VERDICTUM.IN

2024:DHC:6878

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(MISC.)(COMM.) 638/2024

EMCO LIMITED .....Petitioner

Through: Ms. Bhargavi Kannan, Advocate.

versus

DELHI TRANSCO LIMITED .....Respondent

Through: Ms. Anubha Dhulia, Advocate.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

% **04.09.2024**

1. Ordinarily, petitions for extension of the mandate of Arbitral Tribunals are two minute affairs, where the court has only to examine when the mandate terminated and extend it as sought by the parties. Contest is rare in such cases.

2. However, in this case, a simple case of the extension of the arbitral mandate has taken on varied hues, not the least because of the legal inventiveness of learned counsel for both sides.

3. In connection with two Purchase Orders dated 21 December 2004 and 7 January 2005 placed on the petitioner by the respondent, disputes arose. The purchase orders envisaged resolution of disputes by arbitration. As the parties were not able to arrive at a consensus regarding arbitration, the petitioner filed a petition under Section 11(6)

VERDICTUM.IN

of the Arbitration and Conciliation Act, 1996[1] before this Court. On 22 May 2018, this Court disposed of the petition, referring the disputes to the Delhi International Arbitration and Conciliation Centre (DIAC) to appoint an arbitrator in the matter. After nearly a year, by a communication dated 7 May 2019, Justice M.K. Mittal, a former Judge of the High Court of Allahabad, was appointed by the DIAC as the Arbitrator.

4. In the interregnum, the statement of claim was filed by the petitioner on 12 July 2018 and statement of defence, as well as counter claim, was filed by the respondent on 4 December 2018.

5. On 25 May 2019, on the occasion of first personal hearing, the learned Arbitrator granted time to the petitioner to file rejoinder to the Statement of defence and reply to the counter claims filed by the respondent on or before 29 June 2019 and to pay the pending fees of the Arbitrator.

6. On 4 July 2019, even while allowing an amendment to the SOD filed by the respondent, the learned Arbitrator noted that the petitioner had yet to file the rejoinder, despite time having been granted till 29 June 2019. The submission of the petitioner that he was not in a position either to file the rejoinder or deposit the arbitral fee was noted and, in exercise of the powers conferred by Section 38(2)[2] of the 1996

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[1] "the 1996 Act", hereinafter

[2] (2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:
Provided that where one party fails to pay his share of the deposit, the other party may pay that share:
Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral

VERDICTUM.IN

Act, the learned Arbitrator placed the petitioner's claim under suspension. Learned counsel for the respondent was given time to take instructions from the respondent as to whether the respondent desired to pursue the counter claims any further.

7. On 22 July 2019, the petitioner was admitted to corporate insolvency[3] proceedings by the National Company Law Tribunal Mumbai[4]. As a result, on the next hearing fixed by the learned Arbitrator on 23 August 2019, the petitioner was absent. The matter was renotified by the learned Arbitrator for 24 September 2019, on which date the petitioner appeared. The learned Arbitrator directed the petitioner to file rejoinder by the next date.

8. On 31 October 2019, the learned Arbitrator passed the following order :

> "ORDER
>
> The Ld. Counsel for the Claimant has filed the photo copy of certified copy of the Order dated 22.07.2019 passed by the Judicial Member, National Company Law Tribunal, Mumbai Bench. The Ld. Counsel for the Respondent contends that in the circumstances the hearing be adjourned sine die giving liberty to the Parties to move appropriate application for revival of the case after the completion of CIR process.
>
> On the last date, the DIAC was directed to report about the balance payment of fee amounting to Rs.24437/- paid by the Respondent. According to the Respondent it had been paid on line in the month of June, 2019. Shri Gaurav Gupta, Manager (Legal) explained the

proceedings in respect of such claim or counter-claim, as the case may be.

[3] "CIRP" hereinafter

[4] "the NCLT" hereinafter

VERDICTUM.IN

position today in the Accounts Section. This payment has been verified by Sh. Sidharth Gaur, Accounts Asstt. in the Centre.

Accordingly, the case is adjourned *sine die*."

9. The proceedings before the learned Arbitrator remained adjourned *sine die* till 10 June 2024.

10. In the interregnum, as the petitioner could not be revived in the CIRP proceedings by the NCLT, liquidation in respect of the petitioner was commenced on 9 August 2021. On 9 September 2022, the petitioner was acquired as a going concern by Sherisha Powertech Pvt Ltd[5], which presently represents the petitioner in these proceedings. Among the terms of acquisition of the petitioner by the SSPL was a direction to continue all claims that the petitioner had against any third party and all receivables of the petitioner including litigation/proceedings initiated by the petitioner and/or for the benefit of the petitioner.

11. The petitioner, thereafter, engaged in protracted correspondence with the DIAC, seeking revival of the proceedings before the learned Arbitrator.

12. On 8 December 2022, the DIAC addressed the following email to learned counsel for both parties:

"Sir/Madam,

Since the arbitral proceedings of this matter are terminated.

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[5] "SSPL", hereinafter

VERDICTUM.IN

Both the parties are requested to inform their bank account details including the Account holder name, IFSC Code, Bank Name and Branch for initiating the refund of applicable arbitral fees.

Regards,
Co-ordinator / Addl. Co-ordinator"

13. On 10 June 2024, the learned Arbitrator took up the matter once again. On the said date, the learned Arbitrator noted the email dated 8 December 2022 of the DIAC, in which it was stated that the arbitral proceedings stood terminated. However, learned counsel who represented the DIAC admitted that the email had been issued under a misconception. The learned Arbitrator also noted the rival contentions of the petitioner and the respondent; the petitioner contending that, as the rejoinder in the case had yet to be filed, the time for passing the award by the learned Arbitrator as envisaged by Section 29A(1)[6] read with Section 23(4)[7] of the 1996 Act had yet to expire, and the respondent contending that, as nearly five years have passed since the grant of time to the petitioner to file the rejoinder, the proceedings had to be treated as having been terminated and could not be continued unless they were revived in appropriate proceedings under Section 29A of the 1996 Act. The learned Arbitrator, therefore, granted time to the petitioner to institute appropriate proceedings under Section 29A.

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[6] **29-A. Time limit for arbitral award**. –
(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:
Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.

[7] (4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

VERDICTUM.IN

14. It is thus that the present petition has come to be filed.

Rival Contentions

15. I have heard Ms. Bhargavi Kannan**,** learned counsel for the petitioner and Ms. Anubha Dhulia, learned counsel for the respondent at length.

Submissions of Ms. Bhargavi Kannan for the petitioner

16. Ms. Kannan has taken me through the aforenoted sequence of events and proceedings. She submits that the present petition has been filed only by way of abundant caution and that, in fact, the mandate of the arbitral tribunal has not yet been terminated, as the rejoinder has not been filed by the petitioner and no orders closing the right to file the rejoinder has been passed by the learned Arbitrator. She submits that, after the learned Arbitrator had granted time to the petitioner to file its rejoinder, the petitioner went into CIRP proceedings which was succeeded by liquidation proceedings culminating in the petitioner being acquired by SSPL as a going concern. Thereafter, she submits that the petitioner has been vigilant and entered into repeated correspondence with the DIAC for reviving the arbitral proceedings. Apparently under the misconception that the proceedings stood terminated, the DIAC issued the email dated 8 December 2022. She further points out that, on 2 August 2024, the DIAC issued the following clarificatory email:

VERDICTUM.IN

"Sir,

As requested, please find attached the scanned copies of the pleadings and orders for your reference.

Volume I.pdf
Volume II.pdf

Further, in response to your email dated 30.06.2024, as already clarified by the undersigned during the hearing dated 10.06.2024, it is once again reiterated that due to some inadvertence, the email dated 08.12.2022 was issued by the accounts department of DIAC asking for accounts details for initiating the refund process, However, as per records no amount of fee has been refunded to any of the parties.

The captioned matter was only adjourned sine-die vide order dated 31.10.2019 passed by the Arbitral Tribunal.

NDOH in the matter is 30.08.2024 at 4 PM through VC.
Thanks

Vineet Pandey
Deputy Counsel
DIAC"

17. As such, she submits that the DIAC is also of the opinion that the mandate of the arbitral tribunal has not terminated. The petitioner, she submits, cannot be said to be have proceeded with due diligence at any stage. In these circumstances, she seeks a clarification from the Court that the mandate of arbitral tribunal has not terminated. Without prejudice, and in the event that the Court is of the view that the mandate of the learned Arbitrator has terminated, she prays that the mandate of the learned Arbitrator may be extended.

<u>Submissions of Ms. Anubha Dhulia for the respondent</u>

VERDICTUM.IN

18. Ms. Dhulia, learned counsel for the respondent vehemently contests the case. She submits that the mandate of the learned Arbitrator has necessarily to be treated as having terminated in view of the inordinate length of time which has lapsed since 2019, when the petitioner was given time to file rejoinder and the proceedings were adjourned *sine die*. She submits that Section 23(4) of the 1996 Act does not envisage the filing of any rejoinder, and, applying Section 23(4) read with Section 29A(1), the mandate of the learned Arbitrator would terminate on the expiry of 12 months from the filing of the SOD. Filing of the rejoinder is, she submits, entirely irrelevant as a consideration for determining the date on which the mandate of learned Arbitrator would terminate. She submits that, even on the date when the learned Arbitrator had taken up the matter anew on 10 June 2024, over five years had elapsed since the date when the SOD was filed and that it could not held, therefore, that the mandate of the arbitral tribunal was continuing.

19. She further submits without prejudice that, even if the mandate of the learned Arbitrator were to be regarded as continuing, the petitioner has to show sufficient cause for the Court to extend the mandate. No such sufficient cause, she submits, exists in the present case. Ms. Dhulia submits that there was no embargo on the petitioner filing the rejoinder even during the time when the CIRP proceedings were continuing and relies, for this purpose, on Section 14 of the Insolvency and Bankruptcy Code, 2016

VERDICTUM.IN

20. It is the petitioner who has been remiss in filing the rejoinder despite the time granted by the learned Arbitrator. The petitioner cannot, therefore, now seek to contend that the arbitral proceedings were still continuing as no rejoinder has been filed by the petitioner.

21. Ms. Dhulia submits that the petitioner has also been lackadaisical in pursuing the matter after the petitioner was acquired as a going concern by SSPL. She submits that there is no explanation as to why, between 2022 and 2024, no steps were taken to extend the mandate of the learned Arbitrator. At this belated stage, she submits that no case for extending the arbitral mandate can be said to exist.

22. Ms. Dhulia also seeks to underscore the inequity that would arise if the mandate of the learned Arbitrator were to be extended at this time. She submits that it would result in serious prejudice to the respondent, as the respondent may not be in a position to continue to ventilate its counter claim against the petitioner, after the petitioner has been taken over as a going concern by SSPL.

23. This, she submits, is particularly in view of the grant of prayer (j) of the petitioner by the NCLT in its order dated 9 September 2022, whereby the petitioner was permitted to be acquired by SSPL as a going concern. Prayer (j), and the order passed by the learned NCLT thereon read thus :

Prayer clause No.	Prayer	Remark
J	Direct that all inquiries, investigations, assessments, notices	Granted. Since the applicant

VERDICTUM.IN

2024:DHC:6878

	causes of action, suits, claims, disputes, litigations, arbitration, or other judicial regulatory or administrative proceedings against, or in relation to or in connection with the Corporate Debtor or the affairs of the Corporate Debtor (other than against the erstwhile promoters or former members of the management of the Corporate Debtor), pending or threatened, present or future, in relation any period prior to the Transfer Date shall not be continued and/or instituted in future against the Corporate Debtor/Applicant or their successors or assignees	should not be saddled with the liability prior to the issuance of sale certificate.

Analysis

24. Having heard learned counsel for both sides at length, the first question arises for consideration is whether the mandate of the learned Arbitrator has terminated. As has been noted, the DIAC, in its initial e-mail dated 8 December 2022, stated that the arbitral mandate stood terminated, but retracted from that position in its new e-mail dated 2 August 2024 in which it was claimed that the earlier email dated 8 December 2022 was issued inadvertently to the extent it said that the arbitral proceedings stood terminated.

25. That said, the Court cannot rely on the view of DIAC in deciding whether the arbitral mandate has, or has not terminated. The matter has to be seen by applying the statute to the facts.

26. The relevant provisions which call for consideration in this case would be section 23(4) and Section 29A(1) of the 1996 Act.

VERDICTUM.IN

27. Section 23(4) does not refer to the termination of the mandate of the Arbitral Tribunal. It merely states that the statement of claim and defence under Section 23 would be completed within six months from the date of the arbitrator receiving notice of its appointment. The interlink between the termination of the mandate of the arbitral tribunal and Section 23(4) is contained in 29A(1).

28. It is necessary to appreciate the difference in the wordings of Section 23(4) and 29A(1) read with Section 29A(4)[8]. Section 29A(1) states that "*the award in matters other than international commercial arbitration, shall be made by the arbitral tribunal within twelve months from the date of completion of pleadings under sub section 4 of Section 23*". Section 29A(4) goes on the state that "*if the award is not made within the period specified in Section 29A(1), the mandate of the arbitral tribunal would terminate unless the mandate is extended by the Court*".

29. Section 29A(1) read with Section 29A(4) thus, envisages termination of the mandate of arbitral tribunal on the tribunal not making the award within twelve months of completion of pleadings under Section 23(4). It does not state that the period of twelve months

[8] (4) If the award is not made within the period specified in sub-section (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 sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

VERDICTUM.IN

would be reckoned from the date of filing of the SOD before the arbitral tribunal. Clearly, the period of twelve months to be reckoned from the date of completion *of pleadings*. The concluding words "*under sub Section (4) of Section 23*" are, in my considered opinion, employed only because Section 23(4) refers to the filing of the SOD before the learned arbitral tribunal. It would not, in my view, be permissible to read Section 29A(1) as requiring the arbitral award to be passed within twelve months from the date of filing of the SOD as that would amount to rewriting Section 29A(1).

30. The matter may be viewed from another angle as well. Had the legislature intended to require the arbitral award to be passed within twelve months of filing of the SOD, it could very well had said so, especially when Section 23(4) particularly refers filing of the SOD. The legislature, has consciously, not done so. Rather, it has reckoned the period of twelve months from the date of completion of pleadings.

31. The issue that arises for consideration, is that, the interpretation to be placed on the word "pleadings" in Section 29A(1). Specifically, what the Court has to consider is whether, where the rejoinder has been permitted to be filed, the rejoinder should also be included in the ambit of the expression "pleadings".

32. This issue is no longer *res integra*. It stands decided, albeit in the context of the CPC, rather than the 1996 Act, by the judgment of R.C Lahoti J (as he then was) sitting singly in this Court in ***Anant***

VERDICTUM.IN

Construction (P) Ltd v Ram Niwas[9]. This Court, in that case, specifically addressed the issue of whether a rejoinder/replication could be included within the ambit of the expression "pleadings", especially in the light of Order VI Rule 1[10] of the CPC which specifically states that the expression "pleadings" means the plaint or the written submissions. Lahoti J, in his judgment, has specifically held in para 24 thus:

> "Replication is a pleading by plaintiff in answer to defendant's plea. 'Rejoinder' is a second pleading by defendant in answer to plaintiff's reply i.e. replication."

33. The same view stands reflected in the judgment of the Division Bench of the High Court of Andhra Pradesh in ***Nicolas Piramal India Ltd vs. Cultor Food Science Inc***[11]. In the said decision, the High Court has held that "*rejoinder, if received, would also be pleading within the meaning of Order VI*".

34. Specifically in the context of pleadings before the Arbitral Tribunal, a Division Bench of the Karnataka High Court has, in ***Buoyant Technology Constellations Pvt Ltd v Manyata Infrastructure Developer Pvt Ltd***[12], held as under:

> "(c) In terms of Section 23(4), pleadings before the Arbitral Tribunal would include statement of claim, objections, counterclaim and objections to counterclaim. At this stage, it would be useful to refer Order VI Rule 1 of CPC which defines 'pleading'. In terms of Order VI Rule 1 of CPC, 'pleading' shall mean plaint or written statement. Rejoinder or replication could be

[9] **1994 31 DRJ 205**
[10] (1) Pleading. – "Pleading" shall mean plaint or written statement.
[11] **AIR 2003 AP 254**
[12] **MANU/KA/1093/2024**

VERDICTUM.IN

filed with the permission of the Court. When the rejoinder or replication is filed with the permission of the Court, then it would form part of pleadings."

35. The above decision of the Karnataka High Court was carried in appeal to the Supreme Court in SLP (C) 9331/2024, which was disposed of by the following order dated 29 April, 2024:

> "We are in agreement with the findings recorded in the impugned judgment that in case a rejoinder or sur-rejoinder are filed and taken on record, the pleadings for the purpose of Section 29A of the Arbitration and Conciliation Act, 1996, shall concluded on the date the last pleading is filed. We also agree that the period during which there was a stay of arbitration proceedings has to be excluded.
>
> Recording the aforesaid, the special leave petition is dismissed.
>
> Pending application(s), if any, shall stand disposed of. "

36. Ms. Dhulia seeks to distinguish these decisions on the ground that the rejoinder, in these cases, was actually filed and also emphasizes the word "if received", figuring in the said decisions.

37. In my view, such a distinction would be completely untenable in law. The question that arises before the Court is whether a rejoinder can be treated as part of "pleadings" for the purpose of Section 29A(1). Inasmuch as the question arises in the context of determining the *terminus ad quem* from which the period of twelve months under Section 29A(1) is required to be reckoned, it has to be determined with respect to the basic issue as to whether the rejoinder, if permitted to be filed, would constitute part of the pleadings. It cannot be said that, if the rejoinder is permitted to be filed, it would

VERDICTUM.IN

constitute part of the pleadings only if it is actually filed. Where the rejoinder is permitted to be filed by the Court or by the Arbitral Tribunal, the period of twelve months, for the purposes of Section 29A(1) would clearly reckon from the time when the right to file rejoinder stands exhausted. Needless to state, if the rejoinder is on record, the period of twelve months would be reckoned from the date when the rejoinder is actually filed.

38. In the present case, the petitioner was given the right to file the rejoinder, by the learned Arbitrator, on 25 May 2019. On 31 October 2019, the learned Arbitrator adjourned the proceedings *sine die*. It cannot, therefore, be said that the time for filing rejoinder expired or that the pleadings stood concluded so as to enable to Court to hold that the mandate of the arbitral tribunal stands expired.

39. Even otherwise, and even it were to be assumed *arguendo* that the mandate of the learned Arbitrator has expired, I am of the opinion that a clear case for extension of the mandate of the learned Arbitrator is made out in the present case. As is already noted, the learned Arbitrator adjourned the proceedings *sine die* on 31 October 2019. Even prior to that, on 22 July 2019, the NCLT had admitted the petitioner to CIRP proceedings. These proceedings dovetailed into liquidation proceedings, and it was only on 9 September 2022 that the petitioner was acquired as a going concern by SSPL. After 9 September 2022, as Ms. Kannan correctly points out, the petitioner was in repeated correspondence with the DIAC for revival of the arbitral proceedings. The DIAC was, apparently, under the

VERDICTUM.IN

misconception that the arbitral proceedings stood terminated as is reflected by email dated 8 December 2022 addressed by the DIAC to both parties. This error was acknowledged by the DIAC itself in its subsequent email dated 2 August 2024. In the meanwhile, the learned Arbitrator again took up the proceedings on 10 June 2024. In view of the rival stands adopted by learned counsel for both sides regarding termination of the arbitral mandate, the learned Arbitrator granted liberty to the petitioner to take steps under Section 29A for extension of the arbitral mandate. The petitioner has approached this Court with reasonable expedition thereafter.

40. Ms. Dhulia sought to submit that there was no embargo on the petitioner filing rejoinder even after it had been admitted to CIRP proceedings. This submission in my view cannot be heard to be urged by the respondent, *inter alia* for the reason that it was at the instance of the respondent that the learned Arbitrator adjourned the proceedings *sine die* on 31 October 2019. Having itself got the proceedings adjourned *sine die* by the learned Arbitrator, the respondent cannot be heard to contend that, during the period the proceedings stood *sine die* and the petitioner was facing CIRP proceedings, the petitioner ought to have filed the rejoinder and was remiss in failing to do so. In fact, the very status of the proceedings before the learned Arbitrator at that time was completely indeterminate, as the outcome of the CIRP proceedings could not have been predicted by anybody.

VERDICTUM.IN

2024:DHC:6878

41. There is, therefore, clearly no want of diligence on the part of the petitioner in prosecuting the matter before the learned Arbitrator.

42. Ordinarily, once arbitral proceedings commence, unless there are exceptional circumstances, the Court should take steps to ensure that the proceedings continue and reach their logical conclusion. Guillotining the arbitral proceedings midway, and leaving the disputes as it were suspended undecided in mid-air, is a course of action which Courts should not ordinarily follow. The *raison d' etre* of the arbitral process is speedy resolution of disputes. The Court has also to adopt an activist and pro-arbitration approach, and to promote resolution of disputes by arbitration rather than foster attempts which would result in the dispute remaining unresolved.

43. Clearly, the learned Arbitrator is agreeable to continue with the proceedings as is apparent from the liberty that he has granted to the petitioner to file the present petition.

44. In these circumstances, I am of the opinion, that while, in law, the mandate of the learned Arbitrator may not even have terminated as on date, even if it were to be treated as having terminated, the petitioner is entitled to extension of mandate of the learned Arbitrator.

45. Accordingly, the learned Arbitrator is permitted to continue with the proceedings from the stage at which they are at present. The time for passing the arbitral award shall stand extended for the present by a period of one year.

VERDICTUM.IN

46. The petition stands disposed of in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 4, 2024
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Click here to check corrigendum, if any