
(2019) 07 BOM CK 0246

In the Bombay High Court

Case No : Commercial Arbitration Petition (L) No. 814, 815, 816, 817, 818 Of 2019

Cabra Instalaciones Y. Servicios

APPELLANT

Vs

Maharashtra State Electricity Distribution Company Limited

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(f), 11(5), 11(9), 14, 15, 29A, 29A(6)

Citation : (2019) 07 BOM CK 0246

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Arjun Sreenivas, Vineet Bhansali, Rahul Sinha

Final Decision : Disposed Off

Judgement

G.S. Kulkarni, J

1. These are applications filed under Section 29A of the Arbitration and Conciliation Act, 1996 (for short 'the Act') whereby the petitioner has prayed that the mandate of the arbitral tribunal be extended for a period of six months, for the arbitral tribunal to conclude the arbitral proceedings and make an award. The following are the prayers as made in the petitions:-

"(a) that this Hon'ble Court be pleased to extend the time period for making the award in the arbitration proceedings pending between the Petitioner and Respondent before the learned Sole Arbitrator Mr. Justice F.I. Rebello (Retd.) by a period of 6 (six) months or for such other period, from August 20, 2019, as this Hon'ble Court deems fit; and

(b) for such other and further reliefs as this Hon'ble Court deems just and proper in the nature and circumstances of the present case."

2. At the outset it may be observed that the arbitration in question is an international commercial arbitration. The Supreme Court by an order dated 9

August 2017 passed under Section 11(5) of the Act was pleased to appoint an arbitral tribunal. The said order reads as under:-

"1. We have heard the learned Senior Counsel appearing for the parties.

2. This is an application under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator. In the contract between the parties, the arbitration clause, being Clause 17, is set out as follows: -

"17. Arbitration:

(a) All disputes or difference between the parties under or in connection with this Agreement or any breach thereof shall be sought to be referred to the Chief Engineer (Infrastructure Plan).

(b) If such differences or disputes as between the parties cannot be settled through Chief Engineer (Infrastructure Plan) within 180 days of such disputes, they shall be settled by arbitration. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modification thereof from time to time.

(c) The language of the arbitration shall be English and the place of arbitration shall be Mumbai.

(d) Notwithstanding the existence of any dispute referred to arbitration, the parties shall continue to perform their obligations under this Agreement."

3. Learned Senior Counsel appearing on behalf of the respondent states that an arbitration can take place only if disputes and differences between the parties cannot be settled through the Chief Engineer and it is only after 180 days of such disputes not being settled, that arbitration can be invoked.

4. We find that by a letter dated 08.06.2016, the petitioner wrote to the Chief Engineer under the Clause asking that this was by way of a final attempt to achieve amicable settlement of the disputes set out in the letter. It appears that in response to the said letter, the Chief Engineer, by a letter dated 17.06.2016 called a meeting, which was held on 22.06.2016, after which nothing had taken place. Inasmuch as nothing has happened thereafter, and more than 180 days have gone since June, 2016, according to us, an Arbitrator needs to be appointed to resolve the disputes between the parties. We appoint Hon'ble Mr. Justice F.I. Rebello, retired Judge of the Bombay High Court as Sole Arbitrator to resolve the disputes between the parties.

5. Accordingly, the Arbitration Petitions are disposed of."

3. The arbitral tribunal could not conclude the arbitral proceedings within the time limits prescribed under Section 29A of the Act. It appears that the petitioner had earlier approached this Court by filing Commercial Arbitration Petition (L) No. 30 of 2019 seeking extension of the mandate of the arbitral tribunal for six months. A learned Single Judge of this Court by an order dated 14 January 2019

was pleased to extend the mandate of the arbitral tribunal by six months as prayed in the said application. The said order passed by this Court (B.P. Colabawalla, J.) reads thus:-

"This Arbitration Petition has been filed under Section 29A of the Arbitration and Conciliation Act, 1996 seeking an extension of time for the period of six months to complete the arbitration proceedings and pass a final award. Learned Advocate appearing on behalf of the Respondent fairly states that he has no objection if the time is so extended.

2. In these circumstances, the time to complete the arbitration proceedings and pass a final award is extended by a period of six months from 21st February, 2019. The Arbitration Petition is disposed of in the aforesaid terms. No order as to costs."

4. The petitioner is again before this Court seeking further extension of time on the ground that the arguments are concluded and the arbitral tribunal would now be proceeding to pronounce an award.

5. A question that would arise for consideration is as to whether this Court under Section 29A would have jurisdiction to entertain this application, when the arbitral tribunal was appointed by the Supreme Court exercising power under Section 11(5) of the Act, being an international commercial arbitraiton. It would be necessary to note the provisions of Section 29-A which reads thus:-

29A. Time limit for arbitral award.-(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.

(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 subsection (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.

(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."

6. A perusal of Section 29-A would show that it is a substantive and a comprehensive provision inter alia dealing with the time limits for making of an arbitral award and extension of such time limits. Sub-section (1) provides that the award "shall" be made by the arbitral tribunal within a period of twelve months from the date the arbitral tribunal enters upon the reference. As to what is the deemed date for the tribunal to have entered the reference is provided in the 'Explanation' to sub-section (1). Sub-section (2) provides that if an award is made within a period of six months, from the date the arbitral tribunal enters upon the reference, then the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree. Sub-section (3) provides that the parties may by consent extend the period of twelve months specified in subsection (1) for making an award for a further period not exceeding six months. Sub-section (4) provides that when an award is not pronounced within the time specified in sub-section (1) which is within twelve months or the extended period i.e. six months specified in sub-section (3), the mandate of the arbitral tribunal would stand terminated, unless the Court has, either prior to or after the expiry of the period so specified, extended the period. As per the provisions of sub-section (5), extension of period referred to in sub-section (4) may be granted on an application of any of the parties and which may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. Sub-section (6) is of significance which provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all 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 arbitrators so appointed under Section 29A would be deemed to have received the said evidence and material. Sub-section (7) provides that in the event of an arbitrator(s) being appointed under Section 29A, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

7. On a plain reading of Section 29A alongwith its sub-sections, it can be seen that for seeking extension of the mandate of an arbitral tribunal, these are substantive powers which are conferred on the Court and more particularly in view of the clear provisions of sub-section (6) which provides that while extending the period referred to in sub-section (4), it would be open to the Court to substitute one or all the arbitrators, which is in fact a power to make appointment of a new/substitute arbitrator or any member of the arbitral tribunal. Thus certainly when the arbitration in question is an international commercial arbitration as defined under Section 2(1)(f) of the Act, the High Court exercising power under Section 29A, cannot make an appointment of a substitute arbitral tribunal or any member of the arbitral tribunal as prescribed under sub-section (6) of Section 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

8. Thus, as in the present case once the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, in my opinion, this Court lacks jurisdiction to pass any orders under Section 29-A of the Act, considering the statutory scheme of Section 29-A. It would only be the jurisdiction of the Supreme Court to pass orders on such application under Section 29-A of the Act when the arbitration is an international commercial arbitration. The insistence on the part of the petitioner that considering the provisions of sub-section (4), the High Court would be the appropriate Court to extend the mandate of the arbitral tribunal under Section 29-A, would not be a correct reading of Section 29A as the provision is required to be read in its entirety and in conjunction with Section 11(9) of the Act.

9. The petitions are accordingly disposed of, however, with liberty to the petitioner to adopt appropriate proceedings before the Supreme Court seeking extension of the mandate of the arbitral tribunal. No costs.

10. All contentions of the parties are expressly kept open.