

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

Wednesday, the 20th day of March 2024 / 30th Phalgun, 1945
IA.NO.1/2023 IN AR NO. 53 OF 2019

APPLICANT/PETITIONER:

1. RKEC PROJECTS LIMITED, 10-12-1, 3RD FLOOR, REDNAM ALCAZAR, REDNAM GARDEN, OPP. SBI MAIN BRANCH, VISAKHAPATTANAM-530 002, REPRESENTED BY ITS MANAGING DIRECTOR.

RESPONDENTS/RESPONDENTS:

1. THE COCHIN PORT TRUST, THE OFFICE OF CHIEF ENGINEER, WILLINGDON ISLAND, COCHIN-682 009, KERALA. EMAIL: COPTCE@GMAIL.COM, REPRESENTED BY THE CHIEF ENGINEER.
2. INDIAN OIL CORPORATION LIMITED, AREA OFFICE, PANAMPILLI NAGAR, COCHIN-682036, REPRESENTED BY ITS CHEIF MANAGER (LPG-PROJECT).

Application praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to extend the mandate of the Tribunal and the time limit for making the award till 06.05.2023, in the interest of justice.

This Application coming on for orders upon perusing the application and the affidavit filed in support thereof and this court's order dated 30.08.2019 in AR 53/2019 and upon hearing the arguments of SRI.T.KRISHNANUNNI, Senior Advocate along with SRI.JAYKAR K.S., SRI.V.S.ROBIN, SRI.G.BALU, SMT.M.RAMYA RAMACHANDRAN, SRI.K.G.JAYAPRAKASH NARAYANAN, Advocates for the petitioner and of SRI.M.GOPIKRISHNAN NAMBIAR, SRI.K.JOHN MATHAI, SRI.JOSON MANAVALAN, SRI.KURRYAN THOMAS, SRI.PAULOSE C. ABRAHAM, Advocates for the Respondent No.1, the court passed the following:

ANU SIVARAMAN, J.

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&
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Dated this the 20th day of March, 2024

ORDER

1. The question which arises for consideration in these I.As is whether an application for extension of time for passing an arbitral award can be considered by this Court after the award had been passed.



2. The facts are not in dispute. The time provided under Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for passing the arbitral award, as extended by the judgment of the Supreme Court, in view of the COVID lockdown expired on 28.2.2022. The award was passed on 6.5.2023, without any extension of the mandate. One of the parties to the arbitration, that is the 2nd respondent satisfied the award by paying the amount due. However, the 1st respondent filed a petition under Section 34 of the Act before the Commercial Court contending that the award was one passed after termination of the mandate of the arbitral tribunal and is,

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therefore, non est in law. Thereafter, these IAs have been filed stating that the arbitral tribunal had passed the award without noticing that the time stood expired on 1.3.2023 and therefore the applications are liable to be considered by this Court.

3. The learned Senior Counsel appearing for the petitioners in the I.A. placed reliance on the judgment of this Court in **URC Consruction Pvt.Ltd v. BEML Ltd.** [2017 (4) KLT 1140], **Lots Shipping Co.v.Cochin Port Trust** [2020 (2) KLT 907] , **Hiran Valiyakkil Lal v. Vineeth M.V** [2023 KHC 9104] **Balak Ram & Others v. NHAI** [Arb.Appeal 17/2023 and connected cases decided by the High Court of Himachal Pradesh] and **ATC Telecom Infrastructure Ltd and another v. BSNL** [OMP (Misc.)(COMM) No.466/2023 of Delhi High Court] and **Wadia Techno-Engineering Services Limited v. Director General of Married Accommodation Project and Another** [(2023) 4 Arb LR 186].

4. The parties have not joined issues on the question whether this Court is competent to consider the application under Section 29A(4) of the Act. However, it is contended by the learned counsel for the respondent in the I.A that the application for

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extension of time could have been filed before or after the expiry of the time, but only before the arbitral award was passed. It is submitted that all the judgments relied on by the learned Senior Counsel for the petitioners are in situations where an extension of time is sought before the award is passed. It is submitted that there is difference of opinion in judicial pronouncements even on the question whether an application of extension of time can be filed after the maximum time provided under Section 29A as extended by the consent of the parties. It is submitted that after the mandate of the Arbitrator has seized, the Arbitrator or the Arbitral Tribunal could not have passed an award without the time provided having been extended as specifically provided under Section 29A. It is submitted that there can be no *ex post facto* ratification of an award passed beyond the time that too, after it has been subjected to a challenge under Section 34 on the ground that it is passed after the mandate has expired.

5. Reliance is placed on the decision of the Calcutta High Court in **Vrindavan Advisory LLP v. Deep Shambhulal Bhanishali** [2016 SCC Online Calcutta 6075] and in **Rohan Builders (India) Pvt. Ltd v. Berger Paints India Limited** and **SMS Paryavaran Limited v. Asansol Durgapur Development Authority** [2023

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SCC online Calcutta 2645]. Reliance is also placed on the judgment of the Madras High Court in **Suryadev Alloys and Power Pvt. Ltd v. Shri.Govindaraja Textiles Pvt.Ltd.** [2020 SCC online Mad 7858] and of the Apex Court in **Jayesh H. Pandya and another v. Subhtex India Limited and others** [(2020) 17 SCC 383].

6. In **Vrindavan Advisory LLP v. Deep Shambhulal Bhanishali** it was held that the scheme of the 1996 Act does not permit the Court to extend the mandate any further. The arguments made on the petitioner's inability to obtain the relevant dates of the arbitration having proceeded to an advanced stage cannot be a defence to the statutory framework and the timelines provided therein. SLP No.24489/2023 is pending before the Apex Court and a stay of operation of the judgment is also in force.

7. In **Rohan Builders (India) Pvt.Ltd v. Berger Paints India Limited** it was held that Section 29-A(4) of the Act requires that the application for extension of the Arbitrator's mandate must be made during the subsistence of the mandate. If the application is not made within this period, the mandate terminates by operation of law, and any subsequent Award would be void. However, there

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is a Special Leave Petition No.23320/2023 pending before the Apex Court in this Case.

8. In **Suryadev Alloys and Power Pvt. Ltd v. Shri.Govindaraja Textiles Pvt. Ltd.**, a learned Single Judge of the Madras High Court analysed the provisions of Section 29A(1), (3), (4) and (5) of the Arbitration and Conciliation Act, 1996 and came to the conclusion that unlike the provisions of Section 28(1) of the 1940 Act which gave wide powers to the Court to enlarge the time for making an award even after the expiry of the time, the 1996 Act has curtailed these powers and restricted the extension only within the provisions of Section 29A(3) and 29A(4). It was found that the Court can extend the period for making of the award after the expiry of one year period under Section 29A(1) or the extended period under Section 29A(3). However, even the Court cannot ratify an award *ex post facto* by extending the period in a petition filed under Section 34 by an aggrieved party. It was found that Section 28(1) of the 1940 Act gave express power to the Court to enlarge the time even after the making of the Award. However, since a similar provision is not available in Section 29A of the 1996 Act, the mandate of the Arbitrator would stand terminated on the expiry of the period provided unless extended

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by the Court. The Court had noticed the judgments of the Apex Court in **NBCC Ltd. v. J.G. Engineering Private Ltd.** [(2010) 2 SCC 385]. The decision in **Union of India v. Advanced Polymer Technology** [OP(ICA) No.5 of 2018] of this Court was also referred to in the judgment.

9. The Apex Court in **Jayesh H. Pandya and another v. Subhtex India Limited and others** held that the arbitration proceedings should commence and end within the prescribed period of time and participating in the arbitration proceedings by the objecting party does not amount to waiver when such participation is not voluntary. It is submitted that in the instant case, final hearings were held on 16.3.2022 and 27.8.2022, well within the time for passing of the award owing by the extension of time due to the Covid 19 pandemic situation. Thereafter, there was no posting of the case and the award was passed on 6.5.2023, after the mandate expired on 1.3.2023.

10. Having considered the judgments referred to in all these cases, I find that the question considered there was only with regard to whether the application for extension of time can be filed before the High Court after the time provided under Section 29 of the

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Act has expired. The pointed question which arises before me for consideration is whether an application under Section 29A(5) of the Act can be filed after arbitration award has been rendered. It is contended by the learned counsel appearing for the respondent that the mandate of the arbitral tribunal stands terminated by the non-issuance of the award within the time as provided and since there is no extension by consent of the parties under Section 29A(3) of the Act, there is no longer any residual power in the High Court to consider an application after the award has been passed. Reference is made to Section 32 of the Act as well.

11.Having considered the contentions advanced and having perused the judgments relied on, I am of the opinion that the question has to be decided on a plain reading of Section 29A of the Act, which reads as follows:-

“29A.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 endeavor 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.

(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 sub-section (1) for making award for a further period not exceeding six months.

(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.]

(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.

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(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. “

12.A reading of Section 29A(3) and (4) of the Act would lead this Court to the inescapable conclusion that what is intended is that there can be an application for extension either before or after the time provided for termination of the proceedings has elapsed. It is to be noticed that the application is provided to this Court and it is only in situation where this Court is convinced that there is real and proper reason to do so that the time is liable to be extended. It is also pertinent to note that if an application is made under Section 29A (5) of the Act for extension of time either before or after the expiry of the mandate then the 2nd proviso to Section 29A(4) of the Act provides that the mandate of the arbitrator shall continue till the disposal of the said application. A reading of Section 32 would also make it clear that the termination of the mandate of the arbitrator and the termination of the proceedings on a final arbitral award being passed are not absolute and are also subject to Section 33 and Sub-section 4 of Section 44 of the Act. Therefore, it is clear that the termination of the mandate of the Arbitrator under Section 32 of the Act is not an absolute termination so as to denude this Court of any

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further power to consider any application. The said termination can only be read to be subject to the powers of extension of the mandate as provided under Section 29A(3) and (4) of the Act.

13.In the above view of the matter, I am of the opinion that in an appropriate case where this Court is convinced that there is sufficient cause so to do, this Court would be empowered to extend the time for passing the award even in a case where the award has already been passed. In the instant case, I am of the opinion that the intervention of the Covid period and the reasons which are stated in the I.A are sufficient to extend the time for passing the award till 6.5.2023. The IAs are ordered extending the time as sought for. Ordered accordingly.

Sd/-
Anu Sivaraman, Judge

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