

Ats Infrastructure Ltd And Anr vs Rasbehari Traders on 17 November, 2023

Author: Sanjeev Narula

Bench: Sanjeev Narula

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (T) (COMM.) 91/2023

ATS INFRASTRUCTURE LTD AND ANR.

versus

RASBEHARI TRADERS

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O.M.P. (T) (COMM.) 92/2023

ALMOND INFRABUILD PRIVATE LIMITED AND OR

versus

DALMIA FAMILY OFFICE TRUST AND ANR.

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O.M.P. (MISC.) (COMM.) 462/2023

DALMIA FAMILY OFFICE TRUST & ANR.

versus

ALMOND INFRABUILD PRIVATE LIMITED & ORS.

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O.M.P. (MISC.) (COMM.) 493/2023

RASBEHARI TRADERS

versus

ATS INFRASTRUCTURE LTD. & ANR.

For Petitioners:

Mr

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Mr

Mr

For Respondents: Mr. Apoorv Khator, Advo

Mr. Darpan Wadhwa, Seni

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CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

% 17.11.2023

1. Two of the present petitions¹ under Section 14(1) read with Sections 15(2) and Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act") have been filed by the Claimants in the arbitral proceedings, seeking substitution of the Sole Arbitrator Mr. Justice Swatanter Kumar (Retd.).² The other two petitions³ under Section 29A(5) of the Act have been filed by the Respondents in the arbitral proceedings, seeking an extension of the mandate of the Arbitral Tribunal, which expired on 31st August, 2023.

2. The ATS group of companies, which includes ATS Infrastructure Ltd., Almond Infrabuild Private Limited, ATS Housing Private Limited, Anand Divine Developers Private Limited and Domus Greens Private Limited (hereinafter together referred to as "ATS Group"), is the claimant in the arbitral proceedings. The ATS Group, a real estate developer in the Delhi NCR region, has filed O.M.P. (T) (COMM.) 91/2023 and O.M.P. (T) (COMM.) 92/2023, seeking: (a) declaration that the Sole Arbitrator is incapable of further acting as the Sole Arbitrator; (b) substitution of the Sole Arbitrator; and (c) declare the proceedings conducted by and the orders O.M.P. (T) (COMM.) 91/2023 & O.M.P. (T) (COMM.) 92/2023 Former Judge, Supreme Court of India O.M.P.(MISC.)(COMM.) 462/2023 & O.M.P.(MISC.)(COMM.) 493/2023 This is a digitally signed order.

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3. The Dalmia group includes entities such as Dalmia Family Office Trust, Dalmia Family Holdings LLP and allegedly, Rasbehari Traders⁴ (together, the "Dalmia Group"). The Dalmia Group, through O.M.P.(MISC.)(COMM.) 462/2023 and O.M.P.(MISC.)(COMM.) 493/2023, seeks extension of the mandate of the Sole Arbitrator in the various proceedings involving the Dalmia Group and the ATS Group.

4. Mr. Kartik Nayar, counsel for ATS Group, at the outset, states that the mandate of the Arbitrator stood terminated on 31st August, 2023 and as on the said date, no petition had been filed under Section 29A of the Act seeking extension of the mandate. Therefore, he submits, that the only remaining option is to seek fresh proceedings, as Section 29A of the Act bars applications for extension of the mandate once it has expired. He advances Rohan Builders (India) (P) Ltd. v. Berger Paints India Limited⁵ in support of this argument. He further submits that the aforementioned

petitions filed by the Dalmia Group are non est and would have no bearing upon the arbitral proceedings as the mandate of the proceedings has been terminated due to expiry of the term. The invocation of Section 29A after the expiry of the mandate of the Arbitrator, is of no effect. He further argues that the case law relied upon by Dalmia Group (discussed below), which suggests that this Court has the power to allow applications under Section 29A even after the expiry of the mandate, are distinguishable as in those cases, no petition was filed under Section 15 and Dalmia group of companies contests ATS Group's allegation that Rasbehari Traders comprises a part of the former. The defined term "Dalmia Group" includes Rasbehari Traders in this order solely for convenience, and it must not be construed as a comment on the merits of the issue.

2023 SCC OnLine Cal 2645 This is a digitally signed order.

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5. Mr. Darpan Wadhwa, Senior Counsel for the Petitioner in O.M.P.(MISC.)(COMM.) 462/2023, on the other hand, states that the arbitration proceedings have already moved to advanced stages; some proceedings are at the stage of final arguments and some are for recording of evidence. The Arbitrator has already spent substantial time adjudicating the proceedings, arbitral record comprises of 396 volumes running into 500 pages each. There are eleven arbitral proceedings which are being dealt with separately and it would be travesty of justice if the prayer for substitution of Arbitrator at this advanced stage of proceedings were to be allowed. On the legal proposition, Mr. Wadhwa states that this Court has consistently held that the proceedings under Section 29A can be entertained even after the expiry of the period.⁷

6. The Court has considered the aforementioned submissions, and it is not inclined to accept that Section 29A bars applications submitted after the expiry of the mandate from being entertained. The language of the provision (2000) 8 SCC 151 Wadia Techno-Engineering Services Limited v. Director General of Married Accommodation Project, 2023 SCC OnLine Del 2990; and ATC Telecom Infrastructure Private Limited v. Bharat Sanchar Nigam Limited, DHC Neutral Citation: 2023:DHC:8078.

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application under Section 29A may be allowed even after the expiry of the mandate. Relevant portions of Section 29A is reproduced below to aid the reading of our analysis:

"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. ...

(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.

..." (emphasis supplied)

7. Our observations are supported by ATC Telecom Infrastructure Private Limited v. Bharat Sanchar Nigam Limited⁸, whereby this Court has DHC Neutral Citation: 2023:DHC:8078 This is a digitally signed order.

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8. This Court, in ATC Telecom, disagreed with the view taken in Rohan Builders, observing that no explicit outer limits have been prescribed in Section 29A, and that it clearly provides for extension in appropriate cases. Indeed, the intention is evidently not to prescribe inflexible timelines and eliminate the discretion of the Court; if it were so, specifying that explicitly would have been simple. The recommendations of the Law Commission could not be relied upon and interpreted against the plain words of the statute.

The provision recommended by the Law Commission:

29-A(3). - If the award is not made within the period specified in sub-section (1) and the period agreed to by the parties under sub-section (2), the arbitral proceedings shall, subject to the provisions of sub- sections (4) to (6), stand suspended until an application for extension is made to the Court by any party to the arbitration, or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

29-A(4). - Upon filing of the application for extension of time under sub-section (3), suspension of the arbitral proceedings shall stand revoked and pending consideration of the application for extension of time before the court under sub-section (3), the arbitral proceedings shall continue before the arbitral tribunal and the court shall not grant any stay of the arbitral proceedings.

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9. The judgment of Datar Switchgears (supra) advanced by ATS Group is also wholly inapplicable to the present case. The dispute before the Supreme Court was based on an arbitration clause whereby unilateral right to nominate the arbitrator was given to one party, and the legal issue was whether such a right is forfeited when 30 days have elapsed, the party has not appointed an arbitrator before the other party has filed an application under Section 11. The provisions of Section 11 and Section 29A are not *pari materia* and the words of Section 29A(4) clearly provides for extension after the expiry of the period.

10. In light of the above, O.M.P.(MISC.)(COMM.) 462/2023 and O.M.P.(MISC.)(COMM.) 493/2023 are allowed and O.M.P. (T) (COMM.) 91/2023 and O.M.P. (T) (COMM.) 92/2023 petitions are dismissed and the mandate of Sole Arbitrator is extended by a period of one year from today in the following matters:

(i) Arbitration Case No. 1/2021: Almond Infrabuild Private Limited & Anr v. Dalmia Family Office Trust;

(ii) Arbitration Case No. 2/2021: Domus Greens Private Limited & Ors v. Dalmia Family Office Trust;

(iii) Arbitration Case No. 3/2021: ATS Infrastructure Limited & Anr v. Dalmia Family Holdings LLP;

(iv) Arbitration Case No. 4/2021: Almond Infrabuild Private Limited & Anr v. Dalmia Family Office Trust;

(v) Arbitration Case No. 5/2021: Anand Divine Developers Private Limited & Anr v. Dalmia Family Office Trust;

(vi) Arbitration Case No. 6/2021: ATS Housing Private Limited & Anr v.

Dalmia Family Office Trust;

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(vii) Arbitration Case No. 7/2021: Almond Infrabuild Private Limited & Anr v. Dalmia Family Office Trust;

(viii) Arbitration Case No. 8/2021: Anand Divine Developers Private Limited & Anr v. Dalmia Family Office Trust;

(ix) Arbitration Case No. 9/2021: ATS Housing Private Limited & Anr v. Dalmia Family Office Trust;

(x) Arbitration Case No. 10/2021: Geetamber Anand vs. Rasbehari Traders; and

(xi) Arbitration Case No. 11/2021: ATS Infrastructure Pvt. Ltd. vs. Rasbehari Traders.

SANJEEV NARULA, J NOVEMBER 17, 2023 as This is a digitally signed order.

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