts before this Court in as much as the learned Arbitrator had already terminated the mandate by an order dated 24.07.2023, the details of which was not been furnished to this Court. That apart it is submitted that there is total non cooperation by the petitioner before the learned Arbitrator.

3. The learned Senior Counsel for the respondent has drawn the attention to the decision of the Hon'ble Supreme Court in **Lalitkumar V. Sanghavi** reported in **(2014) 7 SCC 255** wherein under a some what similar circumstances the Hon'ble Supreme Court observed as under :-



“12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court “as provided under Section 14(2)”.

13. The expression “court” is a defined expression under Section 2(1)(e) which reads as follows:

“2. (1)(e) ‘Court’ means 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, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;”

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless, is without basis



in law.

15. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the Arbitral Tribunal which in turn is based upon an order dated 29-10-2007 by which the arbitral proceedings were terminated.

16. The appeal is dismissed.”

4. It is submitted that after the mandate of the arbitrator stands terminated by substituting the name with name of another arbitrator would amount to stigmatising the learned arbitrator who terminated the arbitration proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 and therefore this petition is liable to be dismissed.

5. The learned Senior Counsel would submit the manner in which the petition is filed has to be dismissed. It is submitted at best a separate petition ought to have been filed under Section 14(2) of the Arbitration and Conciliation Act, 1996.

6. By way of rejoinder, the learned counsel for the petitioner has drawn the attention to the consequential order passed by the Bombay High Court, pursuant



to the order of the Hon'ble Supreme Court referred *supra* in Arb.OP.No.752 of 2021 dated 12.08.2015. A reference was made to Paragraphs 95 and 96 of the order passed by the Bombay High Court in Arb.OP.No.752 of 2021 which is reproduced herein under :-

“95. I therefore pass the following order :-

a). Delay in filing the petition is condoned.

b). The impugned order dated 29th October, 2007 passed by the arbitral tribunal is set aside. The arbitral proceedings are restored to file. The mandate of the arbitral tribunal is restored. The arbitral tribunal is directed to proceed with the arbitral proceedings and to render an award expeditiously.

If the erstwhile arbitral tribunal or any member thereof is not available for disposal of the arbitral proceedings, the petitioners would be at liberty to take appropriate steps to apply for constitution of arbitral tribunal under section 15 read with section 11 of the Arbitration Act after complying with the conditions thereof.

d). There shall be interim relief in terms of prayer clauses (iii) and (iv).

e). It is made clear that insofar as the office / residential premises described at serial no.2 of Exhibit “A” to the petition is concerned, the Court Receiver shall appoint the respondent no.1 or any other person found in possession thereof, as an agent of the Court Receiver on usual terms and conditions and on payment of royalty but without furnishing security. The respondent no.1 is directed to disclose as to whether the respondent no.1 desires to accept the agency of the Court Receiver as directed aforesaid within two weeks from the date of such offer made by the Court Receiver, failing which the Court Receiver shall take forcible possession of the office / residential premises described at serial no.2 of Exhibit “A” to the petition



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and shall submit a report to this Court for obtaining further orders.

f). Till the Court Receiver takes possession of the property described in Exhibit "A" to the petition, the petitioners as well as the respondents are restrained from disposing of, creating any third party rights in respect of the assets of the firm M/s.Sanghavi Brothers.

96. The arbitration petition is accordingly disposed of in the aforesaid terms. No order as to costs."

7. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Counsel for the respondent.

8. The proceedings commenced on 13.07.2015 before the learned Arbitrator. It proceeded upto 06.12.2018 with an inspection by the learned Arbitrator of the ATM in Triplicane. Thereafter, the petitioner nor the respondent bothered to respond to the learned Arbitrator. The learned Arbitrator also did not fix any further hearing in the Arbitral proceedings, after inspection of ATM on 06.12.2018. Nothing further progressed after 06.12.2018. Meanwhile, the country was under complete, partial and intermittent lockdown from 2020 to March 2022 due to out break of Covid-19 pandemic. In his proceedings dated 29.05.2023, the learned Arbitrator has traced out the entire history of the Arbitral



proceedings before him. Following paragraphs are relevant from the said

proceedings.

“That apart, during the hearing held on 15-11-2018, learned counsel who had entered change of appearance/ vakalath for the Claimant submitted that they may file a an Amended Claim Statement and he was instructed to inform the Arbitrator regarding the same on or before 30-11-2018 and that further hearing would be fixed on being informed about it. Thereafter, there was no intimation from the side of the claimant regarding whether they propose to file any Amended Claim Statement or not.

There was also no intimation either from the Claimant's side or Respondent's side regarding the two clarifications which were sought for by the Arbitrator about the working of the ATM. There was also no request from either side requesting for any extension of time for any reason or to fix a date of hearing for proceeding further with the Arbitral Proceeding.

Till date nothing has happened except for intervention of the pandemic (Covid-19) situation and that period has also passed and both sides have not contacted even thereafter.

The stalemate cannot be allowed to continue further and indefinitely with both parties not showing any interest in continuing the Arbitration. First and foremost, both parties have to inform the Arbitrator whether they are inclined to continue the Proceedings or not and more particularly whether the Claimant is interested in continuing the proceedings and is inclined to file any Amended Claim Statement or not. The Respondent shall also express their response in the said context and further directions can be issued by the Arbitrator.

This has to be complied with by both the Parties within a period of two weeks from the date of receipt of this Proceeding, failing which the Arbitral Proceedings will be terminated under Sec. 32 of the Arbitration and Conciliation Act, 1996 without



any further Notice.”

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9. There was no response from either the petitioner or the respondent or the respective counsel appointed by them. The learned Arbitrator had therefore threatened to terminate the mandate of the Arbitral Tribunal vide communication dated 16.07.2023.

10. The said communication dated 16.07.2023 of the learned Arbitrator was addressed to both the counsels. However, there was a studied silence from the end of the petitioner, the respondent and their respective counsels. Communication dated 16.07.2023 was thereafter followed by actual termination of mandate on 24.07.2023. Thus, the respective counsels tested the patience of the learned Arbitrator and thus frustrated him.

11. It is noticed that earlier on 15.11.2018 a new counsel had appeared before the learned Arbitrator and undertook to file a revised claim for the petitioner. However, the new counsel did not file a revised claim. At that stage, the inspection of the ATM was proposed to be held on 06.12.2018.



12. The learned Arbitrator had also inspected the ATM in Triplicane and had raised certain queries on the technical aspects and had called on both the parties to submit their queries. However, both the parties failed to reply the learned Arbitrator. Thereafter, nothing progressed.

13. It is in this background, the learned Arbitrator has terminated the proceedings of the Arbitral Tribunal on 24.07.2023 under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 by observing that continuation of the Arbitral proceedings was both “**unnecessary**” and “**impossible**”.

14. Once either the Arbitral Tribunal terminates the proceeding under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 or the mandate of the Arbitral Tribunal stands terminated under Section 29(A) r/w 23 of the Arbitration and Conciliation Act, 1996, it is still open for the parties to approach the Court for continuation of the Arbitral Proceedings either before the same Arbitrator or request for appointment of a new Arbitrator as the *inter-se* claim of parties cannot abate by such event.



15. It only means the learned Arbitrator has terminated the proceeding under Section 32(2)(c) of the Arbitration and Conciliation Act, 1966. There is no finality to the *inter-se lis* between the parties.

16. Merely, because the learned Arbitrator has terminated the proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1966 *ipso facto* would not mean, the dispute is no longer justifiable or arbitrable.

17. Termination of the proceeding under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 would not necessarily mean that the *inter-se li* between the parties also perishes and has to abate. Both the parties as also their counsels have been irresponsible by not responding to the letters / Communication sent by the learned Arbitrator. They have not only frustrated the learned Arbitrator but also impelled him to pass order under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 and thereby terminating the proceedings before the Arbitral Tribunal.

18. Since, the dispute remains unresolved, it has to be resolved either by



relegating the petitioner to file a fresh suit against the respondent, for the time spent in the Arbitral proceedings would stand saved in view of Section 43 of the Arbitration and Conciliation Act, 1996 or in the alternative, Court can appoint another arbitrator in place of the arbitrator who has terminated the proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996.

19. Since the pleadings are complete, I see no point in dismissing this petition as it would imply that the petitioner has to file a suit and restart the case afresh as a suit to be filed by the petitioner would not be time barred in view of Section 43 of the Arbitration and Conciliation Act, 1996.

20. Since the learned Arbitrator has terminated the proceeding after expressing his exasperation on the grounds stipulated in Section 32(2)(c) of the Arbitration and Conciliation Act, 1996, there is no scope for extending the mandate of the Arbitral Tribunal by referring the case back to the learned Arbitrator to continue the proceedings.



21. Therefore, I am of the view that the case can be referred to another arbitrator to pass an Award as expeditiously as possible, preferably within a period of 12 months from the date of this order as the pleadings are completed subject to the complying with the directions. Perhaps only Issues have to be framed.

22. It is made clear that the petitioner shall not file any fresh claim statement and further delay the proceedings be the new Arbitrator to be appointed. The proceedings shall continue from where it was left on 15.11.2018 subject to the petitioner suitably compensating the **Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.)**, Former Judge of Madras High Court, the learned Arbitrator who has terminated the Arbitral Proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 for the time spent in holding the proceedings, within a period of 30 days of this Order.

Accordingly, it is ordered as follows:-

- i) the termination of the Arbitral proceeding vide proceedings dated 24.07.2023 by Hon'ble **Mr.Justice K.P.Sivasubramaniam (Retd.)**, Former Judge of Madras High



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Court, the learned Arbitrator is accepted ;

ii) the petitioner shall pay a Sum of **Rs.5,00,000/-** (Rupees Five Lakh Rupees) to **Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.), Former Judge of Madras High Court**, the learned Arbitrator who has terminated the proceedings, within a period of 30 days of this Order.

iii) The **Hon'ble Mr.Justice N.Kirubakaran (Retd.),** Former Judge of Madras High Court residing at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai - 600 089, (Mobile No.9445025454) is appointed as sole Arbitrator to resolve the dispute between the parties to continue the Arbitral Proceedings.

iv) the pleadings completed before the Arbitral Tribunal shall stand be transferred to the new Arbitral Tribunal. The new Arbitral Tribunal shall endeavour to pass an Award on merits and in accordance with law, preferably, within a period of twelve months from the date of receipt of a copy of this order.

v) Counsel for the petitioner shall take the responsibility



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of transmitting the records from the **Hon'ble Mr.Justice K.P.Sivasubramaniam (Retd.)**, Former Judge of Madras High Court, the learned Arbitrator to **Hon'ble Mr.Justice N.Kirubakaran (Retd.)**, Former Judge of Madras High Court.

vi) This Registry shall issue certified copy of the Order to the petitioner for continuance of the Arbitral Proceeding before the new Arbitral Tribunal only after the petitioner files a memo evidencing payment of the aforesaid amount to **Mr.Justice K.P.Sivasubramaniam (Retd.)**, Former Judge of Madras High Court, the learned Arbitrator, within the time stipulated above.

23. This Original Petition stands allowed with the above observations. No costs.

20.03.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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C.SARAVANAN, J.



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