

Talks Of Settlement Between Parties After Arbitrator Enters Upon Reference, Would Not Stop Limitation For Passing Award: Delhi High Court

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**IN THE HIGH COURT OF DELHI AT NEW DELHI
YASHWANT VARMA; J.**

O.M.P. (T) (COMM.) 93/2022; 30 January 2023

M/S RAJ CHAWLA AND CO. STOCK AND SHARE BROKERS

versus

M/S NINE MEDIA AND INFORMATION SERVICES LTD.

Petitioner through: Mr. Mohit Chaudhary, Mr. Kunal Sachdeva, Ms. Sanyukta Gupta, Advs.

Respondents Through: Mr. Vinayak Bhandari, Mr. Bhavninder Singh, Advs.

ORDER

1. This petition styled as being under Section 15 of the **Arbitration and Conciliation Act, 1996**¹ seeks the appointment of a substitute arbitrator in respect of disputes and differences which arose between parties and emanate from a Memorandum of Understanding² dated 24 August 2016. The consideration of the issues that stand raised herein do not require the Court to either record or examine the substance of the disputes that arose except to note that it appears to stem from a transaction pertaining to the purchase of 2200 shares of Hero Honda Motors and the claim of the petitioner of payments due from the respondents in connection therewith.

2. For the purposes of sketching out the backdrop in which the present petition came to be preferred before this Court, it is pertinent to note that arbitration is shown to have commenced consequent to the issuance of a notice dated 04 March 2018 referable to Section 21 of the Act. Ultimately and on a petition preferred under Section 11 of the Act which was numbered as Arb. P. 476/2018, this Court taking notice of Clause 14 in the MoU, by its order of 03 August 2018 proceeded to constitute an Arbitral Tribunal in the following terms:-

“Be that as it may, as the existence of the Arbitration Agreement and due invocation thereof had not been denied by the respondents, I see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above mentioned MoU. I accordingly appoint Ms. Madhurima Panwar Mridul, Advocate (R/o 18, Tughlak Crescent, New Delhi-110011, Mobile: 9810175151) as a Sole Arbitrator. She will give her disclosure under Section 12 of the Act before entering reference. However, taking note of the submission made by the respondents, the reference shall take effect only after 01.09.2018. In case the parties are able to amicably resolve their disputes, they shall request the Arbitrator not to enter upon the reference.”

3. As would be evident from a reading of the aforesaid order, parties had been granted the liberty to explore the possibility of settling their disputes failing which the sole arbitrator so appointed was to enter upon the reference after 01 September 2018. It would also be relevant to note that the Court has not been shown any formal notice or communication in terms of which parties may have apprised the sole arbitrator of the aforesaid order. It is in that backdrop that learned counsel for the petitioner contended that the arbitrator may be presumed to have entered reference on or about 02 September 2018.

¹ the Act

² MoU

4. The record would further bear out that by an e mail of 25 September 2021, the sole arbitrator taking cognizance of a statement of claim submitted by the petitioner, called upon parties to appear before it on 04 October 2021 for a preliminary hearing. By a subsequent e mail of 01 October 2021, the sole arbitrator cancelled the scheduled hearing fixed for 04 October 2021 and thereafter provided that the Arbitral Tribunal would convene on 21 October 2021. The matter is thereafter stated to have been adjourned and rescheduled for 22 November 2021. However, and in the meanwhile, the sole arbitrator by an e mail of 29 October 2021 apprised parties that due to personal difficulty, she would be unable to continue as an arbitrator and thus chose to recuse herself from the proceedings. The present petition purporting to be under Section 15 of the Act thereafter came to be filed on or about 09 September 2022.

5. It must and at the outset be stated that the petitioner appears to have approached this Court directly without complying with the mandate of Section 15(2) of the Act. It would be pertinent to note that where an arbitrator withdraws from office and its mandate stands terminated, a substitute arbitrator is to be appointed in accordance with the rules applicable to appointment. The word “rules” as occurring in Section 15(2) has been duly explained by the Supreme Court to mean the arbitration agreement and the procedure for appointment as stipulated therein. This would be manifest from the following principles as laid down by the Supreme Court in **Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd.**³:-

“4. In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorised originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorising the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so-called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term “rules” in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.”

³ (2006) 6 SCC 204

6. The petition which has evidently come to be instituted without following the procedure for appointment as enshrined in the MoU is liable to be rejected on this ground alone. However since learned counsels for parties additionally addressed submissions turning upon the ambit of Section 29 A, the Court deems it apposite to notice the legal position which appears to emerge upon a consideration of the relevant provisions of the Act

7. The Court notes that the question of substitution of an arbitrator would also not arise in light of the provisions contained in Section 23(4) read with Section 29A of the Act for reasons which follow. Suffice it to note that Section 29A came to be inserted in the Act by virtue of Act 3 of 2016 with retrospective effect from 23 October 2015. Sub-section (1) as it originally stood read as under: -

“(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.”

8. The aforesaid provision was thereafter amended in terms of Act 33 of 2019 which was enforced from 30 August 2019 and presently reads as follows: -

“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 subsection (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 subsection, 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.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the

evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.”

9. As was noticed in the earlier parts of this decision, the sole arbitrator was to enter upon the reference after 01 September 2018. In the absence of any material having been placed on the record by parties and which may have indicated the date on which the sole arbitrator had been apprised of her appointment, learned counsels had contended that the date of 02 September 2018 may be viewed as the point of commencement. Proceeding on that basis, the matter may be examined in light of Section 29A as was originally introduced by virtue of Act 3 of 2016. In terms of the said provision, an award would have had to be pronounced within a period of twelve months from the date the Arbitral Tribunal had entered upon the reference. The period of twelve months when computed from 02 September 2018 would, undoubtedly, have expired on or about 01 September 2019.

10. The petitioner forwarded a statement of claim for the first time on 16 September 2021. No effective proceedings were shown to have been drawn by the Arbitral Tribunal prior thereto. Before the said date, according to learned counsel for the petitioner, proceedings before the sole arbitrator were not pursued since parties were exploring the possibility of arriving at a settlement. Notwithstanding the above, the Court is of the considered view that talks of settlement could not have stopped the march of limitation prescribed by statute. It must be observed that the Act does not envisage proceedings in arbitration remaining in abeyance or a state of latency. Holding otherwise would clearly be contrary to the spirit of the Act and the expeditious dispute resolution process which stands visualised thereunder.

11. If the validity of proceedings were to be viewed on the anvil of Section 29 A as it exists presently, the award would have had to be rendered within a period of twelve months from the date of completion of pleadings as per Section 24 (3). Section 24(3) prescribes that all statements, documents would have to be made to the Arbitral Tribunal within a period of six months from the date when the arbitrator would have received notice in writing of its appointment. Insofar as the present case is concerned, that period of six months would have to be necessarily computed from 02 September 2018. That period too expired long before the sole arbitrator chose to withdraw from the proceedings and the present petition came to be preferred.

12. The aforesaid exposition of the legal regime which prevails was necessary since a failure of parties to abide by the time lines prescribed under the Act leads to certain inevitable consequences. Firstly, Section 25(3) prescribes that where a claimant fails to communicate his statement of claim within the time prescribed by Section 23(4), the Arbitral Tribunal shall terminate proceedings.

13. Section 29A and the regime ushered in by that provision then stipulates the period within which arbitral proceedings themselves must be brought to a close.

Section 29 A (1) stipulates that the award must be rendered within twelve months from the date of completion of pleadings under Section 23(4). In terms of sub-section (3) of Section 29 A, parties may, by consent, extend the period of twelve months specified in sub-section (1) by a further period of six months. The said provision thus clearly envisages the award being rendered within a maximum period of eighteen months. Upon the aforesaid period expiring, the power to extend the mandate of the Arbitral Tribunal vests solely with the court.

14. The recordal of facts above would indubitably establish that the mandate of the Arbitral Tribunal was never extended within the period prescribed in sub-sections (1) and (2) of Section 29 A. The parties have also not petitioned the court for extension of the mandate of the Arbitral Tribunal even thereafter and in accordance with Section 29 A (4). Viewed in light of the above, it is manifest that the question of a substitute arbitrator being appointed really does not arise. This since not only had the mandate of the Arbitral Tribunal come to an end, in the fitness of things, the proceedings should have been terminated in accordance with the mandatory provisions of the Act.

15. While learned counsel for the petitioner had sought to contend that since Section 29A came to be amended and substituted by virtue of Act 33 of 2019, its amended provisions and which connect the mandate of the Arbitral Tribunal to render an award with reference to Section 23(4) would not apply, the Court finds itself unable to sustain that submission for the following reasons.

16. It must at the outset be noted that Section 29A originally came to be inserted in the statute in 2016 itself and thus evidently prior to the order of reference made by the Court. In any case, regard must be had to the fact that, even when the said provision was originally introduced by Act 3 of 2016, it was ordained to operate retrospectively with effect from 23 October 2015. Undisputedly, the reference to the Arbitral Tribunal in the present case came to be made thereafter. Consequently, and when viewed from either angle, the Court finds itself unable to countenance the mandate of the Arbitral Tribunal subsisting today. The Court also bears in mind that Section 25(3) in any case existed on the statute book since inception.

17. More fundamentally, this Court has consistently held that since Section 29A is essentially procedural in character, it would apply even to pending arbitrations. The aforesaid position stands evidenced from the following observations as appearing in the decision rendered by a learned Judge of the Court in **ONGC Petro Additions Limited vs. Ferns Construction Co. Inc.**,⁴:-

“21. Before I proceed to answer the question, it is necessary to refer to the view taken by two Coordinate Benches of this Court in this regard. In the case of Shapoorji (supra), the Court held that the amended Section 29A(1) of the Act being a procedural law would also apply to the pending arbitrations as on the date of the amendment. Whereas, learned Single Judge in MBL Infrastructure (supra), by referring to the Notification August 30, 2019 held that, from the perusal of the said Notification it does not have a retrospective effect. Apparently both the orders are at variance. I also note in the latter order, MBL Infrastructure (supra), the attention of the Court was not drawn to the earlier order in Shapoorji (supra). To that extent the order in MBL Infra (supra) is per incuriam.

22. Mr. Dewan is justified in relying upon the judgment in case of National Insurance (supra), wherein in paragraph 28 has held as under:

⁴ 2020 SCC OnLine Del 2582

“28. In this context, we may also refer to *Sundeeep Kumar Bafna v. State of Maharashtra* [*Sundeeep Kumar Bafna v. State of Maharashtra*, MANU/SC/0239/2014: (2014) 16 SCC 623: (2015) 3 SCC (Cri) 558] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in *Rajesh* case [*Rajesh v. Rajbir Singh*, MANU/SC/0480/2013: (2013) 9 SCC 54: (2013) 4 SCC (Civ) 179: (2013) 3 SCC (Cri) 817: (2014) 1 SCC (L&S) 149] was delivered on a later date, it had not apprised itself of the law stated in *Reshma Kumari* [*Reshma Kumari v. Madan Mohan*, MANU/SC/0287/2013: (2013) 9 SCC 65: (2013) 4 SCC (Civ) 191: (2013) 3 SCC (Cri.) 826] but had been guided by *Santosh Devi* [*Santosh Devi v. National Insurance Co. Ltd.*, MANU/SC/0322/2012: (2012) 6 SCC 421: (2012) 3 SCC (Civ) 726: (2012) 3 SCC (Cri) 160: (2012) 2 SCC (L&S) 167]. We have no hesitation that it is not a binding precedent on the coequal Bench.”

25. So, it follows that the conclusion of a Coordinate Bench in *Shapoorji* (supra) wherein the Court has held that the amendment being a procedural in nature shall be applicable to all pending arbitrations as on the date of amendment is correct. This I say so, for the following reasons:

a. The Supreme Court in *BCCI* (supra) referring to Section 29A of the Act, as incorporated in by way of Amendment of 2015 held it to be a procedural law, as it does not create new rights and liabilities, but held that amendment to be prospective in view of Section 26 of the Amendment of 2015, which clearly stipulated that the said Amendment Act of 2015 shall apply in relation to arbitration proceedings commenced on or after the date of the commencement of the said Act. The relevant portion of *BCCI* (supra) (foot note to paragraph 38) reads as under:

“Section 29-A of the Amendment (sic Amended) Act provides for time limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur v. State of Maharashtra*, MANU/SC/0526/1994: (1994) 4 SCC at p. 633: 1994 SCC (Cri.) 1087, this Court stated (SCC p. 633, para 26)

“26....(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”

It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (sic Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force”.

b. There is no such stipulation akin to Section 26 of Amendment Act of 2015 in the Amendment Act of 2019. It is also pertinent to note that the deletion of Section 26 of Amendment Act of 2015 vide Amendment Act of 2019 has been set-aside by the Apex Court

in Hindustan Construction Company Limited and Ors. v. Union of India (UOI) and Ors., MANU/SC/1638/2019: AIR 2020 SC 122.

c. It is a trite law that substantive law refers to a body of rules that creates, defines and regulates rights and liabilities whereas procedural law establishes a mechanism for determining those rights and liabilities and machinery for enforcing them. Any change/amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability thereof will be prospective in nature and any change/amendment to the provisions of statute dealing merely with matters of procedure or procedural laws will be retrospective in nature, unless there exist a contrary intention of the legislature.

(Reference: Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd., (1973) 1 SCC 813; Board of Control for Cricket in India (supra), Sudhir G. Angur (supra) and Thirumalai Chemicals Ltd. (supra)). Relevant paragraphs of Thirumalai Chemicals Ltd. (supra) reads as under:

“14. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them.

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16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.”

d. By the Amendment of 2019 to Section 29A(1), the time period for making an Arbitral Award in international commercial arbitration been made inapplicable. The prescription of time limit by Amendment Act of 2015 had not conferred any rights or liabilities on a party rather it was a procedural law establishing a mechanism for the Arbitral Tribunal to render the award, which determine the rights and liabilities of parties in twelve months and surely the removal thereof also does not confer/affect rights of any party to be given effect prospectively.

26. In view of my above discussion, it must be held that the provisions of Section 29A(1) shall be applicable to all pending arbitrations seated in India as on August 30, 2019 and commenced after October 23, 2015.”

18. Consequently, and for all the aforesaid reasons, the instant petition fails and shall stand dismissed.

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