



2024:DHC:6367



\$~67 & 68

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

+ **O.M.P.(MISC.)(COMM.) 227/2023 and IA 36911/2024**

APEX BUILDSYS LTD.

.....Petitioner

Through: Mr. Suhail Sehgal, Mr. Achin Goel and Mr. Prashant D., Advocates

versus

VADERA INTERIORS AND EXTERIORSRespondent

Through: Mr. Mritunjay K. Singh, Mr. Saikat Khatva, Mr. Ravi Shankar, Mr. Narsingh Narain Rai, Mr. Praant Sharma, Ms. Parul Sharma, Mr. Harsh Garg and Ms. Charvi Maurya, Advocates

+ **O.M.P.(MISC.)(COMM.) 260/2023**

APEX BUILDSYS LTD.

.....Petitioner

Through: Mr. Rakesh Kumar, Mr. Suhail Sehgal, Mr. Achin Goel and Mr. Prashant Deolia, Advs.

versus

SHAKTI PUMP INDIA LTD.

.....Respondent

Through: Mr. Vasanth Rajasekaran & Mr. Harshvardhan Korada, Advocates

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

%

21.08.2024

O.M.P.(MISC.)(COMM.) 227/2023 and IA 36911/2024



2024:DHC:6367



1. This is a petition under Section 29A(4)¹ of the Arbitration and Conciliation Act 1996² for extension of the mandate of the Arbitrator, who was *in seisin* of the dispute between the parties.

2. Mr. Suhail Sehgal, learned counsel for the petitioner, submits that the mandate of the Arbitrator expired on 21 January 2019 whereas Mr. Singh, learned counsel for the respondent submits that the mandate of the Arbitrator expired on 25 March 2019. That discrepancy is not strictly relevant for deciding the present petition. Suffice it to state that prior to the expiry of the mandate of the learned Arbitrator, the following order was passed by him on 21 January 2019:

Present: None for the parties.

The witness due to accident was admitted in hospital and at the request of Claimant the matter is again adjourned for cross examination and tendering of affidavit and documents for

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.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(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.

² “the 1996 Act” hereinafter



2024:DHC:6367



21.01.2019 at 4:30 P.M.

Sole Arbitrator

Present: Sh. Rajpal and Raja Ram for Claimant alongwith witness
Naveen Sharma
Sh. Mritunjay Singh, Advocate for respondent.
CW-1 Naveen Sharma is present.

He tendered his affidavit with some documents in evidence of
claimant Partly Examined and cross by the respondent counsel.
Now come up for further cross examination of witness on
13.02.2019 at 4:30 PM. Parties are directed to bring remaining fee
on that day.

Sd/-
Sole Arbitrator
21.01.2019”

3. After this, there is no dispute about the fact that, till the expiry
of the mandate of the learned Arbitrator, there was no communication
from his side.

4. Mr. Mritunjay K. Singh, learned counsel for the respondent, has
pointed out that, on 13 March 2019, the respondent wrote to the
learned Arbitrator, pointing out that proceedings could not take place
on 13 February 2019 when the matter was directed to be listed, and
seeking a response from the Arbitrator. It appears that the learned
Arbitrator did not respond to the said communication. As a result, the
mandate of the learned Arbitrator expired on 25 March 2019.

5. It appears that the petitioner has been undergoing liquidation
proceedings since 2020 and they are still in progress. As a result, Mr.
Suhail Sehgal, learned counsel for the petitioner, submits that there
was unavoidable delay in moving the Court for extension of the
mandate of the Arbitrator.



2024:DHC:6367



6. In September 2020, the petitioner, mistakenly moved an application under Section 29A (4) before the learned District Judge (Commercial Courts), Dwarka³. The matter remained pending before the learned Commercial Court till 17 December 2022, on which date the learned Commercial Court held that it had no power or jurisdiction to extend the mandate of the learned Arbitrator under Section 29A of the 1996 Act and that the said power would vest only with the Court which would appoint the Arbitrator under Section 11, meaning this Court.

7. The petitioner thereafter moved the present petition before this Court in May 2023 seeking extension of the mandate of the learned Arbitrator.

8. Mr. Singh, learned counsel for the respondent, has opposed this petition. He submits that the learned Arbitrator must be treated to have abandoned the proceedings after 21 January 2019, as there was complete silence on his part, despite the respondent having written to the Arbitrator on 13 March 2019. Besides, he submits that there has been inordinate delay on the part of the petitioner in seeking an order from the Court under Section 29A (4) extending the mandate of the learned Arbitrator.

9. There is some substance in the second grievance of Mr. Singh as it is true that the petitioner has approached the learned Commercial

³ “the learned Commercial Court”, hereinafter

O.M.P.(MISC.)(COMM.) 227/2023 & conn.



2024:DHC:6367



Court almost a year and a half after the mandate of the Arbitrator had expired. That said, however, this Court has consistently held that the power to extend the mandate of the Arbitrator can be exercised by the Court even after the mandate expires. In fact, this position also stands recognized by the Supreme Court in its judgment in *Tata Sons Pvt Ltd v Siva Industries and Holdings Ltd*⁴, the relevant part of para 26 of which reads thus:

“26. Sub-section (3) of Section 29A empowers parties, by consent, to extend the period specified in sub-section (1) for making the award by a further period not exceeding six months. Thereafter, if the award is not made within the period which is specified in sub-section (1) or the extended period specified in sub-section (3), the mandate of the arbitrator shall terminate *unless the court has extended the period either prior to or after the expiry of the period so specified*. In other words, the timeline of twelve months for making the award (in matters other than international commercial arbitration), is qualified by the consensual entrustment to the parties under sub-section (3) to extend the period by *six months after which the court is empowered in terms of sub-section (4) to extend the period for making the award...*”

(Emphasis supplied)

10. That being so, the mere fact that the mandate of the learned Arbitrator had expired on 25 March 2019 cannot be treated as a delimiting factor, insofar as the power of this Court to extend his mandate under Section 29A (4) is concerned.

11. Mr. Singh’s submission that the learned Arbitrator must be treated as having abandoned the proceedings cannot easily be accepted either. Section 14(1) envisages termination of the mandate of the Arbitrator and substitution by another Arbitrator in two situations,

⁴ (2023) 5 SCC 421

O.M.P.(MISC.)(COMM.) 227/2023 & conn.



2024:DHC:6367



covered by clauses (a) and (b) thereof. Clause (a) deals with a situation in which the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or fails to act without undue delay. This clause cannot be said to apply in the present case as, the learned Arbitrator was dealing with the matter with due promptitude till 21 March 2019, after which the mandate of the Arbitrator terminated, so that he could not continue with the proceedings. Clause (b) of Section 14(1) deals with the situation in which the Arbitrator withdraws from his office or the parties agrees to the termination of his mandate. The parties, in the present case, have clearly not agreed to the termination of the mandate of the learned Arbitrator as the petitioner is seeking extension thereof. Nor can it be said that there is any withdrawal by the learned Arbitrator from his office of Arbitrator. Needless to say, the withdrawal from office by the Arbitrator under Section 14(1)(b) has to be express. There can be no implied withdrawal of the Arbitrator from his office. The mandate of the learned Arbitrator cannot, therefore, be said to have terminated in either of the modes recognized by clauses (a) and (b) of Section 14(1) of the 1996 Act.

12. That being so, there is no justification to reject the request of the petitioner for extension of the mandate of the learned Arbitrator.

13. The mandate of the learned Arbitrator, therefore, shall stand extended by a period of six months from today, for the present. The mandate of the Arbitrator shall be treated as continuing till now.

14. The petitions stand disposed of in the aforesaid terms.



2024:DHC:6367



O.M.P.(MISC.)(COMM.) 260/2023

15. Facially, this petition is similar in complexion to OMP (Misc) (Comm) 227/2023. The arbitrator in both these petitions is also the same. The only difference is that, in the present case, the arbitrator was appointed on 18 July 2017, so that his mandate terminated on 17 January 2019 by operation of Section 29A(1) and 29A(4) read with Section 23(4)⁵ of the 1996 Act.

16. The petitioner applied for extension of the mandate of the learned arbitrator in September 2020 before the learned Commercial Court and, on the learned Commercial Court holding by order dated 17 December 2022 that it had no jurisdiction to entertain the petition, the petitioner has approached this Court.

17. Mr. Vasanth Rajasekaran, learned Counsel for the respondent has advanced various arguments. He submits that the appointment of the learned arbitrator was unilateral. Though the appointment was in terms of arbitration clause in the contract between the parties, he submits that the clause itself was illegal and, in the light of the judgment of the Supreme Court in *Perkins Eastman Architects v HSCC India*⁶ and violative of Section 12(5)⁷ of the 1996 Act.

⁵ (4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

⁶ (2020) 20 SCC 760

⁷ (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the



2024:DHC:6367



18. He further submits that the petitioner company was facing liquidation proceedings under the Insolvency and Bankruptcy Code⁸ and that the present application could not have been filed in view of statutory bar contained in Section 33(5)⁹ of the IBC. He further submits that the authorisation letter by the Official Liquidator, placed on record along with this petition is in respect of another proceeding, namely “Apex Buildsys Ltd v Prime Hi-tech Engineering Ltd”, and not in respect of the present petition.

19. Fourthly, Mr. Vasanth Rajasekaran submits that the petitioner has not filed, with the petition, the arbitration agreement, which contains the arbitration clause. On his attention being invited to the fact that in para 15 of the petition, the petitioner has extracted the arbitration clause, Mr. Vasanth Rajasekaran submits that the said clause was contained in a forged invoice and that an objection to that effect has been taken by him in his reply to the present petition. Even otherwise, he submits that, in the pay order raised between the parties, prior to the invoice, exclusive jurisdiction was vested in courts at Indore and that, therefore, this Court would not have territorial jurisdiction to entertain this petition. The pay order, according to him, is entitled to priority over the invoice.

20. Mr. Sehgal, responding to Mr. Vasanth Rajasekaran, relies on

applicability of this sub-section by an express agreement in writing

⁸ “the IBC” hereinafter

⁹ (5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.



2024:DHC:6367



the judgment of a learned Single Judge of this Court in *Anay Kumar Gupta v Jagmeet Singh Bhatia*¹⁰, to submit that the arguments advanced by Mr. Vasanth Rajasekaran are not available to him in a proceeding under Section 29A(4) of the 1996 Act, in which the court is only concerned with whether the mandate of the learned arbitrator has terminated and whether there is a justifiable ground to extend the mandate.

21. Insofar as the argument relating to the petitioner being in liquidation is concerned, Mr. Sehgal has placed reliance on the following stipulation in the order dated 9 January 2020, passed by the learned National Company Law Tribunal (NCLT):

“h. The liquidator shall also follow any pending application for its disposal during the process of liquidation including initiation of steps for recovery of dues of the Corporate Debtor as per law.”

22. Mr. Sehgal further relies on Section 35(1)(k)¹¹ of the IBC, which empowers the liquidator to institute or defend any suit, prosecution or other legal proceedings, in the name of or on behalf of the corporate debtor. As such, he submits that the Official Liquidator (OL) had the jurisdiction to prosecute these proceedings. The OL, he submits, has duly authorised the petitioner to file the present petition. He concedes the fact that the authorisation which has been placed on record with the present petition is in respect of some other case, but submits that it was a mere clerical error and that, in fact, there is a

¹⁰ 304 (2023) DLT 211

¹¹ 35. Powers and duties of liquidator. –

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or



2024:DHC:6367



separate letter authorising the petitioner to prosecute the present petition, which he has handed over across the Bar. He submits that this error had crept in at the stage of proceedings before the learned Commercial Court at Dwarka, but that, as there is, in any event, an existing authorisation letter, the plea of want of authorisation has no substance.

23. Having heard learned Counsel for both sides, I am in full agreement with Mr. Sehgal in his submission that many of the contentions advanced by Mr. Vasanth Rajasekaran are not available to him in proceedings under Section 29A(4) of the 1996 Act.

24. I also express my concurrence with the decision of the Coordinate Bench in *Anay Kumar Gupta supra*, paras 18 to 21 of which read thus:

“17. The law is also well settled that the Court while considering an application under Section 29A of the Act, is only concerned with the issue as to whether the Arbitrator has acted with expedition in the matter; issues relating to the conduct of the Arbitration and/or arbitral fees are not relevant for the purpose of Section 29A.

18. In this regard, reference may be made to the order of this Court in the case of *Orissa Concrete & Allied Industries Ltd. Vs. Union of India & Anr.*, Order dated 05.03.2018 in OMP (MISC) (COMM) 10/2018, wherein it has been held as follows:-

“In my view, any issue with respect to the conduct of the Arbitration Proceedings, except the one relating to the expeditious disposal of the Arbitration Proceedings, cannot be raised by the respondent at this stage. These contentions can be raised by the respondent before the Arbitrator himself or in an application under Section 34 of the Act while challenging the award passed by the Arbitrator, if the

criminal, in the name of on behalf of the corporate debtor;



2024:DHC:6367



respondent is aggrieved of the same. In exercise of power under Section 29A(5) of the Act, the Court is only to see if there is sufficient cause shown to extend the time for making of the award.”

19. Again, in *NCC Ltd. Vs. Union of India*¹², it has been held by this Court as under:-

“11. Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process.

12. In the present case, the Arbitrator in the first notice itself, issued on 01.09.2017 had stated that he would like to publish the Award within six months from the date of entering upon the reference. By subsequent notice dated 14.03.2018, he fixed the schedule for hearing and called upon the parties to produce all the documents in support of their respective case. In fact, it is the respondents who were seeking postponement of the hearing by filing applications before the Arbitrator.

13. Surely the respondent cannot now make a complaint against the Arbitrator for him having not concluded the arbitration proceedings within the stipulated period of one year as prescribed under Section 29A of the Act.

14. As far as the grievance of the respondents that the conduct of the arbitration proceedings are biased is concerned, the same cannot be the subject matter of the present proceedings. The respondents have also filed an application under Section 13 of the Act before the Arbitrator, which is pending adjudication. This Court, therefore, refrains from making any observation on the said application. Even otherwise, in term of Section 13(4) of the Act, in case the said application is decided against the respondents, the remedy provided to the respondents would

¹² MANU/DE/4418/2018



2024:DHC:6367



be to challenge the same alongwith the ultimate Award passed by the Arbitrator.”

20. In *Wadia Techno-Engineering Services Ltd v Director General of Married Accommodation Project & Anr*¹³, following the aforesaid judgments in the case of *Orissa Concrete (supra)* and *NCC Limited (supra)*, it was reiterated that the grievance of one of the parties with regard to the conduct of the arbitral proceedings, and a party’s substantive challenge with regard thereto, are beyond the scope of adjudication in proceedings under Section 29(A) of the Act. It was reiterated that it is always open to the party aggrieved (with the manner of conduct of arbitral proceedings) to take appropriate remedies as available to it, however, such grievances cannot be ventilated in proceedings before the Court under Section 29 (A) of the Act. The relevant observations in the said case are as under:

“28. The grievance of the respondent is with regard to the conduct of the arbitral proceedings. They have articulated their grievances in the petitions filed under Article 227 of the Constitution, which remain pending. These considerations are entirely beyond the scope of adjudication in the present proceedings, as held in *Orissa Concrete* and *NCC Ltd*. The respondent’s contention that those petitions would be rendered infructuous by an extension of the learned arbitrator’s mandate in these petitions also does not commend to me. The manner in which the proceedings are being conducted, and the respondent’s substantive challenge in that regard are not questions which can be agitated in these petitions. It is always open to the respondent to take a remedies as available to it in this regard. 29. The respondent’s request for substitution of learned Arbitrator is also untenable. Such an order can be passed under Section 29A (6) of the Act only if the learned arbitrator has not acted expeditiously. This has been clearly held in *NCC Ltd.*, to which the respondent agency itself is party.”

25. Section 29A, qualitatively, deals with the time within which an arbitrator has to render his award and the termination of the mandate of the arbitrator by efflux of time, as well as the power of the court to extend the mandate in an appropriate case.

¹³ 2023 SCC OnLine Del 2990



2024:DHC:6367



26. Objections regarding the legality of the appointment of the arbitrator, and other such matters, cannot be raised in proceedings under Section 29A(4). There is a separate mechanism provided in the 1996 Act to cater to such situations.

27. It is always open to either party to invoke Section 14 of the 1996 Act in the event that, according to the party, the mandate of the arbitrator deserves to be terminated for either of the reasons envisaged by clauses (a) and (b) of Section 14(1). In such an event, the procedure that is to be followed is also exhaustively contained in Sections 14 and 15 of the 1996 Act.

28. Section 13 of the 1996 Act also contains sufficient provisions by which the party can challenge the authority of the arbitrator to deal with the matter.

29. The Court under Section 29A, as Mr. Sehgal correctly points out and as has been held by the Coordinate Bench in *Anay Kumar Gupta*, is only concerned whether the mandate of the arbitral tribunal has expired and whether a case for extension of the mandate is made out.

30. The above digression apart, the facts of this case are identical to the facts of OMP (Misc) (Comm) 227/2023 and, for the same reasons stated in the order passed in the said OMP *supra*, a case for extension of the mandate of the learned Arbitrator in this case is also made out.



2024:DHC:6367



31. Insofar as the submissions with respect to the petitioner being in liquidation is concerned, Section 33(5) of the IBC, on which Mr. Vasanth Rajasekaran placed reliance, deals with “institution” of proceedings, and not with prosecution of proceedings which are already instituted. The present application is essentially for extension of the mandate of the learned arbitrator in an arbitral proceeding which already stands initiated before him.

32. That apart, Section 35(1)(k) of the IBC specifically empowers the official liquidator to prosecute the present proceedings, which were pending on the date when he was appointed to oversee the affairs of the petitioner company.

33. For the aforesaid reasons, I am not in agreement with the contentions advanced by Mr. Vasanth Rajasekaran to oppose the present application seeking extension of the mandate of the learned arbitrator.

34. The mandate of the learned arbitrator shall, therefore, stand extended by a period of six months from today.

35. The petition stands allowed in the aforesaid terms.

C. HARI SHANKAR, J.

AUGUST 21, 2024/yg/dsn

Click here to check corrigendum, if any