



2024:DHC:5769



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **O.M.P.(MISC.)(COMM.) 179/2023****EMCO LIMITED**

.....Petitioner

Through: Ms. Bhargavi Kannan, Mr.
Abhijeet Swaroop and Ms. Shivani
Karmakar, Adv.

versus

DELHI TRANSCO LIMITED

.....Respondent

Through: Mr. Prashant Mehta and Ms.
Prachi Kohli, Adv.**CORAM:****HON'BLE MR. JUSTICE C.HARI SHANKAR****JUDGMENT (ORAL)**

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02.08.2024**O.M.P.(MISC.)(COMM.) 179/2023****1. This is a petition under Section 29A(5)¹ of the Arbitration and****¹ 29-A. Time limit for arbitral award. –**

(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.

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Conciliation Act, 1996² (“the 1996 Act”) seeking extension of the mandate of a three member Arbitral Tribunal, which was *in seisin* of the disputes between the parties.

2. Mr. Prashant Mehta, learned Counsel for the respondent submits that this petition is misconceived. He draws my attention to the order dated 11 April 2019 passed by the learned Presiding Arbitrator of the Arbitral Tribunal, which reads as under:

“Order dated 11.04.2019

1. The parties being in default in making payment of fees and administrative expenses to the Arbitrators, this date was fixed for hearing subject to the payment by the parties. Neither party has paid the dues of the Arbitrators.

2. The presiding Arbitrator received notice of her appointment on 10.04.2018. The period of one year within which the Award has to be passed as per Section-29A(1) of the Arbitration and Conciliation Act, 1996 expired yesterday on 10.04.2019. Neither party has expressed any inclination for extension of time under section 29A(3). *As such the mandate of the Arbitrators has come to an end. Hence no further orders in the matter can be passed by the Arbitrators.*

3. The record of this case with the Arbitrator will be retained for six months and thereafter the same will be destroyed without any further notice to the parties unless the same is requisitioned by any court or demanded by any of the parties.

Sd.
PRESIDING ARBITRATOR”
(Emphasis supplied)

3. I find myself in agreement with Mr Mehta.

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the 1996 Act”

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4. A reading of the order dated 11 April 2019 discloses that the Arbitral Tribunal, which was *in seisin* of the disputes between the petitioner and the respondent is no longer *in seisin* thereof.

5. The Arbitral Tribunal has clearly stated that *the mandate of the arbitrators has come to an end*, and that, therefore, no further orders could be passed thereon. This order was never challenged, and has become final.

6. The offshoot of the order dated 11 April 2019 is clear and inexorable. The Arbitral Tribunal has clearly held that its mandate has come to an end. Section 29A(4) of the 1996 Act envisages extension of the mandate of the learned Arbitral Tribunal, which has expired by efflux of time. The circumstance to which Section 29A(4) caters is *sui generis*. It applies in a situation where the Arbitral Tribunal is still *in seisin* of the disputes between the parties but, owing to the time within which the award was required to be passed having expired, the mandate of the Arbitral Tribunal stands terminated. In such a situation, Section 29A(4) empowers the Court to extend the mandate of the Arbitral Tribunal.

7. This is not such a case. In this case, the Arbitral Tribunal has noted that not only has its mandate expired by efflux of time, but also that neither party expressed any inclination for extension of time under Section 29A(3). It was after noting this fact too that the Arbitral Tribunal arrived at an informed conclusion that its mandate had come to an end and that no further orders could be passed in the arbitral

proceedings.

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8. There can be no manner of doubt, in my opinion, that the three member Arbitral Tribunal, which was *in seisin* of the proceedings between the parties, has effectively relinquished hold over of the proceedings and that, therefore, there can be no question of this Court extending the mandate of the Arbitral Tribunal.

9. Ms. Bhargavi Kannan, learned Counsel for the petitioner, sought to submit that no formal order of termination of proceedings, as envisaged by Section 32³ of the 1996 Act, has been passed by the Arbitral Tribunal. In my opinion, this contention is itself debatable. Section 32(1) envisages termination of the proceedings either on the passing of the final arbitral award or on the passing of an order by the Arbitral Tribunal under Section 32(2). Among the circumstances in which an Arbitral Tribunal can pass the order terminating the arbitral proceedings under Section 32(2) is the circumstance, envisaged by clause (c) thereof, in which the Arbitral Tribunal finds that the continuation of the proceedings has become unnecessary or impossible. The order dated 11 April 2019 clearly reflects the view of the Arbitral Tribunal that, in the cumulative circumstances before it, i.e. (i) non-payment of the fees of the Arbitral Tribunal by either party,

³ 32. **Termination of proceedings. –**

- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where –
 - (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;
 - (b) the parties agree on the termination of the proceedings; or
 - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

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(ii) expiry of the period within which the Arbitral Tribunal was required to render its award and (iii) the absence of any inclination by either party to seek extension of the mandate of the Arbitral Tribunal, *no further orders could be passed by the Arbitral Tribunal.*

10. This, in my view, effectively amounts to a finding by the learned Arbitral Tribunal that continuation of the proceedings before it any further had become impossible.

11. Even otherwise, the situation stands covered by Section 14(1)(a) and (b)⁴ of the 1996 Act, which envisages termination of the mandate of the Arbitral Tribunal, where the Arbitral Tribunal becomes *de jure* or *de facto* unable to perform its function. Section 14(1)(a) envisages a circumstance in which the Arbitral Tribunal becomes *de jure* or *de facto* unable to perform its function and Section 14(1)(b) envisages a situation in which the Arbitrator withdraws from his office.

12. In view of the order dated 11 April 2019, the Arbitral Tribunal has clearly expressed its disinclination to continue with these proceedings any further. It has, in fact, stated, in so many words, that its mandate stands terminated, and that *no further orders could be passed by it*, for reasons which are *not merely attributable to efflux of*

⁴ **14. Failure or impossibility to act. –**

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if —

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.



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time. In such a circumstance, the mandate of the Arbitral Tribunal would terminate even under Section 14(1). Section 15(2)⁵ requires, in the event of termination of the mandate of the arbitrator, *inter alia* on the withdrawal of the arbitrator from his office, the appointment of the substitute arbitrator, according to the rules applicable to the appointment of the arbitrator, being replaced. “Withdrawal” from the office of arbitrator obviously follows a disinclination to continue to arbitrate. The order dated 11 April 2019 clearly evinces such disinclination.

13. While the choice of the persons who would man the arbitral tribunal fundamentally rests with the parties to the dispute – subject, of course, to the Court stepping in where the parties are at an impasse – there can be arbitration by coercion. The Court cannot compel an unwilling arbitrator to arbitrate. If it is a mere case of the mandate of the arbitrator expiring by efflux of time, and there is no want of inclination to arbitrate, on the part of the Arbitral Tribunal, the Court would ordinarily unhesitatingly extend the mandate. In such cases, no order, such as the order dated 11 April 2019 that has been passed in this case, would be passed. The order dated 11 April 2019, in my view, clearly discloses the intent of the Arbitral Tribunal *not to continue* with the proceedings – and, indeed, to destroy the arbitral record 6 months thence – and this Court has to respect that decision.

⁵ **15. Termination of mandate and substitution of arbitrator. –**

- (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate –
- (a) where he withdraws from office for any reason; or
 - (b) by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

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It cannot, by judicial *diktat*, compel the Arbitral Tribunal to continue to arbitrate on the dispute.

14. The parties have, in such an event, to re-initiate arbitral proceedings, should they so choose, “according to the rules that were applicable to the (Arbitral Tribunal) being replaced”. The Supreme Court has held in *Yashwith Constructions (P) Ltd v. Simplex Concrete Piles India Ltd*⁶, that the reference to the “rules” in Section 15(2) is intended to be a reference to the covenants of the arbitration agreement between the parties”. In other words, in such a situation the arbitral proceedings would have to be recommenced in terms of Section 21 of the 1996 Act, unless the parties otherwise agree.

15. Of course, in such an event, it would be open to the parties to request the earlier Arbitral Tribunal to continue and finish the arbitral process. Whether to accept such a request, if made, is, however, entirely with the members of the Arbitral Tribunal.

16. In any event, in the facts of this case, seen in the backdrop of the provisions of the 1996 Act, I do not see that how this Court can extend the mandate of the Arbitral Tribunal, which has effectively released the arbitral proceedings from its grasp.

17. Reserving liberty with the petitioner to take appropriate steps in accordance with law, in the event the petitioner desires the disputes to be arbitrated, this petition is accordingly dismissed.

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(2006) 6 SCC 204

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18. This order is passed without prejudice to the rights and contentions of the parties or of any preliminary objection that the respondent may choose to raise in the event of petitioner seeking to reinitiate in the arbitral proceedings.

C.HARI SHANKAR, J

AUGUST 2, 2024

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Click here to check corrigendum, if any

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