

(2005) 12 DEL CK 0028

Delhi High Court

Case No: OMP No. 425 of 2002

Mahalingashetty and Co. Ltd.

APPELLANT

Vs

NPCC Ltd. and Others

RESPONDENT

Date of Decision: Dec. 6, 2005

Acts Referred:

- Arbitration Act, 1940 - Section 28
- Arbitration and Conciliation Act, 1996 - Section 21

Citation: (2006) 126 DLT 142

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: R.K. Kapoor, for the Appellant; S.K. Taneja and Santosh Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Anil Kumar, J.

This order will dispose of petitioner application u/s 28 of the Arbitration Act, 1940 for extension of time for making the award where the last arbitration proceedings had taken place from 27.12.1989 to 29.12.1989.

2. Few brief facts to comprehend the controversy are that the contract of respondent No. 1 to carry out the work, namely, Irrigation and drainage project in Iraq was accepted by Ministry of Industry and Mineral of Republic of Iraq. The respondent No. 1/contractor was authorized to appoint two sub contractors, petitioner and M/s. Royal Construction Company who were appointed as sub contractors.

3. That the agreement between the respondent No. 1 and the petitioner as a sub contractor had an arbitration clause. As disputes arose in respect of work negotiated between the petitioner and respondent No. 1, an arbitrator was appointed by respondent No. 1.

4. Former Chief Justice of India, Mr. Justice P.N. Bhagwati (Retd.) was appointed as a sole arbitrator in accordance with the terms of arbitration agreement who initiated arbitration proceedings on 26th January, 1988.
5. The claims were filed by the petitioner on 5th March, 1988. The learned arbitrator had written a letter dated 19th April, 1988 stipulating categorically that there was some delay on the part of the petitioner in filing their statement of claim and Therefore the arbitration proceedings were rescheduled.
6. After the claims were filed by the petitioner, the written statement and counter claims were filed by the respondent No. 1 and the petitioner thereafter also filed three volumes of documents.
7. It seems that the last arbitration proceedings were held from 27th December, 1989 to 29th December, 1989. Thereafter no proceedings have been held by the Arbitrator till filing of the present petition. The time to give award was offered to be extended by the petitioner vide communication dated 12th December, 1991 addressed to the Learned Arbitrator. However no Explanation had been given about doing nothing till December, 1991. Another communication dated 8th April, 1994 was thereafter sent by the petitioner to the respondent No. 1 contending inter alias that the petitioner had discussed the matter with the Learned Arbitrator on phone and he is willing to continue and take up the matter in the month of May. However, no Explanation had been given as to why the petitioner did not move the Court for extension of time for making and publishing the award.
8. The petitioner wrote another letter to the Learned Arbitrator on 29th June, 1996 seeking to conduct the arbitration proceedings further and the petitioner unilaterally gave his consent. The petitioner also requested the arbitrator to forget the unfortunate incident which has taken place between the respondent No. 1 officer and the learned Arbitrator. The petitioner further contended that the arbitration proceedings were delayed by respondent No. 1 on the premise that the documents were not available with the respondent No. 1 and the documents were taken by the Central Bureau of Investigation, respondent No. 2. However nothing was done to file a petition u/s 28 of the Arbitration Act, 1940 for extension of time for making and publishing the award.
9. The petitioner contended in the facts and circumstances that since the proceedings initiated by Central Bureau of Investigation are still pending and continuing and the next date before the special Judge, Central Bureau of Investigation at Tis Hazari Court is 8th December, 2005, Therefore requested that the time be extended for the arbitration as the matter can now proceed with the arbitrator, as the Central Bureau of Investigation has given the documents to the respondent No. 1. The learned counsel for the petitioner, Mr. Kapoor has also relied on the application u/s 28 of the Arbitration Act, 1940 for enlargement of time filed by another contractor, M/s. Royal Construction Company which was allowed in OMP

No. 172/2000 titled Royal Construction Co. Ltd. v. National Projects Construction Corporation Limited.

10. The petitioner relied on [State of Haryana Vs. Chandra Mani and others](#), ; AIR 1971 Orissa 288, M/s Hindustan Steel Ltd. v. Amarnath Sharma; 1981 (1) K.L.T 89, Varkey v. State of Kerala and 1991 (1) Arb. L.R 390, J.K.Enterprises v. Win Medicare Limited to contend that the power of the Court u/s 28 of the Arbitration Act,1940 is unlimited and Therefore considering the facts and circumstances, the Court should extend the time for making and publishing the award or in the alternative any other Arbitrator may be appointed as sole arbitrator and direct the Arbitrator to conclude the arbitration proceedings within six months and direct the respondent No. 2 to make available the photocopy of documents required by the respondent No. 1.

11. The respondent No. 1 has contested the petition on the ground that the petition suffers from delay and laches as the last proceedings in the arbitration case between the parties were held from 27th December,1989 to 29th December,1989 and the present petition has been filed after thirteen years of discontinuation of the arbitration proceedings. It was asserted on behalf of the respondent No. 1 that though the Court has the power to enlarge the time but the present case is a classic case of abnormal delay. Dismissal of the petition for enlargement of time was sought on the ground that the petitioner is guilty of suppression and concealment of vital facts. It was contended that the petitioner had given a bank guarantee of Rs. 19 lakhs in favor of respondent No. 1 which was invoked. The respondent No. 1 filed a petition and obtained a stay against the respondent No. 1 with the condition that the petitioner shall keep the Bank Guarantee alive. The petitioner kept the bank guarantee alive till 5th October,1996 but thereafter the petitioner has failed and deliberately neglected to keep the bank guarantee alive. The respondent No. 1 also contended that no grounds for appointment of another arbitrator has been made out and in a petition u/s 28 of the Arbitration Act,1940 the authority of the arbitrator can not be revoked nor any grounds for revoking the authority of the arbitrator has been made out.

12. Distinguishing the case of another sub contractor, who had filed another petition being OMP number 172 of 2000, it was contended that the facts of the other case were entirely different from the facts of the present case. In the case of another sub contractor, the proceedings were adjourned sine die by the arbitrator in view of seizure of relevant documents of the respondent No. 1 by respondent No. 2 and Therefore the respondent No. 2 in that matter was directed to provide copies of all relevant documents to enable respondent No. 1 to proceed with the matter. Whereas in the present case the relevant documents had already been filed by respondent No. 1 and the evidence of the parties had been completed and thereafter the matter was adjourned for the arguments from 27th December, 1989 to 29th December, 1989 and thereafter no hearing has been held by the arbitrator on account of delaying tactics adopted by the petitioner. The respondent No. 1 has

strongly opposed the petition for enlargement of time on the ground that for past 13 years no steps were taken by the petitioner seeking enlargement of time and the petitioner himself was not interested in continuing with the arbitration proceedings though intermittently some letters were written for enlargement of time without taking any steps to commence the arbitration proceedings. The respondent No. 1 has also opposed the petition relying on the Arbitration agreement between the parties on the ground that the provision of Arbitration Act, 1940 are not applicable and the Arbitration and Conciliation Act, 1996 is applicable and there is no provision for extension of time in the said enactment.

13. The provisions of Arbitration and Conciliation Act, 1996, nowhere provides or mandates that the re-enacted Act or law would automatically apply to pending arbitration proceedings or that the old Act would automatically be not applicable and the rights, if any, accrued to the parties would also be negated. Reliance for this proposition can be placed on decisions of this Court in the cases of Delhi Development Authority v. Bhai Sardar Singh and Sons, FAO(OS) 93 of 2002 decided on April 20th, 2004; Minny Enterprises v. General Manager, I.T.D.C, FAO(OS) No. 348/2003 decided on July 28th, 2004 and [Milkfood Ltd. Vs. GMC Ice Cream \(P\) Ltd.,](#) . In the case of M/s Minny Enterprises (Supra) it had been held that where the arbitration petition had already been commenced, new Arbitration and Conciliation Act, 1996 will not apply nor the rights which had accrued to the parties under the old Act would be negated. In Milk Food Limited (Supra), it was held that under the Arbitration Act, 1940, an arbitration proceeding is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an Arbitrator. It was further held that for the purpose of applicability of the 1940 Act service of a notice for appointment of an Arbitrator would be relevant date for the purpose of commencement of the arbitration proceeding and if the date of notice is prior to the date of enforcement of Act of 1996, the Arbitration Act, 1940 would apply. The Supreme Court held:

72. Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression commencement of the arbitral proceeding as contained in Section 21 of the 1996 act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceedings.

14. The arbitration proceedings in the present case were pending much before the Arbitration and conciliation Act, 1996 was enacted. The last arbitration proceedings were conducted in December, 1989. If that be so the contention of the respondent No. 1 that the provisions of Arbitration and Conciliation Act, 1996 will apply and not the provisions of Arbitration Act, 1940, is not correct and not sustainable. 15. Next question is whether the time for making and publishing the award be extended

where last arbitration proceedings had taken place from 27th December,1989 to 29th December,1989. The Court u/s 28 of the Arbitration Act, 1940 can enlarge the time for making the award irrespective of whether award has been made or not, even after the time for marking the award has expired. The powers of the court u/s 28 are vast and wide and the time can be enlarged even against the intention expressed in the arbitration agreement not to extend the time. The court even suo moto can grant extension of time and there is no restriction, however, the discretion to extend the time has to be exercised judicially.

16. If delay has been caused on account of a party which seeks enlargement of time, normally, the court should not enlarge the time, as a person who has caused the delay cannot be allowed to take advantage of his own wrong. Extension of time has to be granted after satisfying that it will not work injustice or wrong. Extension of time should be granted, where the award could not be made on account of any stay from the court. For extension of time, the conduct of the parties after the expiry of time for marking the award is also material factor which has to be taken into consideration for enlargement of time.

17. Reliance can be placed on [Ravinder Kumar Khanna and Another Vs. National Hydroelectric Power Corpn. Ltd. and Another](#), ; [Czech Ocean Shipping Vs. M.M.T.C.](#) , Flexi Packs v. Modern Food Industries (I) Ltd; 1997 (43) DRJ 719 and [State of Punjab Vs. Hardyal](#), where time for making and publishing the award was not extended. In Ravinder Kumar Khanna (supra) Arbitrator was asked to give his formal consent which was not given nor formal appointment of arbitrator was made nor terms of reference were sent to arbitrator and despite this arbitrator had given award after four months. One of the parties had also written to the Arbitrator not to proceed further in the matter as there was no proper reference to him. In these circumstances, the Court had declined to extend the time holding that it was not proper for the Arbitrator to proceed with the arbitration proceeding, more so when the time for making and publishing the award had expired and in the circumstances the Arbitrator should have called upon the petitioner to approach the Court for extension of time. The matter of Czech Ocean Shipping (supra) was a petition u/s 28 of the Arbitration Act, 1940 seeking extension of time filed fourteen months after the expiry of period for making award. It was held that the power to extend time for making award being discretionary must be exercised judicially and in those facts and circumstances had not extended the time to make and publish the award. In Flexi packs (supra) it was held that in absence of extension of time, an award which is made much beyond the period of four months from the date of entering upon the reference, is vitiated and is liable to be set aside.

18. The Apex Court in State of Punjab v. Hardyal (supra) had held that the Court alone has been given the power to extend time for giving the award even after the award has been given but the Court has to exercise its discretion in a judicial manner. In this matter the time to give award was extended as the parties had been

taking willing part in the proceedings before the arbitrator without a demur. The Apex Court in another 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."

19. The matter of another sub contractor for extension of time for making and publishing the award, M/s. Royal Construction Company which was allowed in OMP No. 172/2000 titled Royal Construction Co. Ltd. v. National Projects Construction Corporation Limited is apparently distinguishable from the facts of the petitioner. In the case of another sub contractor, the proceedings were adjourned sine die by the arbitrator in view of seizure of relevant documents of the respondent No. 1 by respondent No. 2 and Therefore the respondent No. 2 in that matter was directed to provide copies of all relevant documents to enable respondent No. 1 to proceed with the matter and the time to make and publish the award was also extended. Whereas in the present case the relevant documents had already been filed by

respondent No. 1 and the evidence of the parties had been completed and thereafter the matter was adjourned for the arguments from 27th December, 1989 to 29th December, 1989. No hearing has been held by the arbitrator since December, 1989 nor any plausible reason has been given by the petitioner for not moving the Court seeking extension of time for last almost thirteen years. Though the petitioner had written letters to the arbitrator conveying his consent for extension of time but no plausible reasons have been given for not moving the Court for extension of time for making and publishing the award. The power to extend the time is with the Court and not with the Arbitrator. The apparent reason is that the petitioner was not interested in extension of time and continuing with arbitration proceedings.

20. Some other precedents relied on by the petitioner also do not support his contention for extension of time for making and publishing the award. In *M/s Hindustan Steel Lt. (supra)* the Court had refused to extend the time for making and publishing the award three years after expiry of time for making the award. In *Mian Dost Mohammad (supra)* the Court had held that the discretion to extend the time is not to be exercised in favor of the person who is negligent and guilty of dilatory tactics. In the matter of *Varkey (supra)* it was held that the power to extend the time for making and publishing the award must be exercised with judicial discretion. The arbitration proceedings were at final stage in December, 1989. The petitioner could not impute dilatory tactics to the respondent No. 1 for non production of documents. The contention of the respondent No. 1 is that the arbitration matter was listed for final arguments in December, 1989. In these proceedings the respondent No. 1 is not seeking production of documents and the petitioner can not be allowed production of documents on the part of respondent No. 1. The plea of the petitioner that the respondent No. 2 be directed to hand over the required documents to respondent No. 1, as alleged in para 22 of the petition, is without any legal basis and reflects dilatory tactics adopted by the petitioner for last thirteen years.

21. There are no grounds in the facts and circumstances to direct the respondent No. 3, arbitrator, to proceed with the arbitration proceedings nor there are any grounds for appointing any other alternative arbitrator in the facts and circumstances. There are no grounds for extension of time for making and publishing the award which expired sometime in 1989-1990. The petitioner is also not entitled for direction to respondent No. 2 to make available the photocopies of the documents to respondent No. 1. The petition of the petitioner is without any merit and is dismissed. The parties are however, left to bear their own costs.