2024:DHC:7312

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

\+ O.M.P.(MISC.)(COMM.) 80/2023

POONAM MITTAL .....Petitioner

Through: Ms. Suruchi Mittal and Mr. Naman Pandey, Advs.

versus

M/S CREAT ED PVT. LTD. .....Respondent

Through: Mr. Nikhilesh Kirishnan and Mr. Abhishek Bhushan Singh, Advs.

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

JUDGMENT (ORAL)

% 19.09.2024

1. This is a petition filed under Section 29A(4) and (6)[1] of the Arbitration and Conciliation Act, 1996[2], seeking extension of the mandate of the learned Arbitrator, in *seisin* of the disputes between the parties. Additionally, the petitioner seeks substitution of the learned Arbitrator and relies, for the said purpose, on Section 29A(6) of the

[1] (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.

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(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.

[2] "the 1996 Act", hereinafter

1996 Act.

2. I have heard Ms. Suruchi Mittal, the learned Counsel for the petitioner and Mr. Nikhilesh Kirishnan, learned Counsel for the respondent at some length.

3. Mr. Nikhilesh Krishnan submits that, while he has no objection to the extension of the mandate of the learned Arbitrator, he seriously opposes the prayer for substitution. He submits that no justifiable basis for substitution of the Arbitrator exists in the present case.

4. Ms. Suruchi Mittal has placed reliance on Section 29A(6) of the 1996 Act. She submits that the Court has absolute power, under the said provision, to substitute the Arbitrator, while extending his mandate. Inasmuch as no guidelines or criteria are contained in Section 29A(6), Ms. Suruchi Mittal's contention is that the Court can act *ex debito justiciae,* and, on any reasonable ground being made out, substitute the Arbitrator.

5. I have my reservations on whether Section 29A(6) is as open ended as Ms. Suruchi Mittal would urge it to be. To my understanding, Section 29A(6) has to be read in context, as one of the sub-sections in Section 29A. Section 29A is a provision which deals with extension of the mandate of the Arbitral Tribunal. Sub-section (6), when read in context, would indicate that the substitution of one or more of the Arbitrators is to be undertaken, under the said sub-section, only where the court is of the view that the proceedings are being unduly delayed

by the Arbitrator who is presently in *seisin* of the proceedings. The obvious intent is to ensure that the exercise of discretion by the Court while extending the mandate of the Arbitral Tribunal is not frustrated by an arbitrator who is unduly delaying the proceedings for no justifiable reason.

6. Ms. Suruchi Mittal sought to contend that she is seeking substitution of the learned Arbitrator on the ground of bias.

7. It is well-settled that bias is a question of fact and has to be specifically pleaded and proved by cogent evidence.[3] A Division Bench of this Court has held, in ***Red Roses Public School v Reshmawati***[4], thus, on bias:

> "17. It is well settled in law that personal bias has to be specifically pleaded, and specific allegations have to be made as to who, and for what reason, the person is acting with bias. Not only that, evidence has to be lead to establish actual bias. Bias cannot remain in the mind of the person making the allegation. It has to appear to be in existence on the record."

8. Ms. Suruchi Mittal has not been able to draw my attention to any specific pleading in the present petition, to the effect that the learned Arbitrator is biased. Absent any pleading to that effect, no plea of bias can be raised merely in oral arguments or even in written submissions which are filed in the Court.

9. Bias, I feel, is a concept which is invoked, more often than not,

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[3] **South India Cashew Factories Workers' Union v Kerala State Cashew Development Corpn, (2006) 5 SCC 201**

[4] **2019 SCC OnLine Del 10937**

far too flippantly. It is a concept of legal misconduct which is *sui generis*, especially when applied to a judicial functionary – which, in the ultimate eventuate, the arbitrator, too, undoubtedly is. It exists in the mind, and in the mind alone, and can only be manifested by outward actions. Psychoanalysis being outside the domain expertise of courts, the action of the authority, to be characterised as bias, must be stark and unconscionable. It must indicate a predilection to decide against one party or the other, and, normally, the motive or propulsion for bias must also be discernible. A judge may pass an erroneous, or a manifestly illegal, or even a markedly perverse, order; he may conduct proceedings in a manner which cannot commend itself to any right-thinking individual; he does not, even then, become *biased*. The record must transparently disclose an animus against one of the parties to the *lis* before him for a judge to be regarded as biased.

10. That said, it is also true that, as bias rests in the mind of the individual, and can be gleaned only by its outward manifestations, it would be impractical to expect direct proof of bias. No judge, or arbitrator, can be expected to make a public announcement that he is biased against a party before him. Thus, the law only requires "*reasonable likelihood* of bias" to exist. The likelihood must, however, be *reasonable*. In other words, viewed from the perspective of a *reasonable* person conversant with the facts and the proceedings, it must be *likely* that the judge, or arbitrator, is biased. The likelihood must, however, to reiterate, be real, and a natural inference from the conduct of the proceedings, or conduct of the judge, and not fanciful or speculative. Imaginary suspicions of bias, howsoever *bona fide*,

can immeasurably damage the judicial, or the arbitral, institution.

11. Apart from the fact that there is no pleading of bias against the learned Arbitrator, the material on record does not, even on facts, make out a case of reasonable likelihood of bias.

12. Mr. Nikhilesh Krishnan drew my attention to the decision of a Coordinate Bench of this Court in ***NCC Ltd v UOI***[5]**,** which, dealing with Section 29A(6) of the 1996 Act, has observed as under:

> "11. Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process."

13. Though Ms. Suruchi Mittal seeks to submit that the above observations of the Coordinate Bench in ***NCC*** have to be understood in the backdrop of the facts of that case, I do not think that would be an appropriate way of reading the decision. The Coordinate Bench has clearly held in near absolute terms, that substitution of an Arbitrator under Section 29A is only to be effected when the existing Arbitrator has failed to proceed expeditiously in the matter.

14. This is, in fact, a reflection of what I had observed earlier,

[5] **2018 SCC OnLine Del 12699**

which is that the intent of conferring power on a Court, in sub-section (6) of Section 29A, to substitute the Arbitrator is essentially to further the purpose of Section 29A itself, which is to enable the proceedings to arrive at a culmination. I am, therefore, in agreement with the Coordinate Bench in its understanding of Section 29A(6) as a provision which would apply only where the existing Arbitrator is needlessly protracting the proceedings.

15. On this aspect, Ms. Suruchi Mittal's contention is that the Arbitrator has allowed the respondent to cross-examine the petitioner's witness, for over eight hearings. She submits that the defence of the respondent was struck off and, therefore, the respondent ought not to have been granted such latitude in the matter of cross-examination.

16. Even if this submission were to be accepted, it cannot make out a case for substitution of the Arbitrator on the ground that he has failed to proceed with reasonable expedition. This is not a case in which the Arbitrator has been merely adjourning the matter without any good reason, thereby delaying the proceedings. On the other hand, the Arbitrator has been proceeding with the matter with all due sincerity. The extent to which a party should be permitted cross-examination of the witness of the opposite party is a matter for the discretion of the court - or, in arbitral proceedings of the arbitrator. There is no hard and fast rule on the number of hearings for which cross-examination can be permitted to continue. Of course, in a given

case, if cross-examination continues for an unduly protracted period of time, the court may pass remedial orders. However, eight hearings cannot be treated as such an unduly protracted period of time as to make out a case for substitution of the Arbitrator on that ground under Section 29A(6).

17. Insofar as the closure of the defence of the respondent is concerned, the law is well settled in that regard. Even if the respondent's defence is closed, it is always open to him to cross-examine the witness of the petitioner. Even if a party is proceeded *ex parte*, he continues to retain a right to participate in further proceedings, the decision to proceed *ex parte* being limited to the date on which it is taken. ***Sangram Singh v Election Tribunal***[6] is an authority on the point. Indeed, where the defence is closed, the necessity for cross-examination may be exacerbated as the defendant would be able to make out a case only by demolishing the case of the plaintiff.

18. In any event, I am not required in this case to return any finding on the whether the respondent ought or ought not to have been permitted to cross-examine the petitioner's witness over eight hearings. Suffice it to state that, on this sole ground, I am not convinced that a case for substitution of the learned Arbitrator is made out, on the ground that the Arbitrator has needlessly protracted the proceedings.

[6] **AIR 1955 SC 425**

19. Ms. Suruchi Mittal thereafter proceeds to make certain submissions which on the face of it are somewhat surprising. She submits that she "didn't know why the arbitrator could not be substituted", especially when arbitration is a matter in which trust is essential and her client has "trust issues". If such a submission were to be even countenanced, it would throw the entire arbitral system into disarray and, would provide a *carte blanche* for parties to come to court and seek substitution of the Arbitrator on the ground that they had trust issues with the arbitrator. It is but logical that a party may not be comfortable with a judge or an arbitrator who is expressing an opinion which is against the party's case.

20. The substitution of an Arbitrator cannot be resorted to at the drop of a hat, else no arbitration would ever proceed to a conclusion. It is only where a clear and substantial case for substitution is made out that a court should resort to it. Substitution of an arbitrator is an extreme measure. It has, in fact, negative connotations even for the Arbitrator concerned.

21. In my opinion, no case for substitution of the learned sole Arbitrator presently in *seisin* of the disputes between the parties is made out. The prayer for substitution of the Arbitrator is accordingly rejected.

22. Accordingly, the mandate of the learned Arbitral Tribunal shall stand extended presently for six months from today, i.e., 20 September 2024. The mandate shall be treated as continuing till today and

extended as directed.

23. The petition is thus partly allowed.

C.HARI SHANKAR, J

SEPTEMBER 19, 2024*/aky*

Click here to check corrigendum, if any