

(2006) 04 DEL CK 0118
In the Delhi High Court
Case No : OMP No. 16 of 2005

Vijay Industries and Projects Ltd.

APPELLANT

Vs

NTPC Limited

RESPONDENT

Date of Decision : 18-04-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12, 28, 28(1), 28(2)

Citation : (2006) 04 DEL CK 0118

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Chandan Kumar and Shankar Kr. Jha, for the Appellant; V.K. Rao, for the Respondent

Final Decision : Disposed Off

Judgement

Anil Kumar, J.—This order shall dispose of petition of petitioner u/s 28 of Arbitration and Conciliation Act, 1940 for enlargement of time for making of the award.

2. The brief facts to comprehend the controversies between the parties are that petitioner contended that for the work awarded to him disputes arose and as there was an arbitration agreement between the parties, upon invocation of arbitration clause by the petitioner, respondent did not appoint their nominee arbitrator. It was asserted that the respondent did not participate in the arbitral proceeding on 29.7.1995 and thereafter filed suit No. 2065A/05 seeking that the arbitration agreement between the parties be superseded and pending decision in the petition, the arbitration hearing be stayed.

3. On the petition of the respondent seeking superseding the arbitration agreement, by order dated 11.9.1995 the arbitration proceedings were stayed, as the allegation leveled in the petition were that the respondent No. 2 has been convicted under the Prevention of Corruption Acts.

4. The petition filed by the respondent for superseding the arbitration agreement

was disposed of by order dated 7.3.2003, as the arbitrator against whose appointment, objections had been raised had resigned. In view of the resignation of the arbitrator, petition was dismissed as infructuous with liberty to the respondent to raise any plea against any subsequent arbitrator.

5. After order dated 7.3.2003 the competent authority under the arbitration agreement being Institution of Engineers appointed Mr. Madan Lal as the third arbitrator by letter dated 26.11.2003 who accepted his nomination by letter dated 15.12.2003.

6. It was pleaded that the first hearing took place on 3.4.2004 where the schedule for filing claim, reply to the claim etc were fixed and the matter was adjourned to 1.9.2004

7. The petitioner contended that on 1.9.2004 minor changes to the schedule already fixed on 3.4.2004 were made and the matter was adjourned for 29.1.2005.

8. Before the adjourned date 29.1.2005, by letter dated 18.10.2004 it was contended on behalf of respondent that the arbitral tribunal had entered the reference on 29.7.1995 and four months is contemplated under condition 3 of first Schedule of the Arbitration Act, 1940. The four months period expired in 1995. It was contended that after the disposal of the petition time was not extended by the parties for arbitral Tribunal to give its award and consequently the proceedings before the Tribunal have abated and the tribunal has become functus officio. The petitioner replied to the notice dated 18.10.2004 by reply dated 6.12.2004 contending that no objection was raised by the respondent in terms of order dated 7.3.2003 on 3.4.2004 when the respondent participated in the arbitration proceedings and thereafter on 1.9.2004 The petitioner contended that the respondent is trying to take benefit of its own wrongs and reliance was placed on *Vidya Grover v. D.D. Grover* 1986(1) 412. The petitioner thereafter filed the present petition on 12.1.2005 seeking enlargement of time for making the award.

9. The petitioner also relied on 1985 2 GJX 0130, *State of Punjab v. Hardyal*; 1994 1 GJX 0190, *Krishna Construction Co. v. Delhi Development Authority*; 2002 2 GJX 0117, *Inder Sain Mittal v. Housing Board, Haryana and Ors.* and 113(2004) Dlt 778, *Shyam Telecom Ltd. v. Arm Ltd.* To contend that the time to give the award should be enlarged in the present facts and circumstances.

10. The petition is strongly contested by the respondent who emphasised that the contract was awarded to petitioner on 24.3.1982 for setting up of fire protection system. The condition of contract, Clause 26 had an arbitration agreement and consequently though the demand was raised by the petitioner as long back as 11.6.1985 for an amount of Rs. 73,38,382.40 which is allegedly not paid by the respondent however, the arbitration agreement was invoked again by letter dated 9.12.1989. Mr. M.M. Sharma was appointed by the petitioner and the respondent was asked to appoint his arbitrator, however, this letter was not

communicated to the respondent. The respondent contended that invocation of arbitration clause in the year 1989 itself was barred by limitation and could not have been invoked. According to respondent the petitioner had forfeited his right to seek appointment of the arbitrator, however, since the arbitrator persisted with the arbitration clause and caused the notice dated 10.5.1994 to be issued in continuation of earlier letter dated 9.12.1989 the Institution of Engineers appointed Sh. D.B. Chachad along with Brig. D.R. Kathuria as the nominee arbitrator. Since there were proceedings under the Prevention of Corruption Act against Brig D.R. Kathuria entailing respondent to file an OMP No. 2065A/94 u/s 5, 11 and 12 of Arbitration Act, 1940 where the arbitration proceedings were stayed by order dated 11.9.1995.

11. During the pendency of the proceedings on behalf of respondent u/s 5 of the Arbitration Act, 1940, an application u/s 85 of Arbitration and Conciliation Act, 1996 was filed in the said petition seeking that the arbitration proceedings pending between the parties will be governed by the provisions of Arbitration and Conciliation Act, 1996 and not under the Arbitration Act, 1940. The application of the petitioner was, however, dismissed. Subsequently as Brig D.R. Kathuria had resigned as an arbitrator, the petition was disposed of by order dated 7.3.2003.

12. Regarding first hearing of the arbitration taking place on 3.4.2004 pursuant to the appointment of the third arbitrator on 26.11.2003 the respondent contended that the consent to extend the time ought to be an express one and the presence of the representatives in the arbitration proceedings cannot construe under law for continuation of arbitral tribunal. It was stated that since no specific Explanation was agreed or given the proceedings before the arbitral tribunal has abated and consequently the respondent was justified in sending communication dated 18.10.2004 contending that the arbitral tribunal had no jurisdiction and could not given the award. The respondent also raised objection about the appointment/continuation of Sh. D.B. Chachad as arbitrator on behalf of NTPC by Institution of Engineers, India.

13. The relevant provisions of the Arbitration Act are as under. Section 3 reads:

3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference.

Section 28 reads:

28. (1) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Clause 3 of First Schedule provides:

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

14. A perusal of these provisions indicates that it is open to the parties to an arbitration agreement to fix the time within which the arbitrator must give award, but it has to be so stated in the agreement itself. If no time has been specified by the parties in the arbitration agreement, then by virtue of operation of Section 3 read with Clause 3 of the First Schedule, the award must be given within four months of the arbitrator entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

15. In this matter the arbitrator after accepting the reference had held its first meeting on 29th July, 1995, however, these proceedings were stayed by order dated 11th September, 1995 and were decided on 7th March, 2003 as one of the Arbitrator had resigned, whose removal was claimed by the respondent. After order dated 7.3.2003 the competent authority under the arbitration agreement being Institution of Engineers had appointed Mr. Madan Lal as the third arbitrator by letter dated 26.11.2003 who accepted his nomination by letter dated 15.12.2003 and the Arbitration Tribunal held its first meeting on 3rd April, 2005.

16. On 3rd April, 2005 in the first meeting of the new Arbitral Tribunal, the schedule for filing claims, reply to claims etc. was fixed and the matter was adjourned to 1st September, 2005. The respondent did not object to the hearing on the ground that the time to give the award had expired in 1995, as the earlier tribunal had held its hearing on 29th July, 1995 and the time to give award had expired after four months of 29th July, 1995, according to the respondent.

17. In *Union of India v. Rattal Lal Brij Mohan and Anr.* (Supra) the Apex Court had held that the conduct of the parties have to be such so as to lead to an unequivocal inference that the conduct reflected in the participation before the arbitrators resulted in fresh agreement which would express an intention which is different from the terms of Clause 3 of First Schedule.

18. In *Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao* (Supra) it was held that the arbitration proceedings should not be unduly prolonged and the arbitrators must give award within the period prescribed under Clause 3 of First Schedule. It was further held that it is the Court alone which has the power to extend the time for giving the award and the time can be extended even after the award has been given or after the expiry of the time prescribed for the award. The Apex Court, however, cautioned that the power has to be exercised in a judicial manner. In this matter since parties had taken willing part in the proceedings before the arbitrator without a demur and had all along been willing to extend time and had also proceeded before the umpire on that basis it was held to be a fit case for extension of time.

19. Similarly in *Inder Sain Mittal (Supra)* even after the transfer of the arbitrator he continued with arbitration proceedings and passed the award after giving opportunity to the parties who participated in the proceedings. The petition filed u/s 30 that the award was held to be without authority and lack of jurisdiction upon transfer of arbitrator was repelled on account of the conduct of the parties in participating in the arbitration proceedings without any protest and it was held that the parties would be deemed to have waived their right to challenge validity of the proceedings and the award consequently and the objection was rejected.

20. A Single Judge of this Court had held in *Shyam Telecom Ltd (Supra)* that object of providing time for rendering an award by the arbitrator is aimed at expeditious resolution of the disputes rather than to leave the disputes unsettled or inconclusive on the expiry of the stipulated period. Considering the facts and circumstances of the case the Court was of the opinion that having regard to the entirety of the facts and circumstances the petitioner in that case will be deemed to have waived its right to object about the continuation of the arbitral proceeding or alleging the termination of the mandate of the arbitrator simply on the ground that the time prescribed under Article IV(3) of the Disinvestments agency for making the award had expired. Another Single Judge had held that when an arbitrator is appointed by a statutory authority pursuant to the arbitration clause contained in the agreement, normally extension of time should be granted as a matter of course until and unless the appointing authority is of the opinion that the continuation of the arbitrator would result in miscarriage of justice or there are other strong reasons for not granting the consent for such extension, in the matter *M/s. Krishna Construction Co. (Supra)*. Similarly the Supreme Court had held that in view of the policy of law that the arbitration proceedings should not be prolonged and in view of the fact that the parties had been taking willing part in the proceedings before the arbitrator without a demur extension of time in making the award was allowed in *State of Punjab v. Hardyal (Supra)*.

21. Though the work was awarded to the petitioner in 1982 and first time he had raised the demand for Rs. 73,38,382.40 on 16.11.1985 and thereafter had invoked the arbitration agreement by letter dated 9th December, 1989 which letter was not served by the respondent and thereafter another notice was given on 10th May, 1994 and first Tribunal held its sitting on 29th July, 1995, however, objection was not raised by the respondent that the time for making the award had expired. The respondent rather filed a petition u/s 5 of the Arbitration Act, 1940 for removal of one of the arbitrator, which became infructuous on account of resignation of that Arbitrator and it was held so on 7th March, 2003. The competent Authority, thereafter, appointed another arbitrator on 26th November, 2003 and he accepted his nomination and the Arbitral Tribunal held its first meeting on 3rd April, 2004 In that sitting the schedule for various things was fixed and the matter was adjourned to 1st September, 2004 clearly beyond four months. Neither on 3rd April, 2004, the respondent took objection that the Arbitral Tribunal can not hold proceedings because the time to give award had

expired in 1995 after holding first sitting on 29th July, 1995 nor took the objection that the Arbitral Tribunal can not hold the sitting on 1st September, 2004 after 3rd April, 2004 as it was beyond four months. In *Inder Sain Mittal* (supra) the Apex Court had held:

13. Therefore, by their conduct by participating in the arbitration proceedings without any protest the parties would be deemed to have waived their right to challenge validity of the proceedings and the awards, consequently, the objections taken to this effect did not merit any consideration and the High Court was not justified in allowing the same and setting aside the award.

22. The Supreme Court in a matter *Hari Krishna Wattal Vs. Vaikunth Nath Pandya* (Dead) by Lrs. and Another, dealing with Section 28 of the Arbitration Act, 1940 had observed:

There is no doubt that the arbitrator is expected to make his award within four months of his entering on the reference or on his being called upon to act or within such extended time as the Court may allow. Reading Clause 3 of the scheduled along with Section 28 one finds that the power to enlarge the time is vested in the Court and not in the arbitrator. Clause 3 and Section 28(1) exclude by necessary implication the power of the arbitrator to enlarge the time. This is emphasized by Section 28(2) which provides that even when such a provision giving the arbitrator power to enlarge the time is contained in the agreement, that provision shall be void and of no effect. The head note of Section 28 brings out the force of this position in law by providing that the power is of the Court only to enlarge time for making the award.

Sub-section (2) of Section 28, however, indicates one exception to the above rule that the arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the arbitrator has entered on the reference, the arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such consent must be post reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is Therefore, clear that the arbitrator gets the jurisdiction to enlarge the time for making the award only in the case where after entering on the arbitration, the parties to the arbitration agreement consent to such enlargement of time.

23. Whether the time should be extended in the facts and circumstances or not? It is not disputed that the Court can extend the time for making the award even after the award is made and published and it will depend on the facts and

circumstances of each case. If the parties are willing to extend the time and has not objected to it then the time should be extended.

24. In view of fact that the parties had been taking willing part in the proceedings before the arbitral Tribunal, as in none of the hearings, the objection was taken that the time to give the award had expired and had not objected to even the adjournment of more than four months on 3rd April, 2004, this will be a fit case for extension of time, despite the fact that the notice invoking the arbitration agreement was first given in 1989 and thereafter in 1994 in respect of a contract of 1982. The objection was raised by the respondent for the first time by letter dated 18th October, 2004 and immediately thereafter, the petitioner filed this petition seeking enlargement of time to make the award on 12th January, 2005 after receiving the rejoinder dated 21st December, 2004 to his reply dated 6th December, 2004. The time is also extended because till now only three hearing have been held on 29th July, 1995, 3rd April, 2004 and 1st September, 2004 because of pendency of judicial proceedings or considerable time taken in appointment of arbitrators.

25. Consequently the time to make the award is enlarged by four months of Arbitral Tribunal comprising of Justice C.L. Chaudhary (Retd.) D-15, Sector 20, NOIDA 201301 U.P; Mr. D.B. Chachad, FIE, A-1/297, Safdarjung Enclave, New Delhi - 110023 and Mr. Madan Lal, FIE, 18-A, Patliputra Colony, Patna, (Bihar) in the disputes between the petitioner and the respondent pertaining to Ramagundam Super Thermal Power Project.

26. Let the parties appear before the Arbitral Tribunal on 27th April, 2006 at 11 A.M. Copies of this order be sent to the Arbitral Tribunal forthwith. Copies of this order be also sent by the parties to the Arbitral Tribunal. Copies dusty to the parties.