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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 07th May, 2024

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O.M.P. (MISC.) 6/2024

M/S POWER MECH PROJECTS LTD

..... Petitioner

Through: Mr. Naresh Markanda, Sr. Adv. with
Mr. Rajesh Markanda, Mr. Keshri
Kumar, Mr. Rohan Markanda, Ms.
Aviral Setia, Advs. (M:9501031506)

versus

M/S DOOSAN POWER SYSTEMS INDIA PVT. LTD... Respondent

Through: Mr. Shankh Sengupta, Mr. Aubert
Sebastian and Mr. Vedant Kumar,
Advs. (M:9437506175)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

Background and Submissions of ld. Counsels for the parties

2. The present petition has been filed under Sections 29A(4) & (5) of the Arbitration and Conciliation Act, 1996 (*hereinafter*, '1996 Act') by the Petitioner-M/s. Power Mech Projects Ltd., seeking extension of the mandate of the three member Arbitral Tribunal.

3. According to the petition, the parties entered into an Agreement dated 12th May, 2016 titled 'Subcontract for Boiler Works of Unit 1,2,3 of BARH STPP-1 (3x660 MW) Balance Work of Main Plant Package (SG &AUX.)' (*hereinafter*, 'Works Contract'). The scope of the said Works Contract included erection, testing & commissioning of balance work of main plant package. The works underlying the said Works Contract was stipulated to be

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completed by 30th November, 2018, however, according to the petition, works are still being executed. Disputes arose between the parties, and the Petitioner invoked arbitration proceedings in terms of Clause 25 of the Works Contract, under the aegis of the Indian Council of Arbitration, by way of a '*Request for Arbitration*' dated 10th May, 2022. A three-member Arbitral Tribunal entered reference on 6th July, 2022. The petition states that, since the proceedings did not complete within a period of one year in terms of the Section 29A of the 1996 Act, both parties consented for a six-month extension on 10th October, 2023.

4. According to the Petitioner, in the meantime, mandate of the Id. Arbitral Tribunal expired on 4th February, 2024. Further, the arbitral proceedings are at the stage of cross-examination. Hence, Mr. Markanda, Id. Sr. Counsel for the Petitioner, prays that the mandate of the Id. Arbitral Tribunal be now extended by a further period of 12 months. Since the extended time expired on 4th February, 2024, the Id. Arbitral Tribunal vide order dated 21st February, 2024 stated that its mandate had expired and that it would resume proceedings after receiving appropriate orders.

5. Notice was issued in the present petition on 4th March, 2024, and the Respondent was directed to reply to the same.

6. On behalf of the Respondent-Mr. Sengupta, Id. Counsel has filed a detailed reply on 13th March, 2024. He contests the present petition seeking extension of the mandate, and submits that the Petitioner's conduct before the Id. Arbitral Tribunal shows that the Petitioner is deliberately delaying the arbitration proceedings.

7. In fact, according to Id. Counsel for the Respondent, the Id. Arbitral Tribunal itself noted on several occasions, as noted in a communication



dated 4th August, 2023, that the Petitioner was taking unnecessary adjournments. As an illustration, Id. Counsel referred to the orders passed by the Id. Arbitral Tribunal on 7th July, 2023, wherein the Petitioner's witnesses (Claimant before the Id. Arbitral Tribunal) did not appear, citing ill health. Immediately thereafter, the Petitioner sought an amendment of its claims before the Id. Arbitral Tribunal. Once again, when the matter was listed for the Petitioner's evidence, an adjournment was sought. However, in a curious twist of events, the order sheet dated 25th August, 2023, recorded that the application for amendment was being withdrawn, and the matter was to be fixed for the Petitioner's evidence.

8. Thus, the main plank of the Respondent's submissions is that various email correspondence and the order sheets before the Id. Arbitral Tribunal reveal that the Petitioner was not diligent in concluding evidence, and thus, the arbitral proceedings are being repeatedly delayed, due to one reason or the other.

9. Id. Counsel for the Respondent further submits that the mandate of the Id. Arbitral Tribunal itself expired on 4th February, 2024. It is further submitted that while the Respondent has no objection to continuing the mandate of the Id. Arbitral Tribunal, since the mandate has already expired by operation of law, the same cannot be extended through the present petition. Further, any consent by the parties for the continuation of the mandate of the Id. Arbitral Tribunal is not valid. Thus, under such circumstances, whether the Court can extend the mandate of the Id. Arbitral Tribunal is a question, now pending before the Supreme Court in *SLP(C) No. 23320/2023* titled '*Rohan Builders (India) Pvt. Ltd. v. Berger Paints*



India Ltd.’ and SLP(C) Nos. 26990/2023, 26991/2023 titled ‘ATS Infrastructure Ltd. v. Rasbehari Traders’ and other matters.

10. According to Id. Counsel for the Respondent, in view of the question of law to be adjudicated by the Supreme Court, the present petition would not amount to extension of the mandate, but revival of the mandate of the Id. Arbitral Tribunal.

Analysis

11. The question as to whether the extension of the mandate of an arbitral tribunal, may be granted under Section 29A(5) of the 1996 Act, even after expiry of the mandate, has now been considered in several decisions of various High Courts.

DELHI HIGH COURT

12. The instant issue was considered in ***Wadia Techno-Engineering Services Limited v. Director General of Married Accommodation Project (2023 SCC OnLine Del 2990)*** and ***ATC Telecom Infrastructure Pvt. Ltd. v. Bharat Sanchar Nigam Ltd. [2023:DHC:8078]***. These two decisions held that the mandate can be extended “*either prior to or after expiry of the period so specified*”¹.

13. The above view has also been followed in other decisions of this Court, which include:

- (i) ***Religare Finvest Ltd. v. Widescreen Holdings Pvt. Ltd. (2024:DHC:3004)***
- (ii) ***KMP Expressways Ltd. v. IDBI Bank Ltd. (2024:DHC:2739)***
- (iii) ***PSA Protech and Infralogistics Pvt. Ltd. v. Food Corporation***



of India [O.M.P (MISC) (COMM.) 517/2023, decision dated 21st February, 2024]

- (iv) *Ajanta Soya Ltd. v. The Oriental Insurance Company (2024:DHC:1114)*
- (v) *Larsen and Toubro Ltd. v. IIC Ltd. (2024:DHC:909)*
- (vi) *Iqbal Singh v. Naresh Kumar (2023:DHC:8580)*
- (vii) *Reliance Infrastructure Ltd. v. Madhyanchal Vidyut Vitran Nigam Ltd. (2023:DHC:8078)*
- (viii) *ATS Infrastructure v. Rasbehari Traders [O.M.P. (T) (COMM.) 91/2023, decision dated 17th November, 2023]*

14. However in *Shapoorji Pallonji Company Pvt. Ltd. v. Elena Power and Infrastructure Limited [O.M.P.(MISC.)(COMM.) 95/2023, decision dated 30th May, 2023]* , the Court took a view that only after period under Section 29A(3) of the 1996 Act is exhausted, the parties can resort to Section 29A(4) of the 1996 Act.

CALCUTTA HIGH COURT

15. In *Rohan Builders (India) Private Limited v. Berger Paints India Limited (2023 SCC OnLine Cal 2645)*, the Calcutta High Court held that if an arbitral award is not delivered within the time limits prescribed under Section 29A(1) and/or Section 29A(3) of the 1996 Act, the arbitral tribunal's mandate automatically ends. Thus, once the arbitral tribunal's mandate has expired, it is no longer feasible to file a petition under Section 29A(4) of the 1996 Act. Therefore, it is essential for parties to file a petition under Section 29A(4) of the 1996 Act before the arbitral tribunal's mandate expires, as

¹ See Section 29A(4) of the 1996 Act.



seeking an extension post-expiry is not permissible. This is because, as per the decision, the Legislature has explicitly used the term ‘terminate’ in Section 29A(5) of the 1996 Act, as opposed to ‘revival’ or ‘renewal’.

16. The said decision was challenged before the Supreme Court in **SLP No. 23320/2023** titled ‘**Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.**’. In another decision titled ‘**Vrindavan Advisory Services LLP v. Deep Shambhulal Bhanushali**’ [decision dated 29th August, 2023, bearing no. A.P. 448/2023], the Calcutta High Court followed its decision in **Rohan Builders (supra)**, and the Supreme Court vide order dated 6th November, 2023, in **SLP(C) 24489/2023** has stayed the operation of the said judgment.

17. However, recently in **Multiplex Equipments and Services Pvt. Ltd. v. Bagzone Lifestyles Pvt. Ltd. (2024 SCC OnLine Cal 174)**, in relation to the precedential value of **Rohan Builders (supra)**, the Calcutta High Court observed that the pendency of the SLP in **Rohan Builders (supra)** ought not to disadvantage a petitioner, and the arbitration proceedings cannot be kept in abeyance. The relevant portion of the observations are as follows:

“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."

18. It is to be noted that this Court in *ATC Telecom (supra)* was unable to concur with the findings of the Id. Single Judge in *Rohan Builders (supra)*.



HIGH COURT OF JAMMU & KASHMIR

19. In *H. P Singh v. G. M. Northern Railways (2023 SCC OnLine J&K 1255)* it was held that the Court had authority to extend the mandate of an arbitral tribunal beyond the initial period of one year, or even the extended period of six months under Section 29A(4) of the 1996 Act. In the said decision, the Court placed reliance on the decision of this Court in *ATC Telecom (supra)*, instead of the decision of the Calcutta High Court in *Rohan Builders (supra)*.

HIGH COURT OF KERALA

20. In *Hiran Valiyyakkil Lal v. Vineeth M.V., (2023 SCC Online Ker 5151)* the Court held that under Section 29A(4) of the 1996 Act, extension of the mandate of an arbitral tribunal may be granted prior to or after expiry of the period provided under Section 29A(2) & (3) of the 1996 Act, on sufficient cause, and on such terms and conditions as may be imposed by the Court.

MADRAS HIGH COURT

21. In *Suryadev Alloys and Power Pvt. Ltd. v. Shri Govindaraja Textiles Pvt. Ltd. (2020 SCC OnLine Mad 7858)* the Madras High Court also took a similar view, and held that extension for making of the award may be granted by the Court, even after the period under Section 29A(1) or Section 29A(3) of the 1996 Act has expired. However, after the award is passed, the mandate cannot be extended in a petition under Section 34 of the 1996 Act.



BOMBAY HIGH COURT

22. In *Nikhil H. Malkan v. Standard Chartered Investment and Loans (India) Ltd. (2023:BHC-OS:14063)*, the Bombay High Court followed the decision of this Court in *ATC Telecom (supra)*, instead of the decision in *Rohan Builders (supra)*. The relevant observations are set out below:

“15. Having perused Section 29A(4) of the said Act, particularly in the light of use of the words “either prior to or after the expiry of the period so specified”, this Court finds that the purpose for which Section 29A was introduced in the aforesaid Act would be defeated, if it is to be held that the Court could exercise power to extend the mandate of the learned Arbitrator even after expiry of the extended period only if the application or petition for extension of mandate is filed prior to expiry of such mandate. There is nothing in the provision to indicate that if such an application or petition is not filed before the expiry of the mandate of the learned Arbitrator, the Court would be rendered powerless to exercise its authority. The aforesaid provision i.e. Section 29A of the aforesaid Act, is a provision that enables the Court to pass appropriate orders in order to ensure that the arbitral proceeding reaches its logical conclusion. No purpose would be served in holding that if such an application or petition for extension of mandate of the learned Arbitrator is filed after the expiry of the mandate, the Court would be in no position to entertain the same. Any apprehension regarding inordinate and unexplained delay on the part of the party approaching the Court can be addressed by holding that the Court would extend the mandate only when it is satisfied that sufficient grounds are made out for granting extension of mandate of the learned Arbitrator.

16. In view of the above, this Court respectfully



disagrees with the views expressed by the learned Single Judge of the Calcutta High Court in the case of Rohan Builders (India) Private Limited Vs. Berger Paints India Limited (supra) and the Division Bench of the Patna High Court in the case of South Bihar Power Distribution Company Limited Vs. Bhagalpur Electricity Distribution Company Private Limited a Private Limited Company registered under the Companies Act, 1956 (supra) in the aforementioned judgments. This Court is in agreement with the view adopted by the Delhi High Court in the case of ATC Telecom Infrastructure Private Limited Vs. Bharat Sanchar Nigam Limited (supra).”

23. Additionally, this Court in *Larsen and Turbo Ltd. (supra)*, having considered the case laws above, observed as under:

“54. A perusal of Section 29A(4) of the 1996 Act would show that it contemplates various situations as set out below:

- Under Section 29A(1) of the 1996 Act, the award in all arbitration matters except international commercial arbitration matters is to be made within 12 months from the date of completion of pleadings under sub-Section 23(4).
- Under Section 29A(2) of the 1996 Act, if the award is made within six months, the Arbitral Tribunal is given an incentive of payment of additional fee. Section 29A(2) of the 1996 Act would have no application in the present case.
- Under Section 29A(3) of the 1996 Act, the parties, by consent can extend the period of 12 months by another six months i.e. the mandate would be valid for a period of 18 months.
- Section 29A(4) of the 1996 Act, however, contemplates two situations i.e.,
 - where the mandate is not extended and the time of 12 months has expired as per sub-section (1) or



- where the mandate has been extended for a further six months by consent of parties under sub-section (3).

In either situation, the Court has the power to extend the mandate of the Arbitral Tribunal. The consent of parties is only contemplated under Section 29A (3) of the 1996 Act and not under Section 29A(4) of the 1996 Act.

55. There are multitudinal situations where parties may be unable to give consent for extension of the mandate as is evident even in the present case for example, wherein one of the parties is under liquidation or in insolvency proceedings. The Arbitral Tribunal has already taken a view that the proceedings can continue against Respondent No.2/RPL and as observed earlier, the said order has not been challenged. Under such circumstances, the Court is not powerless to extend the mandate of the Arbitral Tribunal. Since the proceedings were ongoing against Respondent No.2/RPL at the time when the mandate expired, mere non-giving of the consent by the Liquidator or the IRP/RP cannot render the entire proceedings before the Tribunal as null and void or cannot be rendered infructuous.”

24. In view of the above legal position, this Court is unable to follow the decision of the Calcutta High Court in **Rohan Builders (supra)**, relied upon by the Respondent.

25. In the present case, the mandate of the Id. Arbitral Tribunal expired on 4th February, 2024. The present petition has been filed on 23rd February, 2024. The matter is at the stage of cross-examination. In view of the fact that the expression used in Section 29A(4) of 1996 Act is “*prior to or after expiry of the period so specified*”, this Court is fully empowered to extend the mandate, even after expiry of the mandate of the Id. Arbitral Tribunal.



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Accordingly, the mandate of the Id. Arbitral Tribunal is extended till 31st December, 2024.

26. Let the Registry communicate the present order to the Presiding Arbitrator of the Tribunal.

27. The present petition is disposed of in the above terms. All pending applications disposed of.

PRATHIBA M. SINGH
JUDGE

MAY 7, 2024

dj/dn