



2024:DHC:7128



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **O.M.P.(MISC.)(COMM.) 254/2023****EMCO LIMITED**

.....Petitioner

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

versus

DELHI TRANSCO LIMITED

.....Respondent

Through: Mr. Viksit Arora, Adv.

CORAM:**HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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13.09.2024

1. This is a petition under Section 29A(4)¹ of the Arbitration and Conciliation Act 1996² by the petitioner seeking extension of the mandate of a three-member learned Arbitral Tribunal *in seisin* of the dispute between the petitioner and the respondent.

2. The petition has been vehemently opposed by Mr. Viksit Arora, learned Counsel for the respondent.

¹ (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.

² "the 1996 Act", hereinafter



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3. The disputes arose in the context of a Contract Agreement dated 30 January 2009. Notice was issued by the petitioner to the respondent under Section 21 of the 1996 Act, invoking arbitration, on 17 July 2018.

4. A three-member arbitral tribunal came into existence, which conducted its first hearing on 22 October 2018. Statement of Claim was filed by the petitioner before the learned Arbitral Tribunal on 21 November 2018. Statement of defence and counter claims were filed by the respondent on 18 February 2019.

5. On 19 February 2019, the learned Arbitral Tribunal directed the petitioner to file rejoinder and pay the fees of the arbitration.

6. The next order which came to be passed by the learned Arbitral Tribunal on 3 July 2019 is the matter of some debate and requires, therefore, to be extracted in *extenso*, thus:

“

“PRESENT:

For the Claimant

Ms. Tanesha Sultan Singh, Advocate

Ms. Aparajita Upadhyay, Advocate

For the Respondent

Mr. Prashant Mehta, Advocate

Mr. Jagat Singh, Manager (T)

Mr. Kailash Chand, Manager (T)

Mr. Gaurav Gupta, Manager (T)

Mr. Umesh Kaushal, AM (T)

MINUTES OF PROCEEDING DATED 03.07.2019 HELD AT
GH ARBITRATION CENTRE, A-8, PAMPOSH ENCLAVE,
G.K.- I, NEW DELHI.



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5th SITTING

1. In this matter the Arbitral Tribunal held its first sitting on 22.10.2018. On this date the Tribunal gave various practice and procedural directions to both the parties and also set down the schedule for completing pleadings in the matter. The Tribunal also directed both the parties to deposit a tentative amount of Rs.2.5 Lacs each in favour of each member of the Tribunal within a period of four weeks pending fixation of arbitration fee payable to the members of the Tribunal.

2. In compliance of the directions given by the Tribunal vide order dated 22.10.2018, the Claimant had filed their Statement of Claim alongwith documents and the Respondent has filed their Statement of Defence alongwith Counter Claim. In its sitting held on 19.02.2019, the Tribunal directed the Claimant to file their rejoinder to the Statement of Defence and reply to the Counter claim within a period of five weeks i.e. on or before 26.03.2019. In this order the Tribunal also observed that the Claimant has not so far deposited tentative fee for an amount of Rs.2.5 Lacs in favour of each member of the Tribunal and therefore, the Claimant shall deposit the same within a period of two weeks. In this very order, it was further directed that both the parties shall further deposit a tentative amount of Rs.2 Lacs each in favour of each member of the Tribunal within a period of four weeks.

3. The Claimant failed to file their rejoinder to the Statement of Defence filed by the Respondent and also reply to the Counter Claim. The Claimant also failed to comply previous two directions given by the Tribunal with regard to payment of tentative amount of arbitral fee i.e. for a sum of Rs.2.5 Lacs and additional amount of Rs.2 Lacs in favour of each Arbitrator. In the proceedings held on 08.05.2019, the Tribunal gave last opportunity to the Claimant to file rejoinder to the Statement of Defence and reply to the Counter Claim within a period of three weeks. While granting last opportunity to the claimant, the Tribunal made it explicitly clear that on failure of the Claimant to file the said pleadings, their right to file the same shall stand closed. The Tribunal also directed both the parties to comply the directions given by the Tribunal with regard to the deposit of tentative amount of arbitral fee.

4. In the last sitting held on 29.05.2019, Ld. Counsel appearing for the Claimant submitted that the Claimant has been facing dire financial hardship and therefore, is unable to pay even the tentative amount of arbitral fee as directed by the Tribunal vide its two previous orders dated 22.10.2018 and 19.02.2019. The Counsel also submitted that in fact the Claimant has already given



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instructions not to proceed with the filing of any pleadings in this matter for the time being. Taking note of the said submission made by the Ld. Counsel for the Claimant the Tribunal directed that it will be desirable if the Claimant Company place on record their Board Resolution wherein they have taken such a decision not to continue with the prosecution of claims filed by them in the present arbitration proceedings. It was also directed that copy of Board Resolution shall be placed by the Claimant within a period of four weeks from the said date. The Tribunal also gave direction to the Respondent to take clear instructions in the matter so as to apprise the Tribunal as to whether the Respondent will be interested in prosecuting their Counter Claim in the event of the Claimant taking a decision not to prosecute their claims. The Tribunal also directed the Respondent to comply with the direction given by it with regard to deposit of the tentative amount of Rs.2 Lacs each in favour of each member of the Tribunal vide its order dated 19.02.2019.

5. Today again Ms. Tanesha Sultan Singh, Ld. Counsel for the Claimant has reiterated her submission that the Claimant presently are not in a position to proceed with their claims filed before this Tribunal. She further submits that the Claimant is also not in a position to pay the arbitral fee of the members of this Tribunal because of their hard financial condition. Ld. Counsel has also informed that the Claimant has not provided the Board Resolution in compliance of direction given by the Tribunal on the last date. Mr. Prashant Mehta, Ld. Counsel for the Respondent on instructions, submits that the Respondent would continue with their Counter Claim and shall also pay their share of arbitral fee on the Counter Claim.

6. As can be seen from the aforesaid and on perusal of various directions given by the Tribunal there has been a total non-compliance and non-adherence on the part of the Claimant to various directions given by the Tribunal with regard to filing of the pleadings and also payment of the arbitral fee. Taking into consideration the conduct of the Claimant we close right of the Claimant to file rejoinder to the Statement of Defence and reply to the Counter claim filed by the Respondent. For not taking any steps to pay the tentative amount of arbitral fee as directed by the Tribunal vide its order dated 22.10.2018 and 19.02.2019 we suspend the arbitral proceedings in respect of the claims preferred by the Claimant in their Statement of Claim under the second proviso of Section 38 (2) of Arbitration and Conciliation Act, 1996 (as amended).

7. The Respondent in this matter has taken a decision to continue with their Counter Claim even in a situation like this



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where the Claimant has shown no interest to prosecute their claims. In this scenario, the Respondent has taken a position that they will pay their share of arbitral fee on the amount of Counter Claim and the other half share of arbitral fee to be paid by the Claimant. The Claimant in this matter has already shown their inability to pay the fee amount even on their claim amounts and when asked to the Ld. Counsel for the Claimant that whether the Claimant would be paying their share of fee on the Counter Claim, Ld. Counsel for the Claimant is quite candid and fair in stating that once the Claimant has express their helplessness and inability to pay the fee amount on the claim there is no question of their making any payment towards arbitral fee on the amount of Counter Claim.

8. The Tribunal in this matter has not fixed the fee payable to the members of the Arbitral Tribunal. With the consent of the parties the fee of the Arbitral Tribunal is fixed under fourth schedule of Arbitration and Conciliation Act, 1996.

9. Keeping in view the aforesaid circumstances, we direct the Respondent to pay the entire fee of the Arbitral Tribunal on the Counter Claim in terms of fourth schedule of the Arbitration and Conciliation Act, 1996.

10. Ld. Counsel for the parties apprise the Tribunal that time period of making the Award in this matter is going to expire somewhere in the month of September, 2019. With the consent of Ld. Counsel for the parties the time period for making the Award is extended for another period of six months under Section 29A (3) of the Arbitration and Conciliation Act, 1996.

11. The matter is now adjourned for filing of additional documents and affidavit in evidence by the Respondent on their Counter Claim within a period of four weeks.

12. With regard to the payment of arbitral fee, it is directed that 2/3rd of fee payable on the amount of Counter Claim as per fourth schedule of Arbitration and Conciliation Act, 1996 shall be deposited by the Respondent in favour of each member of the Tribunal within a period of four weeks after adjusting the amount of fee already paid by the Respondent. While giving these directions, we make it clear that with regard to payment of total amount of arbitral fee by the Respondent on the amount of Counter Claim necessary direction shall be given by the Tribunal in this regard in the final Award to be passed by the Tribunal.

13. List the matter on 07.08.2019 at 5.00 p.m. at the venue to be arranged by the Respondent with advance intimation to all concerned.”



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7. Learned counsel for the parties have relied on different paragraphs of this order, to take opposing stands.

8. Ms. Bhargavi Kannan, learned Counsel for the petitioner, submits, on the basis of paras 4, 5 and 6 of the said order, that, as the petitioner was not in a position to pay the arbitral fees and prosecute the matter at that point of time, and had also defaulted in filing rejoinder, the learned Arbitral Tribunal took two decisions; firstly, to close the right of the petitioner to file rejoinder and, secondly, to suspend the arbitral proceedings in respect of the claims preferred by the claimant under the second proviso to Section 38(2)³ of the 1996 Act.

9. Mr. Arora, learned Counsel for the respondent, relies, *per contra*, on para 7 of the same order to point out that the learned Arbitral Tribunal recorded, in the opening sentence of para 7 that, the claimant had shown no interest to prosecute its claims.

10. According to Mr. Arora, therefore, a conscious decision had been taken by the claimant on 3 July 2019 not to press its claims any further and, today, the claimant is estopped from performing a *volte face* on the said decision and deciding to prosecute its claims.

³ (2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:
Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.



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11. I may state, even at this point of time, that I am not inclined to agree with the manner in which Mr. Arora is reading the order dated 3 July 2019. It is obvious that the order of the learned Arbitral Tribunal has to be read holistically and its interpretation cannot be confined to one observation contained in para 7.

12. In the paragraphs which precede para 7, the learned Arbitral Tribunal has noted, in para 4, the submission of counsel for the petitioner that the petitioner had instructed the counsel not to proceed with the filing of any pleadings in the matter *for the time being*. In the next paragraph, the learned Arbitral Tribunal notes the submission of the petitioner's counsel that the petitioner "*presently*" was not in a position to proceed with the claims or to pay the arbitral fees, in view of its impecunious condition. In para 6, after initially observing that the petitioner had thus not complied or adhered with the directions issued by the learned Arbitral Tribunal with respect to filing of pleadings, and payment of the arbitral fees, the learned Arbitral Tribunal has chosen only to close the right of the petitioner to file rejoinder and reply to the counter claims of the respondent. In so far as the right of the petitioner to prosecute its claims is concerned, the learned Arbitral Tribunal has clearly kept the right alive and has merely *suspended* the arbitral proceedings in respect of the said claims. It goes without saying that there is a difference between suspension and termination. The order dated 3 July 2019 cannot be read, in any manner of speaking, as an order terminating the right of the petitioner to continue to prosecute its claims. The right has only



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been placed in suspension, which, in fact, is what the second proviso to Section 38(2) envisages.

13. I am also not in agreement with Mr. Arora that the petitioner had at any point of time given up its intention of prosecuting the claims preferred before the learned Arbitral Tribunal.

14. Paras 4 and 5 of the order dated 3 July 2019 clearly note the submission of the counsel for the petitioner that she had been instructed not to proceed with the filing of pleadings *for the time being* as the petitioner was presently not in a position to proceed to prosecute with the claims on account of financial hardship.

15. There is, clearly, therefore no intention to abandon, much less any actual abandonment, by the petitioner, of its claims before the learned Arbitral Tribunal.

16. Proceeding with the recital of facts, before the next date of hearing, the petitioner was subjected to corporate insolvency⁴ proceedings before the learned National Company Law Tribunal⁵ which, on 22 July 2019, issued a moratorium against the continuance of any legal proceeding against the petitioner.

17. Following this, on 7 August 2019, another significant order came to be passed by the learned Arbitral Tribunal. Paras 1 and 2 of the said order deserve to be reproduced thus:

⁴ CIRP

⁵ NCLT



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“1. On behalf of the Claimant Ms. Aparajita Upadhyay, Advocate has appeared alongwith Mr. Rajendra Prasad, General Manager (Marketing) of Claimant. Mr. Rajendra Prasad submits that the Claimant intends to continue with the claims filed by them before this Tribunal as well as to defend the Counter Claim filed by the Respondent. He further submits that the Claimant is already negotiating with the Banks and so far there is no success achieved in the debt resolution process and the Claimant atleast need minimum 60 days time to arrange the fees payable to the Members of this Tribunal and accordingly pray for extension of 60 days time in this matter to enable the Claimant to proceed further in the matter.

2. On the last date a detailed order was passed by this Tribunal after taking note of the submissions made by the Counsel Ms. Tanesha Sultan Singh representing the Claimant. Ld. Counsel for the Claimant very candidly stated that the Claimant presently are not in a position to proceed with their claims filed before this Tribunal and also they are not in a position to pay the Arbitral fees of the Members of the Tribunal because of the hard financial conditions of the Claimant. Taking note of the overall conduct of the Claimant, not only the Tribunal had close the right of the Claimant to file rejoinder to the Statement of Defence and reply to the Counter Claim filed by the Respondent, but the Tribunal also passed an order under proviso of sub-Section 2 of Section 38 of Arbitration and Conciliation Act, 1996 to suspend the Arbitral proceedings in respect of the claims preferred by the Claimant. We do not find any change in the position as Mr. Rajendra Prasad has only reiterated the submission which was made by the Counsel representing the Claimant. It is, therefore, directed that as and when there is any kind of positive change in the stand of the Claimant, they may move an appropriate application in this regard.”

18. Thus, even on 7 August 2019, the learned Arbitral Tribunal recorded the contention of the representative of the petitioner that the petitioner intended to continue with the claims filed by it before the learned Arbitral Tribunal and to defend the counter claim filed by the respondent. Following this, para 2 of the order commences with the observation that the submission of the petitioner’s representative only reiterated the submission which was made by the counsel representing the petitioner on 3 July 2019. As such, this also reflects the



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understanding of the learned Arbitral Tribunal that, on 3 July 2019, the submissions made before it by the petitioner's counsel did not reflect any abandonment or permanent intention of the petitioner not to prosecute its claims before the learned Arbitral Tribunal.

19. The learned Arbitral Tribunal proceeds, in para 2 of the order dated 7 August 2019, to grant liberty to the petitioner to move an appropriate application in the event of any kind of positive change in its stand.

20. This concluding observation by the learned Arbitral Tribunal should in fact be dispositive of the issue in controversy. The learned Arbitral Tribunal specifically granted liberty to the petitioner to move an appropriate application in the event of the petitioner adopting a more positive attitude; in other words, in the event of the petitioner deciding to prosecute its claims.

21. I may note that neither of the orders dated 3 July 2019 or 7 August 2019 was ever called into challenge by any manner known to law, and, therefore, remain binding on all parties before the learned Arbitral Tribunal.

22. In the next hearing which took place on 1 November 2019, the learned Arbitral Tribunal was apprised of the fact that a resolution professional had been appointed by the NCLT to oversee the affairs of the petitioner, and that an order of moratorium had also been issued on 22 July 2019. While expressing some disapproval about the fact that



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this position had not been brought to its notice on 7 August 2019, the learned Arbitral Tribunal, nonetheless, concluded its order by observing that it was in no position to proceed with the matter till the moratorium imposed by the NCLT under Section 14 of the Insolvency and Bankruptcy Code (IBC), 2016 continued to remain in operation. The learned Arbitral Tribunal, therefore, “*adjourned the proceedings sine die reserving liberty with the parties to seek revival of the present proceedings at an appropriate stage*”.

23. The CIRP proceedings were not successful, as a result of which, by order dated 9 August 2021, the Resolution Professional was made the official liquidator to take charge of the affairs of the petitioner. Subsequently, the petitioner was taken over as a going concern by Sherisha Powertech Pvt Ltd⁶ on 9 September 2022, and the present application has been filed by SPPL.

24. The order dated 9 September 2022 passed by the NCLT, whereby SPPL was permitted to take over the affairs of the petitioner, disposes, in a tabular fashion, of the various requests made by the petitioner before it. At serial no. (R) of the said table, the learned NCLT observes thus:

Prayer Clause Sl. No.	Prayer	Remark
R	Direct that all claims that the Corporate Debtor may have against third parties and related parties and all receivables of the Corporate Debtor including without limitation, in relation to any litigations/ proceedings initiated by the Corporate	Granted. Since the applicant should not be saddled with the liability prior to the issuance of sale certificate.

⁶ “SPPL”, hereinafter



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	Debtor and/ or for the benefit of the Corporate Debtor shall continue to remain recoverable by the Corporate Debtor in accordance with law and in case of any such claim/ recovery in future, the benefits of the same shall be solely available to the Corporate Debtor;	
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Thus, while allowing SPPL to take over the petitioner, the learned NCLT specifically granted the prayer of SPPL to continue to prosecute its claims against third parties for any amounts which were recoverable by it.

25. Following this, the petitioner, through SPPL, addressed e-mails to the learned Arbitral Tribunal on 8 December 2022 and 11 March 2023. On 17 March 2023, the petitioner was informed by the learned Arbitral Tribunal that the respondent's arbitrator had expired. On 22 May 2023, the respondent nominated a substitute arbitrator. Thereafter, on 5 July 2023, the Arbitral Tribunal reconvened, and para 9 of the order passed by the learned Arbitral Tribunal on the said date reads thus:

“9. At the outset, Ld. Counsel for both the parties pointed out that the time period to complete the arbitral proceedings and pass an award as provided under Section 29A of the Arbitration Act has already come to an end and therefore, immediate steps are required to be taken to seek extension of time from the Hon'ble Delhi High Court. Ld. Counsel for the Claimant Ms. Bhargavi Kannan submits that the Claimant shall move an appropriate Application before the Hon'ble High Court under Section 29A (4) of the Arbitration Act to seek, an extension of time within a period of 2 weeks. Ld. Counsel for the Claimant also submits that the Claimant will be filing an appropriate Application to place on record all the subsequent facts with regard to the liquidation of EMCO Limited and taking over of the said company. She further submits that the Claimant would also be moving an appropriate Application to seek recall of the Order of suspension dated 03.07.2019 passed by the Tribunal.”



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26. Following the liberty granted by para 9 of the order dated 5 July 2023, the petitioner has moved an application before the learned Arbitral Tribunal for recall of the order dated 3 July 2019, to the extent it suspended the right of the petitioner to prosecute its claims, and has also moved the present petition before this court under Section 29A for extension of the mandate of the learned Arbitral Tribunal.

27. Though Mr. Arora sought to advance the contention that the petitioner is guilty of having approached this court after an inordinate period of delay, this contention quite obviously cannot sustain in the facts of the case. The petitioner was prosecuting its proceedings before the learned Arbitral Tribunal till 3 July 2019. Thereafter, the petitioner went into CIRP proceedings and a moratorium was issued on 22 July 2019. In the order that was subsequently passed by the learned Arbitral Tribunal on 7 August 2019, the petitioner was specifically granted liberty to re-approach the Tribunal in the event of any positive change in its stand. Subsequently, on being apprised of the CIRP proceedings and of the moratorium having been issued, the learned Arbitral Tribunal on, while adjourning the proceedings *sine die* on 1 November 2019, reserved liberty with both parties to seek revival of the proceedings at an appropriate stage. The CIRP proceedings which subsequently assumed the colour of liquidation proceedings, came to an end only on 9 September 2022, when the petitioner was taken over by SPPL. After that date, the petitioner has written to the learned Arbitral Tribunal on 8 December 2022, 11 March 2023, and, ultimately on 5 July 2023, the learned Arbitral Tribunal has granted liberty to the petitioner to move the present petition.



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28. In these circumstances, there is absolutely no ground on which the petitioner can be said to have been remiss or negligent at any stage, or to have failed to prosecute the proceedings with due expedition.

29. In fact, the court finds it surprising that the respondent, which is a government company, is so vehemently opposing an application for extension of the mandate of the learned Arbitral Tribunal, particularly when, on 22 May 2023, the respondent has itself appointed a substitute arbitrator in place of its original arbitrator, who unfortunately expired in the interregnum. The plea of acquiescence, therefore, if any, if at all, would operate against the respondent rather than against the petitioner. By nominating a substitute arbitrator on 22 May 2023 and having failed to challenge any of the orders passed by the learned Arbitral Tribunal prior thereto, which granted liberty to the parties to revive the proceedings at an appropriate stage, the respondent can certainly not be heard to oppose the petitioner's application under Section 29A(4), which has been filed consequent on the specific liberty to that effect granted by the learned Arbitral Tribunal in its order dated 5 July 2023, which, too, I may note, has remained unchallenged.

30. I do not deem it necessary to burden this order, which is only for extension of the mandate of the learned Arbitral Tribunal under Section 29A(4) of the 1996 Act, with any further recital of facts or the law.



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31. For all these reasons, the mandate of the learned Arbitral Tribunal shall stand extended by a period of one year from today. The mandate shall be treated as continuing till today.

32. The petition is allowed in the aforesaid terms.

C. HARI SHANKAR, J

SEPTEMBER 13, 2024

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Click here to check corrigendum, if any