Dani Wooltex Corporation vs Sheil Properties Private Limited on 16 May, 2024

Author: Abhay S. Oka

Bench: Pankaj Mithal, Abhay S. Oka

2024 INSC 433

Report

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6462 OF 2024
(Arising out of Special Leave Petition (C) no.19301 of 202

Dani Wooltex Corporation & Ors. … Appella

versus

Sheil Properties Pvt. Ltd. & Anr. … Respondent

JUDGMENT

ABHAY S. OKA, J.

1. Leave granted.

2. In this appeal, the issue involved is about the legality and validity of the order of termination of the arbitral proceedings under clause (c) of sub-section (2) of Section 32 of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act') passed by the Arbitral Tribunal.

FACTUAL ASPECTS to appreciate the issue. The first appellant, Dani Wooltex Corporation, is a partnership firm that owned certain land in Mumbai. The first respondent, Sheil Properties (for short, 'Sheil'), a private limited company, was engaged in real estate development. The second respondent, Marico Industries (for short, 'Marico'), is also a limited company in the consumer goods

business. A part of the first appellant's property was permitted to be developed by Sheil under the Development Agreement dated 11th August 1993 (for short, 'the Agreement'). A Memorandum of Understanding (MOU) was executed by and between the first appellant and Marico, by which the first appellant agreed to sell another portion of its property to Marico. Under the MOU, Marico was given the benefit of a certain quantity of FSI/TDR. Marico issued a public notice inviting objections, to which Sheil submitted an objection and stated that any transaction between the first appellant and Marico would be subject to the Agreement. The dispute between the first appellant and Sheil led Sheil to institute a suit (Suit no.2541 of 2006) for the specific performance of the MOU as modified by the alleged consent terms. The first appellant and Marico were parties to the said suit. Marico also filed a suit (Suit no.2116 of 2011) against the first appellant herein, and Sheil was also made a party defendant to the suit. A consensus was reached amongst the three parties, and a senior Member of the Bar was appointed as the sole Arbitrator. The order of appointment of the sole Arbitrator was passed on 13th October 2011 in the suit filed by Marico. The order records that the dispute in the suit was referred to the arbitration. On 17 th November 2011, the suit filed by Sheil was disposed of by referring the dispute in the said suit to the same sole Arbitrator. Thus, the Arbitral Tribunal had to deal with the claims filed by Sheil and Marico, both against the first appellant. Both Sheil and Marico filed their respective statements of claim. It appears that the arbitral proceeding based on Marico's claim was heard earlier, culminating in an award on 6 th May 2017. For whatever reasons, the arbitral proceeding based on the claim filed by Sheil did not proceed.

4. The first appellant addressed a communication to the Arbitral Tribunal on 26th November 2019, followed by another communication dated 7th January 2020 requesting the Arbitral Tribunal to dismiss the claim of Sheil on the ground that the company had abandoned the claim. In response, the Arbitral Tribunal fixed a meeting on 11 th March 2020. As Sheil did not attend the meeting, the next meeting was fixed on 18 th March 2020. The meeting scheduled for 18 th March 2020 was not held. Due to the COVID□19 pandemic, the next meeting could be held only on 12th August 2020, when the Arbitral Tribunal directed the first appellant to file a formal application for dismissal of the claim of Sheil and permitted Sheil to file a reply. Accordingly, on 27 th August 2020, the first appellant filed an application invoking the Arbitral Tribunal's power under clause (c) of sub□section (2) of Section 32 of the Arbitration Act. The contention raised by the first appellant in the said application was that Sheil's conduct of not taking any steps for eight years shows that the said company abandoned the arbitral proceedings. Sheil filed an affidavit and specifically contended that no ground was made out to act under Section 32(2)(c) of the Arbitration Act. Sheil also raised other factual contentions and denied the allegation of abandonment.

5. The Arbitral Tribunal passed an order on 1 st December 2020 terminating the arbitral proceedings in the exercise of power under Section 32(2)(c) of the Arbitration Act. The Arbitral Tribunal relied upon a decision of the Calcutta High Court in the case of NRP Projects Pvt. Ltd. & Anr. v. Hirak Mukhopadhyay & Anr1. Sheil filed an application before the High Court of Judicature at Bombay to challenge the legality and validity of the order of the Arbitral Tribunal by taking recourse to Section 14(2) of the Arbitration Act. By the impugned judgment and order, the learned Single Judge set aside the order of termination of the proceedings passed by the Arbitral Tribunal and directed the Arbitral Tribunal to continue the proceedings. We may note here that I.A.

no.180843 of 2023 reveals that on 26th July, 2023, the learned sole Arbitrator informed the parties of his unwillingness to continue as the sole Arbitrator.

SUBMISSIONS

6. Mr Nakul Divan, the learned senior counsel appearing for the first appellant, pointed out that the learned Single Judge of the High Court of Judicature at Bombay in her 1 2012 SCC OnLine Cal 10496 judgment dated 13th January 2023 in the case of Kothari Developers v. Madhukant S Patel2 held that the Arbitral Tribunal was entitled to invoke its power under Section 32(2)

(c) of the Arbitration Act if it is proved that the proceedings have become unnecessary due to the claimant's inaction. He submitted that Section 14 of the Arbitration Act does not empower the Court to second□guess the Arbitral Tribunal, especially when the decision of the Arbitral Tribunal is based on the appreciation of facts and a plausible view has been taken. The learned senior counsel further pointed out that the Arbitral Tribunal attempted to ensure Sheil's participation in Marico's arbitration. After the award in the case of Marico, Sheil declined to attend the meeting held on 11 th March 2020 by the Arbitral Tribunal. It is submitted that there is nothing on record to indicate that the arbitration based on Sheil's claim was to proceed after Marico's arbitration, and there is no material placed on record to that effect. He submitted that the Arbitral Tribunal had rendered a finding of fact on the stand taken by Sheil, which cannot be disturbed by the Court. He submitted that Sheil's plea that it was awaiting the decision in the Marico arbitration could not be accepted as the Arbitral Tribunal never indicated that the arbitration based on Sheil's claim would proceed only after the Marico arbitration was over. He submitted that Sheil took no interest in moving the Arbitral Tribunal for a long time since 2012. He submitted that the word "unnecessary" used in Section 2 Arbitration Petition (L) No.29362 of 2022 32(2)(c) of the Arbitration Act will have to be widely or liberally interpreted.

7. Mr Shekhar Naphade, the learned senior counsel appearing for Sheil, contended that without recording a positive finding that it is either unnecessary or impossible to continue the proceedings, the power under Section 32(2)(c) of the Arbitration Act cannot be exercised. Relying upon the decision on this Court in the case of Lalitkumar V Sanghavi & Anr. v. Dharamdas V Sanghavi & Ors. 3, the learned senior counsel submitted that the Court, while exercising the power under Section 14(2) of the Arbitration Act, is required to go into the issue of the legality of the termination of mandate by the Arbitral Tribunal. He submitted that the abandonment cannot be inferred. He relied upon a decision of this Court in the case of Godrej and Boyce Manufacturing Company Limited v. Municipal Corporation of Greater Mumbai & Ors 4. He submitted that suits filed by Marico and Sheil were separate suits, and, therefore, arbitral proceedings were also separate. Marico and Sheil had not sought any relief against each other. However, as there was an overlap between the two references concerning the enforceability of the consent terms, the parties agreed to proceed with Sheil's reference after Marico's reference was decided. He further submitted that after preliminary directions were issued on 8th November 2011 3 2014 (7) SCC 255 4 2023 SCC Online 592 regarding the filing of pleadings, no further directions were issued by the sole Arbitrator in the reference of Sheil. He submitted that the decision of the Calcutta High Court in the case of NRP Projects Pvt. Ltd.1 is confined to the facts of the case before it. He submitted that Marico's reference took six

years, and that is the reason for postponing Sheil's reference. The learned senior counsel would, therefore, submit that the interference made by the High Court in the arbitral proceedings under Section 14 of the Arbitration Act was certainly justified.

CONSIDERATION OF SUBMISSIONS

8. Chapter V of the Arbitration Act contains provisions regarding the conduct of arbitral proceedings. If parties do not agree on the timelines for filing statements of claim and defence, under sub-section (1) of Section 23, the Arbitral Tribunal has the power to determine the timelines for filing pleadings. Sub-section (4) of Section 23, incorporated with effect from 23rd October 2015, provides that the filing of pleadings (statements of claim and defence) shall be completed within six months from the date the learned Arbitrator or all the learned Arbitrators, as the case may be, receive notice of their appointment in writing.

9. After the pleadings are complete, the next stage is of hearing. Sub-section (2) of Section 24 provides that parties shall be given sufficient advance notice of any hearing or meeting of the Arbitral Tribunal for inspections of documents, goods or other property.

10. The issue of the parties' default is dealt with in Section 25 of the Arbitration Act. Section 25 reads thus:

> "25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—
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> (a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;
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> (b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.
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> (c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it." (emphasis added) Clause (a) of Section 25 of the Arbitration Act provides that on the failure of the claimants to communicate the statement of claim in accordance with sub-section (1) of Section 23, the Arbitral Tribunal shall terminate the proceedings. Clause (b) of Section 25 provides that if the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the Arbitral Tribunal shall continue the proceedings. Clause (c) of Section 25 provides that if a party fails to appear at an oral hearing or to produce documents, the Arbitral Tribunal may continue the proceedings and make the arbitral award on the basis of whatever evidence is available with it. The power to terminate arbitral

> proceedings on the claimant's default to file a statement of claim is the only provision under the Arbitration Act to terminate the arbitral proceedings apart from Section
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> 32.

11. The Arbitration Act has two provisions for terminating an Arbitrator's mandate. Sections 14 and 15 are the relevant sections. The Arbitrator is empowered to withdraw from his office, which terminates his mandate. However, the arbitral proceedings continue by the arbitrator's substitution.

12. The order of termination passed by the learned Arbitrator, in this case, gives an impression that he was of the view that unless parties move the Arbitral Tribunal with a request to fix a meeting or a date for the hearing, the Tribunal was under no obligation to fix a meeting or a date for hearing. The appointment of the Arbitral Tribunal is made with the object of adjudicating upon the dispute covered by the arbitration clause in the agreement between the parties. By agreement, the parties can appoint an Arbitrator or Arbitral Tribunal. Otherwise, the Court can do so under section 11 of the Arbitration Act. An Arbitrator does not do pro bono work. For him, it is a professional assignment. A duty is vested in the learned Arbitrator or the Arbitral Tribunal to adjudicate upon the dispute and to make an award. The object of the Arbitration Act is to provide for an efficient dispute resolution process. An Arbitrator who has accepted his appointment cannot say that he will not fix a meeting to conduct arbitral proceedings or a hearing date unless the parties request him to do so. It is the duty of the Arbitral Tribunal to do so. If the claimant fails to file his statement of claim in accordance with Section 23, in view of clause (a) of Section 25, the learned Arbitrator is bound to terminate the proceedings. If the respondent to the proceedings fails to file a statement of defence in accordance with Section 23, in the light of clause

(b) of Section 25, the learned Arbitrator is bound to proceed further with the arbitral proceedings. Even if the claimant, after filing a statement of claim, fails to appear at an oral hearing or fails to produce documentary evidence, the learned Arbitrator is expected to continue the proceedings as provided in clause (c) of Section 25. Thus, he can proceed to make an award in such a case.

13. On a conjoint reading of Sections 14 and 15, it is apparent that an Arbitrator always has the option to withdraw for any reason. Therefore, he can withdraw because of the parties' non□ cooperation in the proceedings. But in such a case, his mandate will be terminated, not the arbitral proceedings.

14. Now, we come to Section 32 of the Arbitration Act, which reads thus:

> “32. Termination of proceedings.— (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub□section (2).
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> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub□section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings." (emphasis added) Section 32 provides for the termination of the arbitral proceedings in the following contingencies:

a. On making final arbitral award;

b. On the Claimant withdrawing his claim as provided under clause (a) of sub□section (2) of Section 32;

c. Parties agreeing on termination of arbitral proceedings as provided under clause (b) of sub□section (2) of Section 32; or d. When the Arbitral Tribunal finds that the continuation of proceedings has become unnecessary or impossible for any other reason, as provided under clause (c) of sub□section (2) of Section 32.

15. Therefore, clause (c) of sub□section (2) of Section 32 can be invoked for reasons other than those mentioned in sub□section (1) of Section 32 and clauses (a) and (b) of sub□section (2) of Section 32. Under clause (c), the mere existence of a reason for terminating the proceedings is not sufficient. The reason must be such that the continuation of the proceedings has become unnecessary or impossible. In a given case, when a claimant files a claim and does not attend the proceedings, clause (a) of Section 25 comes into operation, resulting in the learned Arbitrator terminating the proceedings. If, after filing a claim, the claimant fails to appear at an oral hearing or fails to produce documentary evidence, it cannot be said that the continuation of proceedings has become unnecessary. If the claimant fails to appear at an oral hearing after filing the claim, in view of clause (c) of Section 25, the learned Arbitrator can proceed with the arbitral proceedings. The fact that clause (c) of Section 25 enables the Arbitral Tribunal to proceed in the absence of the claimant shows the legislature's intention that the claimant's failure to appear after filing the claim cannot be a ground to say that the proceedings have become unnecessary or impossible.

16. Therefore, if the party fails to appear for a hearing after filing a claim, the learned Arbitrator cannot say that continuing the arbitral proceedings has become unnecessary. Abandonment by the claimant of his claim may be grounds for saying that the arbitral proceedings have become unnecessary. However, the abandonment must be established. Abandonment can be either express or implied. Abandonment cannot be readily inferred. One can say that there is an implied abandonment when admitted or proved facts are so clinching and convincing that the only inference

which can be drawn is of the abandonment. Mere absence in proceedings or failure to participate does not, per se, amount to abandonment. Only if the established conduct of a claimant is such that it leads only to one conclusion that the claimant has given up, his/her claim can an inference of abandonment be drawn. Merely because a claimant, after filing his statement of claim, does not move the Arbitral Tribunal to fix a date for the hearing, it cannot be said that the claimant has abandoned his claim. The reason is that the Arbitral Tribunal has a duty to fix a date for a hearing. If the parties remain absent, the Arbitral Tribunal can take recourse to Section 25.

17. Now, coming to the facts of the case, we must note here that Sheil and Marico had filed separate suits. In the suit filed by Marico, an order was passed on 13th October 2011, referring the dispute involved therein to the sole Arbitrator. Similarly, in the suit filed by Sheil, the order of reference to the learned Arbitrator was passed on 17th November 2011. Therefore, by two separate orders, two arbitral proceedings were ordered to be initiated. In one proceeding, the claimant was Marico. The first appellant and Sheil were the respondents. In the other, Sheil was the claimant. The first appellant and Marico were the respondents. In fact, in the minutes of the preliminary meeting dated 8th November 2011, it is noted that the learned Arbitrator issued directions to Marico and Sheil to file their statements of claim. Therefore, even the learned Arbitrator proceeded on the footing that there were two distinct claimants and claims. They were directed to file their statements of claim in the respective arbitral proceedings. After that, on 20 th December 2011, the learned Arbitrator granted an extension of time to complete the pleadings. Both the claimants filed their respective statements of claim. The learned Arbitrator first conducted arbitral proceedings in which the claimant was Marico.

Paragraph 10 of the award dated 6 th May 2017 made on Marico's claim is very relevant, which reads thus:

> "10. The 2nd Respondent has also filed a reply to the Statement of Claim.
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> However, no evidence was led by the 2 nd Respondent (either documentary or oral) nor was any argument addressed by the 2nd Respondent to me, although the 2nd Respondent was present at all hearings of this arbitration." (emphasis added) The respondent no.2 before the Arbitral Tribunal was Sheil, as can be seen from the cause title of the award. Thus, Sheil was represented throughout before the Arbitral Tribunal during the hearing of the claim of Marico. Therefore, it cannot be said that the first respondent herein (Sheil) remained absent. On the contrary, it was present at all hearings. Nothing is placed on record to show that simultaneously with the arbitral proceedings based on the claim of Marico, any meeting or date was fixed by the learned Arbitrator for hearing the claim of Sheil. The first meeting on Sheil's claim was fixed on 11 th March 2020 when COVID□19 pandemic had already set in.

18. The application made by the first appellant under Section 32(2)(c) of the Arbitration Act, in short, raised the following contentions:

a. Sheil did not bother to pursue its claim for eight years after filing the statement of claim;

b. Sheil did not attend the meeting of 11 th March 2020;

c. Sheil attended the next meeting held on 12 th August 2020 and informed the learned Arbitrator that it wished to press its claim and d. Sheil has abandoned its claim.

19. Sheil filed an affidavit in reply to the said application filed by the first appellant. In the reply, a contention has been raised that the reference filed by Marico was taken up first and therefore, till the award was made on 6th May 2017, there was no requirement on the part of Sheil to take any further steps. The affidavit of evidence of Mr. Sanjay Patel was affirmed on 16th April 2017 and was kept ready. Sheil has pleaded that there was a requirement to change its advocate. After Sheil engaged the services of M/s. Markand Gandhi & Co., its senior partner fell ill and died on 1 st May 2018. As regards the meeting held on 11 th March 2020, Sheil claimed that it had deputed one Mr Utsav Ghosh to attend the meeting. He reached late after the meeting dispersed.

20. The question is whether Sheil abandoned its claim filed before the learned Arbitrator. As stated earlier, Sheil regularly attended meetings held to hear Marico's claim. During the period during which the claim of Marico was heard, at no stage, the learned Arbitrator suggested that the claim of Sheil could be heard simultaneously. On the contrary, from the conduct of the parties and the learned Arbitrator, an inference can be drawn that Marico's claim was given priority. Two meetings were convened in March 2020 in connection with Sheil's claim. In March 2020, the COVID□19 was spreading its wings in our country. The second meeting in March 2020 was admittedly not held. In any case, there is no express abandonment. Even if it is to be implied, there must be convincing circumstances on record which lead to an inevitable inference about the abandonment. In the facts of the case, there was no abandonment either express or implied. In a case where the claim is abandoned, the learned Arbitrator can take the view that it would be unnecessary to continue the proceedings based on the already abandoned claim. In this case, the inference of the abandonment has been drawn by the learned Arbitrator only on the grounds that Sheil did not challenge the Marico award and took no steps to convene the meeting of the Arbitral Tribunal. The failure to challenge the award on Marico’s claim will not amount to abandonment of the claim filed by Sheil in January 2012. In the claim submitted by Sheil, a prayer was made in the alternative for passing an award in terms of money against the first appellant. Therefore, we hold that there was absolutely no material on record to conclude that Sheil had abandoned its claim or, at least, the claim against the first appellant. Till the award dated 6th May 2017 was passed in Marico’s claim, Sheil’s representative was always present at all hearings till the passing of the award. After the award, the learned Arbitrator never convened a meeting to deal with Sheil’s claim until 11th March 2020. Hence, the finding of the learned Arbitrator that there was abandonment of the claim by the first appellant is not based on any documentary or oral evidence on record. The finding is entirely illegal. Such a finding could never have been rendered on the material before the Arbitral Tribunal. Thus, the learned Arbitrator committed illegality.

21. To conclude, a. The power under clause (c) of sub□section (2) of Section 32 of the Arbitration Act can be exercised only if, for some reason, the continuation of proceedings has become unnecessary or impossible. Unless the Arbitral Tribunal records its satisfaction based on the material on record that proceedings have become unnecessary or impossible, the power under clause (c) of sub□ section (2) of Section 32 cannot be exercised. If the said power is exercised casually, it will defeat the very object of enacting the Arbitration Act;

b. It is the Arbitral Tribunal's duty to fix a meeting for hearing even if parties to the proceedings do not make such a request. It is the duty of the Arbitral Tribunal to adjudicate upon the dispute referred to it. If, on a date fixed for a meeting/hearing, the parties remain absent without any reasonable cause, the Arbitral Tribunal can always take recourse to the relevant provisions of the Arbitration Act, such as Section 25;

c. The failure of the claimant to request the Arbitral Tribunal to fix a date for hearing, per se, is no ground to conclude that the proceedings have become unnecessary; and d. The abandonment of the claim by a claimant can be a ground to invoke clause (c) of sub□section (2) of Section 32. The abandonment of the claim can be either express or implied. The abandonment cannot be readily inferred. There is an implied abandonment when admitted or proved facts are so clinching that the only inference which can be drawn is of the abandonment. Only if the established conduct of a claimant is such that it leads only to one conclusion that the claimant has given up his/her claim can an inference of abandonment be drawn. Even if it is to be implied, there must be convincing circumstances on record which lead to an inevitable inference about the abandonment. Only because a claimant, after filing his statement of claim, does not move the Arbitral Tribunal to fix a date for the hearing, the failure of the claimant, per se, will not amount to the abandonment of the claim.

22. Therefore, for the reasons recorded above, we concur with the view taken by the learned Single Judge. The appeal is, accordingly, dismissed with no order as to costs. As the learned sole Arbitrator has withdrawn from the proceedings, the parties shall take necessary steps to get the substituted Arbitrator appointed in accordance with law.

.....J. (Abhay S. Oka) .....J. (Pankaj Mithal) New Delhi;

May 16, 2024.