
(2003) 08 AP CK 0027

In the Andhra Pradesh High Court

Case No : Writ Petition No. 20137 of 2002

N. Jayalaxmi

APPELLANT

Vs

R. Veeraswamy and Another

RESPONDENT

Date of Decision : 22-08-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(2), 16(3), 16(4), 16(5)
Constitution of India, 1950 — Article 226, 227

Citation : (2003) 5 ALD 776 : (2003) 6 ALT 186 : (2004) 1 ARBLR 31 : (2004) 52 SCL 709

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : C. Ramesh Sagar, for the Appellant; C. Kodandaram, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—An important question regarding the power of arbitrator/arbitral tribunal to terminate proceedings in the light of Section 25 of the Arbitration and Conciliation Act, 1996 "the Arbitration Act" for brevity) falls for consideration in this writ petition.

2. The chronology of events leading to filing of this writ petition may be noticed in brief as follows. The second respondent namely, the Airports Authority of India granted licence to use land admeasuring 1500 Sq.yds. (1253.13 Sq.mtrs.) to the petitioner for a period of three years. The licence was granted for construction of godown for storage of LPG cylinders and office. The licence fee was fixed at Rs. 9,097/- per month for the year 1994; Rs. 10,007.26p. per month for the year 1995; Rs. 11,008.75p. per month for the year 1996; and Rs. 12,109.41p. per month for the year 1997. The petitioner constructed godown measuring 40 x 100 ft. with asbestos roof. She also constructed an office room with dimensions 20 x 40 ft. with RCC roof. Subsequently, the licence was granted for yet another period of seven years from 15-7-1997 to 14-7-2004 on yearly licence fee of Rs.

1,88,100/- (monthly licence fee comes to Rs. 15,675/-). Accordingly, a deed of licence was executed on 9-8-1996. In this case, we are not concerned with other details. Under Clause 19 of the deed of licence, any dispute regarding contract arising out of the licence has to be referred to the Chairman of Airports Authority of India. In case the Chairman is not willing to act as arbitrator, the dispute has to be referred to a person nominated by the Chairman and the award of the arbitrator is final and binding.

3. In 1999, there was a demand to pay increased licence fee. The petitioner approached this Court challenging the demand. The writ petition being W.P. No. 23592 of 1999 was dismissed by a learned single Judge of this Court on 8-6-2000. The petitioner's writ appeal being W.A. No. 706 of 2000 was also dismissed on 17-8-2000. The petitioner's attempt to seek special leave under Article 136 of the Constitution was also unsuccessful before the Hon'ble Supreme Court of India.

4. The second respondent, by a communication dated 17/19-10-2000, informed termination of licence from 1-11-2000, as a result of which the petitioner vacated the premises in November, 2000 and handed over possession of the same. Thereafter, the second respondent demanded payment of arrears of licence fee from the petitioner. The petitioner did not pay. Therefore, by communication dated 29-4-2002, the petitioner was asked to give consent for initiation of arbitral proceedings. The petitioner did not accept arbitration. Hence, the second respondent nominated the first respondent herein as arbitrator under Clause 19 of the deed of licence to decide the dispute. The petitioner raised objection for appointment of first respondent on the ground that as he is an employee of the second respondent he cannot be treated as arbitrator. Be that as it is, the second respondent commenced proceedings under the Arbitration Act after giving notice to the petitioner and the second respondent. On 31-7-2002, the second respondent was also directed to submit detailed statement of facts within 30 days from the date of receipt of the letter. Similarly, the petitioner was also directed to submit her statement within 30 days from the date of receipt of statement of facts from the second respondent. The second respondent did not file the statement of facts before the first respondent within the stipulated time nor sought for extension of time. Though the period of 30 days granted to the second respondent expired on 6-9-2002, the first respondent by communication dated 17-9-2002 suo motto granted 21 days further time to the second respondent to submit statement of facts. Assailing the same, the petitioner filed the present writ petition seeking a writ of mandamus declaring the action of the first respondent in continuing the arbitral proceedings after expiry of 30 days granted to the second respondent to file statement of facts as illegal and contrary to the provisions of the Arbitration Act.

5. This Court, while ordering notice before admission, by order dated 10-10-2002, stayed the proceedings before the first respondent pending adjudication of the writ petition. The second respondent entered appearance and

filed WVMP No. 3338 of 2002 along with a counter-affidavit praying this Court to vacate the interim order dated 10-11-2002. As the submissions for the purpose" of interlocutory application and the main writ petition are the same, the matter was heard finally on 4-8-2003 and is being disposed of at the interlocutory stage with the consent of both the Counsel.

6. In the elaborate counter affidavit filed by the second respondent, it is stated that though the first respondent initially granted 30 days for filing statement of facts, the said period was extended by granting additional time of 21 days so as to file claim petition. Pursuant to the communication dated 17-9-2002 extending time, the second respondent filed a claim petition with necessary documents within the additional time granted. It is also contended that the arbitrator is well within his power to grant additional time for filing claim statement/petition. Strong reliance is placed on Section 23 read with Section 25 of the Arbitration Act in support of the case. It is also contended that Section 25(a) is not mandatory and whenever a party initiating arbitral proceedings fails to file statement of facts, the same does not result in termination of proceedings.

7. Learned Counsel for the petitioner, Sri C. Ramesh Sagar contends that under the new Arbitration Act, the arbitrator has to act in accordance with the provisions of Chapter V of the Act, which contains detailed procedure for conduct of arbitral proceedings. If a claimant fails to communicate the statement of facts, the arbitral tribunal shall have to proceed on the basis of the material available before it. He would also submit that if the claim statement is not filed within the time stipulated, the proceedings shall have to be terminated. Therefore, he would urge that the communication dated 17-9-2002 is without jurisdiction and contrary to the provisions of Section 25 of the Arbitration Act.

8. Per contra, learned Counsel for the second respondent, Sri C. Kodcndaram submits that Section 25(a) is not mandatory and it is only directory. Alternatively, he would submit that Section 25(a) is to be read in the light of Section 23 and if Section 25(a) is read in isolation, the same would result in absurdity.

9. As pointed out in the beginning of this order, the only question that fails for consideration is whether the arbitrator appointed can grant extension of time to the party who failed to communicate the statement of facts or has to terminate arbitral proceedings?

10. Arbitration Act, 1996 is a comprehensive legislation made taking into account the model law on "International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) as per the recommendation of the General Assembly of United Nations Organisation. It repealed the Arbitration Act, 1940. It was intended to remove the defects in the Arbitration Act, 1940, especially regarding unending delay, interlocutory intervention by the Courts, enforceability of awards and conferment of more powers on the arbitrator/ arbitral tribunal.

11. Section 11 of the Act speaks of appointment of arbitrator either by parties to a dispute or by an order of the Chief Justice of a High Court or a person designated by him under a scheme made by him. Section 13 lays down the procedure to challenge the arbitration and Sub-section (1) thereof stipulates that the parties are free to agree on a procedure for challenging the arbitration. It is competent for the arbitrator to decide on the question when his appointment is challenged. Under Sub-section (4), if the challenge as to any procedure agreed upon by the parties or under the procedure is not successful, the arbitral tribunal shall continue the arbitral proceedings and make the award. Such award can be challenged in accordance with Section 34 of the Act. Chapter VI of the Arbitration Act deals with jurisdiction of arbitral tribunal. Section 17 empowers arbitrator to pass interlocutory orders as a measure of protection in respect of the subject matter of the dispute. Section 16 of the Act reads as under.

16. Competence of arbitral tribunal to rule on its jurisdiction :--(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and or that purpose--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

12. A reading of Sub-sections (2) to (6) of Section 16 would make it plain that the party to arbitration can raise a plea that the arbitral tribunal is exceeding the scope of its authority. If a ruling is given under Sub-section (4) or Sub-section (5) rejecting the plea raised as to the jurisdiction or authority of the arbitrator and an award is passed, the party aggrieved can make an application for setting

aside the award u/s 34 of the Act, Whatever be the award or rejection order in relation to a plea regarding the jurisdiction of the arbitral tribunal, the Act does not contemplate interlocutory intervention by common law Courts or by the High Court under Article 226/227 of the Constitution of India.

13. The petitioner has not raised the plea as is raised in this writ petition either under Sub-section (2) or Sub-section (3) of Section 16 of the Arbitration Act though the Act has specifically provided for such procedure. Therefore, ex facie, the writ petition is not maintainable. The petitioner has not availed the effective alternative remedy provided by the Arbitration Act itself. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , after referring to the important case law on the subject, the Supreme Court ruled as under:

The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, prohibition, quo watranto and Certiorari for the enforcement of any of the Fundamental Rights contained in part III of the Constitution but also for "any other purpose". Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But, the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged.

14. Further, I am of the considered opinion that when the special enactment empowers an authority to adjudicate questions of jurisdiction and questions of exercise of jurisdiction, that is to say, error of jurisdiction and error within the jurisdiction, a party has to move the said authority only and the writ petition is not maintainable.

15. The next aspect of the matter is interpretation of Section 25 of the Arbitration Act. To appreciate the contention raised by the learned Counsel for the petitioner, it is necessary to refer to relevant provisions in Chapter V of the Act which deals with conduct of arbitral proceedings and Chapter VI which deals with making of arbitral award and termination proceedings.

16. Section 18 declares that parties to an arbitration shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 is relevant and reads as under;

19. Determination of rules of procedure :--

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in Sub-section (2) the arbitral tribunal may, subject to this part, conduct the proceedings in the manner it consider appropriate.

(4) The power of the arbitral tribunal under Sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

17. While declaring that arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (CPC) of Evidence Act, 1872, in Sub-section (2) of Section 19, it is laid down that the parties to arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings. Such procedure, however, must be subject to the provisions in Chapter V. Be that as it is, in case the parties fail to agree with the procedure, it is open to the arbitral tribunal, subject to the provisions of Chapter V, to conduct proceedings in the manner which it considers appropriate. Sub-section (4) of Section 19 confers such power on the arbitral tribunal. It further makes it clear that it is open to the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence. Sections 20, 21 and 22 deal, with place of arbitration, commencement of arbitral proceedings and language of proceedings respectively. Sections 23 and 25 are relevant and it is necessary to extract the same.

23. Statements of claim and defence :--

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

25. Default of a party :--Unless otherwise agreed by the parties, where, without showing sufficient cause,--

(a) the claimant fails to communicate his statement of claim in accordance with Sub-section (1) of Section 23, the arbitral Tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with Sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

18. Under Sub-section (1) of Section 23, the claimant shall file a statement of facts/claim which would contain the points in issue and the relief or remedy sought. Such presentation of the claim shall have to be within the period of time agreed by the parties or within the period of time given by the arbitral tribunal. Under Sub-section (3) of Section 23, it is open to the parties to amend the claim petition or supplement the claim or defence during the course of arbitral proceedings and the authority to accept the amendment or supplementary statement vests with the arbitral tribunal. We have referred to Sub-section (2) of Section 19 which enables the parties to agree with the procedure to be followed by the arbitrator and in the absence of agreed procedure, it is for the arbitral tribunal to conduct the proceedings in the manner which the tribunal considers appropriate. Therefore, to my mind, reading Sections 19(2) and (3) with Section 23(1), it becomes clear that the procedure accepted to be followed by the parties under Sub-section (2) of Section 19 or the procedure decided to be followed by the arbitral tribunal u/s 19 can also stipulate the period during which the parties have to file the claim statement and counter claim statement.

19. Coming to Section 25, Clause (a) of Section 25 lays down that the arbitral tribunal shall have to terminate the proceedings if the claimant fails to communicate his statement of claim under Sub-section (1) of Section 23. If the respondent fails to file his statement of facts, however, it is open to the arbitral tribunal to continue the proceedings and make arbitral award on the evidence before it, but without treating that failure in itself as an admission of the allegations by the claimant. That is to say, that cannot be an ex parte award on default, but there can be an ex parte award on merits of the case. Reading Section 23(1) and Section 25(a) together, it becomes clear that if the claimant fails to communicate the statement of account within the period of time agreed upon by the party or within the period of time determined by the arbitral tribunal, the proceedings have to be terminated. Further, Section 25 opens with a phrase "unless otherwise agreed by the parties, where, without showing sufficient cause".

20. Section 25(a) of the Arbitration Act empowers the arbitrator to terminate the proceedings only when the party fails to show sufficient cause for not filing the statement of facts within the period as stipulated u/s 23(1) of the Act. If, in a given case, the parties have agreed on the procedure to be followed by the arbitral tribunal including time schedule u/s 19(2) and such procedure enables the arbitrator to condone the delay in filing the statement of facts for sufficient

cause, Section 25(a) has no application. In yet another given case, where the party has not agreed to a procedure to be followed by the arbitral tribunal, but, under Sub-section (3) of Section 19 read with Section 23(1), the arbitral tribunal has laid down the procedure for the arbitral proceedings including the power to permit the parties to file statement of facts or claim petition beyond the period agreed, Section 25(a) has no application. In either of the situation, it is well within the jurisdiction of the arbitrator to extend the time for filing the claim statement. The observations made by the Supreme Court in a recent judgment in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , support this view.

21. In the above case, the Supreme Court considered the grounds on which a Court can set aside the award u/s 34 of the Arbitration Act. The Supreme Court referred to the various provisions of the Act and while observing that if there is no agreement between the parties, the arbitrator/arbitral tribunal should follow the procedure prescribed in Part I of the Act i.e., Sections 2 - 43 and that if any procedure contemplated either by the agreement of the parties or otherwise, if it is in conflict with the provisions of the Act should not be followed. The Supreme Court further laid down as under:

In Section 34(2)(a)(v) of the Act, the composition of the Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in Part I of the Act i.e. Sections 2 - 43. These provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the Tribunal to decide the dispute is prescribed. In these sections there is no distinction between the jurisdiction/ power and the procedure. Therefore, if the award is de hors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

22. Thus, while testing the action of the arbitral tribunal as to whether it violates the provisions of the Act, the above principles must be taken into consideration. In the case on hand, the arbitrator was appointed on 26-7-2002 by the Chairman of Airports Authority of India. The first respondent who is arbitrator issued a communication dated 31-7-2002 commencing the arbitration proceedings. The said communication, in my considered opinion, contained the procedure prescribed by him u/s 19(3) read with Section 23(1). The arbitrator also prescribed time schedule for filing statement of facts, for filing counter statement, for filing rejoinder to the counter statement, and for conclusion of arbitral proceedings. The communication, no doubt, does not lay down any rule

that in case of delay it is open to the arbitrator to condone the delay and accept the statement of facts or counter statement. But one thing is clear. When the arbitrator himself prescribed procedure and the parties did not agree for any procedure which is followed by the arbitral tribunal, was it proper to the arbitrator to suo motto extend the time for filing the statement of facts by the second respondent? This can be appreciated by referring to the impugned order dated 17-9-2002 passed by the first respondent which reads as under:

In the abovecase, the claimant was directed by reference Ref. No. AAI/NAD/SR/GM(F)/ HY/2002-ARB dated 31-7-2002, to file the statement of facts within 30 days from the date of receipt of the said reference. As per the acknowledgement received, the claimant has received the referred letter on 5-8-2002. Hence, the time stipulated for filing the statement of facts had expired on 6-9-2002.

The claimant had neither filed the statement of facts nor sought for any extension of time as on date. Though the claimant has not sought any extension of time, I.R. Veeraswamy, Sole Arbitrator in the matter of arbitration between M/s.Airports Authority of India, represented by Airport Director, Hyderabad and Smt. N. Jayalaxmi, Sri Sai Balaji Gas Agency, in the interest of justice and fair play, suo motu grant 21 days time from the date of receipt of this letter and if the claimant fails to submit the statement of facts, it will be presumed that the claimant has nothing to present before the sole arbitrator and the matter shall be decided according to the merits as available in the reference without any further notice,

23. The arbitrator, it cannot be denied, suo motu granted 21 days time to the second respondent to file statement of facts "in the interest of justice and fair play". Therefore, the same is in accordance with Section 18, which mandates that the arbitral tribunal must treat the parties with equality and each party shall be given full opportunity to present his case. If a party to the proceedings fails to file the pleadings within the time stipulated by the arbitrator and for that reason the arbitral proceedings are terminated, the same would not amount to treating the party with equality and the same does not amount to giving full opportunity to the party to present his case. That is not the intention of the Act. An arbitration is an alternative dispute resolution mechanism where the endeavour is not much on solving the problem and resolving the dispute with reference to settled principles of law, but it is achieving justice with cooperation. There can be myriad reasons for a party for not filing the pleadings within the stipulated time. It is always open to the arbitrator having regard to the nature of the dispute and having regard to the nature and status of the parties to extend the time in a reasonable manner. It would be altogether different if the arbitrator ignores the basic principles of arbitration, i.e., expeditious justice and perennially goes on adjourning the matter for completion of pleadings, it can certainly be a situation where unfairness would be meted to the other party, if the proceedings are not terminated.

24. It is axiomatic that in the conduct of proceedings, the arbitral tribunal has to

follow the procedure contemplated under the statute and it should also act having regard to the principles of fairness and natural justice. In every arbitration, there are implied rules of procedure. An arbitrator should be impartial and give a reasonable opportunity to each party to present his case. Even in the matter of imposing limits as to time, the arbitrator is competent to allow some latitude to the party having regard to the principles of fairness. In the treatise by Russel on Arbitration, 21st edition (Sweet & Maxwell) at page" 193, para 5.056, the following passage appears.

Limits. A party is required to comply with procedural orders and directions from the tribunal, including those imposing limits as to time and content of submissions and evidence. On the other hand, if the tribunal's directions in this regard can be said to be unfair or to operate unfairly against one of the parties, that party may have a genuine ground of complaint. In practice the tribunal will usually allow some latitude to a party who has further relevant submissions or evidence to put forward, but will need to draw the line at some point. Provided it has made clear to the parties exactly where that line will be drawn, for example by giving advance warning of a cut-off date for evidence and submissions, and provided of course it is not unreasonable to draw the line in that way, the tribunal should not fall foul of the requirement to give the parties a reasonable opportunity to present their case.

25. If during the conduct of reference, the arbitral tribunal extends time suo motu either for filing pleadings or for leading further evidence or for filing counter claim, the same cannot be held to be contrary to any substantive law, which will suffer invalidation in the hands of the Court Section 32 of the Act appearing in Chapter VI (dealing with making of arbitral award & termination of proceedings) lays down the procedure. The same reads as under:

32. Termination of proceedings :--(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under Sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where--

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and Sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

26. As per Sub-section (2) of Section 32, the arbitral tribunal shall issue an order

for the termination of the proceedings inter alia where the arbitral tribunal finds that continuation of proceedings has become unnecessary or impossible. This would furnish sufficient guidelines for exercising power u/s 25(a) as well. It is only when the arbitral tribunal finds that continuation of the proceedings is impossible for non-filing of the pleadings within the time or extended time, the arbitral proceedings shall be terminated. In every case if the proceedings are terminated u/s 25(a) for the reason that parties have not filed the pleadings within the time stipulated by the arbitrator, the same would violate the principles enunciated in Sub-section (2) of Section 28 of the Act. The said sub-section lays down that "the arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. The phrase "ex aequo et bono" connotes that the issues in the arbitral proceedings can be decided on the basis of what is fair and right (See Oxford Companion to Law by David M. Walker 1980, p.444). An arbitrator has to act as amiable compositeur and unite the parties together, though he cannot ignore the rules of substantive law as applicable to decide the dispute. If the parties consent for arbitration and the reference is conducted, the principles of fairness cannot be forgotten. That is precisely the purport of Sub-section (2) of Section 28. Therefore, the submission of the learned Counsel for the petitioner is misconceived.

27. In the event the arbitrator extends time for filing statement of facts and proceeds further and passes an award, whether the award is vitiated? I am afraid, I cannot agree with the submission made by the learned Counsel for the petitioner on this aspect. In ONGC v. Saw Pipes Ltd. (supra), the Supreme Court laid down that the Court can set aside the arbitral award u/s 34(2) on various grounds including on the ground that the award is contrary to fundamental policy of Indian law, interest of India or justice or morality and the award is patently illegal. The award can also be set aside if the arbitral procedure followed was not in accordance with the agreement of the parties or in the absence of any agreement, the arbitral procedure was not in accordance with Part I of the Act. Extension of time for filing pleadings is not a ground to set aside the award. Therefore, Section 25(2) cannot be construed as mandatory provision.

28. It is now well settled, the use of the word "shall" is not decisive in construing whether a provision is mandatory or directory. In a given situation, the word "may" is required to be construed as "shall" and vice-versa. In construing a provision of law where the word used is either "shall" or "may", the intention of the legislature and the consequence that would flow from the construction thereof one way or the other have to be kept in view. It is not necessary to refer to the case law which is galore on this aspect of the matter. It is sufficient to refer to the judgment of the Supreme Court in Mohan Singh and Others Vs. International Airport Authority of India and Others, , where it was laid down as under:

.....The word "shall", though prima facie gives impression of being of mandatory character, it requires to be considered in the light of the intention of

the Legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the Court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word "shall" is construed as having mandatory character, the mischief that would ensue by such construction; whether the public convenience would be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision would be mandatory or directory. If an object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object or enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether. Effect must be given to all the provisions harmoniously to suppress public mischief and to promote public justice.

29. In the same decision, it was observed as under:

Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty. In *Craies on Statute Law* (7th Edn.), it is stated that the Court will, as general rule, presume that the appropriate remedy by common law or mandamus for action was intended to apply. General rule of law is that where a general obligation is created by statute and statutory remedy is provided for violation, statutory remedy is mandatory. The scope and language of the statute and consideration of policy at times may, however, create exception showing that the legislature did not intend a remedy (generality) to be exclusive. Words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word "shall" is not always decisive. Regard must be had to the context, subject-matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the Court to try to get at the real intention of the Legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration.

30. Applying the above principle and having regard to the objects and reasons for which the Arbitration Act, 1940 was repealed and Arbitration Act, 1996 was enacted, I am of the considered view that though Section 25(a) contains a phrase ".....the arbitral tribunal shall terminate the proceedings", it should be read as "the arbitral tribunal may terminate the proceedings". Such interpretation would also be in accordance with the principle of harmonious construction. If Section 25(a) is read as mandatory, the same would defeat

Sections 18, 19, 23(1) and 32(2) of the Arbitration Act. Such a recourse should be avoided.

31. In the result, for the above reasons, the writ petition fails and is accordingly dismissed with costs assessed at Rs. 5,000/-.