

SUPREME COURT OF INDIA

Jayesh H.Pandya

Vs.

Subhtex India Ltd.

C.A.No.6300 of 2009

(N.V.Ramana,J., Mohan M.Shantanagoudar and Ajay Rastogi,JJ.,)

27.08.2019

JUDGMENT

Ajay Rastogi,J.,

1. The instant appeal is directed against the final judgment and Order dated 14th March, 2008 passed by the High Court of Judicature at Bombay whereby the High Court while dismissing the Arbitration Petition held that the appellants had waived their right to the extension of time for completion of the arbitration proceedings and making the award, beyond the stipulated period four months.

2. The seminal facts in brief relevant for the present purpose are that the appellants are partners of a partnership firm by the name Hetal Construction Company. The first respondent is a company incorporated under the Companies Act, 1956 and is a claimant in the arbitral proceedings which was initiated pursuant to the arbitration agreement dated 28th April, 2000. The first respondent Subhtex India Limited instituted an application under Section 11 of the Arbitration and Conciliation Act, 1996(hereinafter being referred to as the "Act 1996") for appointment of an Arbitrator in A.P. No. 150 of 2003 before the High Court of Judicature at Bombay despite resistance by the present appellants that the agreement dated 28th April, 2000 was a collusive and a forged document. Initially, by an Order dated 14th November, 2003, late Shri Justice V.D. Tulzapurkar, former Judge of this Court was appointed as a sole Arbitrator without prejudice to the rights and contentions of the parties and it was clarified that the views expressed in the order dated 14th November, 2003 about the existence, validity and effect of the arbitration agreement were prima facie and it would be open to be examined by the learned Arbitrator under Section 16 of the Act, 1996. The order passed by the Single Judge of the High Court dated 14th November, 2003 was a subject matter of challenge in a writ petition filed under Article 226 of the Constitution of India which was dismissed vide judgment and order dated 20th January, 2004 with an observation that adequate remedies are available under Section 16 of raising all contentious issues relating to the existence of the arbitration agreement and constitution of the Arbitral Tribunal, before the Tribunal.

3. The order of the Division Bench of the High Court dated 20th January, 2004 came to be challenged in a Special Leave Petition (Civil) No. 3919 of 2004 before this Court. This Court issued notice on 8th March, 2004 and stayed proceedings before the learned Arbitrator until further orders. Unfortunately, the sole Arbitrator appointed pursuant to Order dated 14th November, 2003 died in October, 2004. The said special leave petition was dismissed on 24th April, 2007 with the following observation as under:-

“Heard.

In the facts and circumstances of the present case, we are not inclined to exercise our jurisdiction under Article 136 of the Constitution of India. The special leave petition is dismissed.

We are informed that Mr. Justice V.D. Tulzapurkar, former Judge of this Court, who was appointed as the Arbitrator, has passed away. Counsel for the parties are agreed that Hon'ble Mr. Justice S.N. Variava, a former Judge of this Court be appointed in place of Mr. Justice V.D. Tulzapurkar, as the Arbitrator. We order accordingly. Learned Arbitrator shall fix his remuneration etc. All the points including the existence, validity and enforceability of the contract, as indicated by the Division Bench in its Judgment, shall be decided by the learned Arbitrator. Parties are directed to appear before the learned Arbitrator on 4th of May, 2007 with a certified copy of this order for further directions. The address and contact numbers of the learned Arbitrator are as under:

7-B, Rockside,

116, Walkeshwar Road,

Mumbai - 400 006.

Phone Nos. (022) 23620614, 23620598

Copy of this order be sent to the learned Arbitrator.”

4. It will be apposite to take note of the terms of the Arbitration Agreement dated 28th April, 2000 relevant for the purpose which are extracted hereunder:-

“1....

2....

4. Arbitrator shall follow the procedure of allowing parties to file their respective claims & contention and to file documents within reasonable time as the arbitrator may deem fit.

5. The arbitrator will make his award within a period of 4 months from the date of service of copy of agreement.

6. The arbitrator shall have power to extend the period for making and publishing the award from time to time, with the consent of both the parties.

7. The Arbitrator shall give reasons for his award.

8. The arbitrator will follow provisions of Arbitration & Reconciliation Act, 1996. The parties here to and the parties represented by party of the first part be bound by the award that will be given by arbitrator.”

5. In terms of the conditions of the agreement dated 28 th April, 2000, apart from the procedure to be followed by the Arbitrator, he was under an obligation to make his award within a period of four months from the date of service of copy of agreement with a proviso that the Arbitrator would have the power to extend the period for making and publishing the award, with the consent of both the parties.

6. Indisputedly, the first preliminary meeting before the Arbitrator was held on 4th May, 2007. As per clause 5 of the terms of the agreement dated 28th April, 2000, four months period which was available at the disposal of the Arbitrator for passing of an award in the ordinary course of his business subject to extension with the consent of both the parties was to expire on 4th September, 2007. The claimant was permitted to file its statement of claims and a compilation of documents and the defendants to the arbitral proceedings(appellants) were to file written statement and counter claims on or before 6th July, 2007 and thereafter a discovery and inspection was to be completed by 27th July, 2007 and the parties were directed to make their statements of admission and/or denials by 10th August, 2007, in respect of the documents disclosed. A preliminary meeting was to be held on 13th August, 2007. The fact which came on record is that the appellants alleged that they had received the statement of claim on 6th June, 2007 and extension of time was sought for compilation of documents in order to file their written statement. The compilation of documents was received on 15th June, 2007. The fact is that the time was consumed in exchange of claims and counter claims and compilation of documents. Date of 27th August, 2007 was fixed for hearing before the Arbitrator. In the course of hearing, it was urged by the appellants that even if the agreement dated 28th April, 2000 for the sake for submission is to be taken as a genuine agreement, arbitration proceedings have to be culminated within a period of four months from the date of service of a copy of the agreement and the time could be extended only with the consent of both the parties. He further contended that the appellants had refused to consent to an extension of time; and since the Tribunal held its first meeting on 4th May, 2007, the arbitral proceedings could not be concluded within a period of four months; and no purpose is going to be served to continue the arbitral proceedings further, even with the hearing on the applications filed by the parties.

7. On objection being raised by the appellants before the learned Arbitrator, in his meeting on 27th August, 2007, it was observed that had this point been urged on 4th May, 2007, a shorter time frame could have been fixed and dates would have been allotted and proceedings could have been completed within time. In the given circumstances, it would be more appropriate if the claimants obtain an extension of time or a clarification from this Court that the time could be extended of the Tribunal even without the consent of the

parties to the arbitral proceedings. The matter was adjourned for obtaining extension of time or a clarification from this Court.

8. Indisputedly, no interim application was filed for extension of time or a clarification in this Court, as a result, jurisdiction to continue with the proceedings came to an end by passage of time on 4th September, 2007 and it was observed by the learned Arbitrator to continue with the arbitral proceedings and if the issue so urged by the parties is raised in writing, it could be decided at the appropriate stage. Accordingly, learned Arbitrator fixed a meeting on 26th October, 2007 in pursuance of the communication dated 3rd October, 2007. At this stage, the appellants filed a written application before the Arbitrator stating therein that the period of four months from the date of first preliminary meeting had expired on 4th September, 2007 and the Arbitral Tribunal has become functus officio with no power to proceed with the arbitral proceedings any more. But that came to be rejected by the learned Arbitrator vide Order dated 31st December, 2007 which came to be challenged by the appellants in Arbitration Petition(L) No. 59 of 2008 before the High Court of Judicature at Bombay invoking Section 14 of the Act, 1996 seeking a declaration that the Arbitrator has become de jure unable to perform his functions and the mandate to act as an Arbitrator in the arbitral proceedings between the parties has terminated. The arbitration petition filed at the instance of the present appellants came to be dismissed by the High Court under its Order dated 14th March, 2008 holding that the appellants by their conduct have waived their defence to enforce a punctilious observance of the time schedule of four months; and sustaining objection would frustrate the object and purpose of the arbitral proceedings and will bring the whole machinery provided by the Act to facilitate an efficacious recourse to arbitration into a grave peril which is a subject matter of challenge in the instant proceeding before us.

9. Learned counsel for the appellants submits that there is no dispute on facts that after Mr. Justice S.N. Variava, former Judge of this Court, was appointed as a substitute Arbitrator pursuant to the Order of this Court dated 24th April, 2007, the first preliminary meeting was held by the Arbitrator on 4th May, 2007 and in the hearing which took place before the Arbitrator on 27th August, 2007, an objection was raised by the appellants that the Arbitrator has to make his award within a period of four months from the date of service of copy of the agreement and the time could only be extended with the consent of both the parties. The appellants had instructed to refuse to consent to an extension of time, and despite their specific objection, followed with an application being filed at a later stage, noticing refusal to consent for extension of time which had been arbitrarily rejected by the Arbitrator, and genesis of the terms of the agreement has not been looked into by the learned Single Judge of the High Court under the impugned judgment and after the expiry of four months, in the absence of time being extended with the consent of both the parties, the Arbitrator becomes functus officio and all subsequent proceedings stands abated and has placed reliance on the judgment of this Court in NBCC Limited Vs. J.G. Engineering Private Limited and submits that order of the High Court of Bombay impugned herein is not sustainable in law and deserves to be interfered by this Court.

10. Per contra, learned counsel for the respondents, while supporting the finding recorded

by the High Court in the impugned judgment submits that once the appellants have participated in the arbitration proceedings which for all practical purposes could not be concluded within a period of four months and it reveals from the proceedings that delay in furnishing written statements/counter claims were attributable to the appellants and in the given circumstances, the very participation in the arbitration proceedings with their right to claim objection for extension of time for the Arbitrator to complete the arbitral proceedings in submitting an award stands waived by their implied consent and this has been noticed by the High Court in the impugned judgment and submits that if the objection which has been raised by the appellants is taken to its logical conclusion the very object and intent of the Parliament in enacting the law to facilitate an efficacious recourse to arbitration will be in jeopardy and the High Court has rightly observed that the Arbitrator is justified in coming to the conclusion that the appellants with their conduct waived their objection to enforce a punctilious observance of the time schedule of four months under the terms of the agreement for the Arbitrator to conclude the arbitral proceedings and it needs no interference by this Court.

11. We have heard learned counsel for the parties and with their assistance perused the material available on record.

12. As noted herein earlier, an application was filed by the appellants under Section 14 of the Act, 1996 before the High Court of Bombay with a declaration that the Arbitrator has become de jure unable to perform his functions and the mandate of the Arbitrator to act as an Arbitrator in the arbitral proceedings between the parties stood terminated. As already mentioned, that came to be rejected by the High Court under its Order dated 14th March, 2008 and because of the interim Order passed by this Court dated 1st September, 2008, Arbitrator was unable to conduct arbitral proceedings and the same is lying in the storage for the last eleven years.

13. The undisputed facts manifest from the record are that after the appointment of a substituted Arbitrator, in compliance of Order of this Court dated 24th April, 2007, the first preliminary meeting was held before the learned Arbitrator on 4th May, 2007 and four months from the date of first preliminary meeting was to expire on 4th September, 2007 and in the hearing which took place before the Arbitrator on 27th August, 2007, objection was raised by the appellants that apart from their objection that the agreement dated 28th April, 2000 is a collusive and forged document, even if taken at its face value, taking note of the clause of arbitration under the agreement dated 28 th April, 2000, the Arbitrator has to make his award within a period of four months from the date of service of a copy of the agreement and time may be extended only with the consent of both the parties; and despite an opportunity being granted by the learned Arbitrator on their objection, recording refusal for extension of time to the parties to obtain an extension of time or clarification from this Court, no such application was filed by the respondents/claimants either for seeking extension of time or for clarification from this Court. The respondents, on the other hand, vide application dated 1st October, 2007 expressly refused not to file any application seeking extension or clarification from this Court and when the Arbitrator proceeded with the proceeding, a written application was filed by the appellants before the Arbitrator

stating inter alia that four months period had expired and the Arbitral Tribunal has become de jure unable as an Arbitrator in this matter which came to be rejected by the learned Arbitrator vide Order dated 31st December, 2007.

14. From the records before us, it is established that the Arbitrator was unable to complete the arbitral proceedings within four months from the date of the first preliminary meeting held on 4th May, 2007 in terms of clause (5) of the arbitration agreement and objection to extend the time was recorded by the appellants before the Arbitrator. The Arbitrator having failed to do so rejected their application by an Order dated 31st December 2007 that came to be challenged by the appellant invoking Section 14 of the Act 1996 by filing an Arbitration Petition in the High Court of Bombay with a declaration that the Arbitrator has become je jure unable to perform his functions and the mandate to act as an Arbitrator in the arbitral proceedings between the parties stood terminated which came to be dismissed by the High Court under the impugned judgment dated 14th March, 2008.

15. It is necessary to mention Section 14 and 15 of the Act, 1996 for the sake of convenience which is as under:-

“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.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

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.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.”

16. It is clear from the bare reading of sub-section 1(a) of Section 14 that mandate of an arbitrator shall terminate if it fails to act without undue delay. In the present case, the first preliminary meeting was held on 4th May, 2007 and the Arbitrator in terms of the agreement was supposed to conclude and pass the award within a period of four months which indisputedly stood expired on 4th September, 2007 and in the meantime the appellants recorded their objection of not consenting for extension of time beyond 4th September, 2007 and thus, it can be construed that parties were not in agreement for extension to the mandate of the Arbitrator failing which the arbitral proceedings automatically stood terminated.

17. Sub-section(2) of Section 14 clearly stipulates that if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), the party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate and the appellants rightly applied to the Court for termination of the mandate of the Arbitrator pursuant to the provisions of this Section and the Court was within its jurisdiction to decide accordingly.

18. It is true that the object of the scheme of the Act, 1996 is to secure expeditious resolution of disputes and it is based on the fulcrum of promptitude but at the same time the Arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the procedure. Therefore, the arbitration proceedings are supposed to be governed and run by the terms as agreed by the parties. The Arbitrator, therefore, cannot go beyond the clause of the arbitration agreement. We all need to respect the legislative intent underlying the Act. The speedy and alternative resolution to the dispute thus cannot be overlooked but at the same time, proceedings have to be governed and run by the terms agreed between the parties in concluding the arbitral proceedings failing which it will frustrate the mandate of the object of the Act with which it has been legislated by the Parliament to act upon on agreed terms and conditions of the agreement in concluding the arbitral proceedings. The exposition of law has been considered by this Court in NBCC Limited case(supra) in para 12 and 22 as under:-

“12. A perusal of the arbitration agreement quite clearly reveals that the arbitrator has the power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, it is obvious that the arbitrator has no power to further extend the time beyond that which is fixed without the consent of both the parties to the dispute. It is an admitted position that the respondent did not give any consent

for extension of time of the arbitrator. Thus given the situation, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings.

22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently there is no provision under the Act for the Court to fix a time-limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.”

19. In the instant case, from the pleadings on record and noticed by the High Court in its impugned judgment dated 14th March, 2008, the proceedings stood terminated as the appellants have not recorded their consent for extension of time which was the requirement and essence of the conditions of the agreement and the Arbitrator became de jure unable to perform his functions after the expiry of four months from the date of first preliminary meeting held on 4th May, 2007 but that was declined by the High Court on the premise that after the appellants have participated in the arbitral proceedings, that waived their right to question extension of time as it was impracticable for the Arbitrator to conclude the proceedings within a period of four months and the High Court was of the view that the Act has been legislated with an object to facilitate an efficacious recourse to arbitration failing which it will be in grave peril.

20. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. That apart, the doctrine of “waiver” or “deemed waiver” or “estoppel” is always based on facts and circumstances of each case, conduct of the parties in each case and as per the agreement entered into between the parties and this exposition has been affirmed by this Court in NBCC Ltd.(supra) regarding adherence to the imposition of time limit for the conclusion of the arbitral proceedings. The parties have to stand by the terms of contract including the Arbitrator.

21. The clause so referred indicates that the parties have admittedly agreed and the time period so prescribed is final and binding. It means the arbitration proceedings should commence and end within the prescribed period of time which in the instant case was of

four months and expired on 4th September, 2007 and, there was no occasion for either party to raise an objection as long as the time was available at the command of the Arbitrator to conclude the arbitral proceedings and pass an award within the time schedule fixed under the terms of contract as agreed by the parties.

22. That apart, there is no provision under the arbitration agreement to condone the delay when agreement between the parties binds them to see that the arbitration proceedings should be concluded within the time prescribed. This time restriction is well within the scope and purport of the Act, 1996 at national and international arbitrations.

23. The time fixed for the arbitration and/or schedule of time limit in such arbitration proceedings, as it is recognised by law, there is no reason not to accept the same, basically in the present facts and circumstances where the parties themselves agreed to bind themselves by the time limit. Section 14 read with Section 15 of the Act, 1996 also recognise this mechanism and after the expiry of four months period from the date of first preliminary meeting held on 4th May, 2007, the Arbitrator indeed became de jure unable to perform his functions and the mandate to act as an Arbitrator in the arbitral proceedings between the parties as prayed for stood terminated.

24. Consequently, in our considered view, the appeal deserves to succeed and is accordingly allowed. The judgment and order of the High Court dated 14th March, 2008 is hereby set aside. The respondents are at liberty to ventilate their grievance as admissible under the law. No costs.

25. Pending application(s), if any, stand disposed of.