

Taurant Projects Ltd vs Gail (India) Ltd. & Anr on 15 March, 2021

Author: Sanjeev Narula

Bench: Sanjeev Narula

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (T) (COMM.) 38/2020

TAURANT PROJECTS LTD.

..... Petition

Through: Mr. Raman Gandhi, Advocate.

versus

GAIL (INDIA) LTD. & ANR.

..... Respond

Through: Mr. Shashank Garg and Mr.

YashrajSamant, Advocates for R

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% 15.03.2021

1. The present petition under Section 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') , seeks a direction to the Respondent No.2 (Sh. S.M. Chopra, the learned Sole Arbitrator) to pronounce the arbitral award in respect of the matter in dispute between the Petitioner and Respondent No.1. Briefly, stated the facts of the case are that the arbitration proceedings in the present case have been terminated by virtue of the order/Award dated 7th January, 2016, the relevant portion of which reads as under:

"7. On 03.10.2015 the final arguments were addressed by Shri Dinesh P.Lalwani, Director of the Claimant Company who was accompanied by Ms. Poonam Sharma of the Claimant & Shri Ajit Puduserry, Ld. Counsel for the Respondent who was accompanied by the officers of the Respondent. On conclusion of final arguments, an order was passed calling upon the parties to pay the outstanding amount of their respective share of the Arbitrator's Fee, as noted in the aforesaid order, to enable the Arbitrator to decide the claims and render the award on merits. The respondent GAIL has paid its share of the Arbitrator's Fee by NEFT on 07.10.2015. The Claimant has not paid its share of the outstanding Arbitrator's Fee of Rs.94,525/- (Rupees ninety four thousand five hundred twenty five only), whatever may be the underlying intent.

8. In view of the developments noted in the preceding paragraph, I render the following award:-

(1) The Claims are dismissed for NON PROSECUTION, with liberty to the Claimant to pay its share of the outstanding Arbitrator's Fee within 30 days of the receipt of this award for an ADJUDICATORY AWARD on merits of the claims;

(2) As of now, the parties are left to bear their own costs.

(3) The parties shall collect their respective original pleadings, documents and evidence, through their duly authorized representative, from the Arbitrator with prior intimation on phone, after 30 days of the receipt of this award."

2. The learned counsel for the Petitioner submits that the learned Arbitrator had fixed an amount of Rs.4,27,500/- as his arbitral fee, which according to the Petitioner was not correct. He further submits that Petitioner had paid to the learned Arbitrator an amount of Rs. 1,19,225/- and only a balance amount of Rs. 43,900/- was remaining. The Petitioner was always ready to pay the balance fee, noted above, but the learned Arbitrator continued to demand Rs. 94,525/- without giving any explanation or indication for computing the balance fee. He further submits that even the final arguments had been addressed in the arbitration proceedings and only the award remained to be pronounced.

3. In May, 2016, the Petitioner became aware of the passing of the order dated 7th January, 2016 from the office of the Respondent and thereafter several attempts were made to get in touch with the learned Arbitrator, without success. The Petitioner made similar efforts in the year 2019. The Petitioner has been caught unaware by the termination of the arbitration proceedings on account of the non-payment of fee. If they had any indication about this outcome, the payment would certainly have been made. Nonetheless, the Petitioner is now willing to pay the amount as demanded by the learned Arbitrator.

4. The Court has heard the counsels at length. The arbitration proceedings have been terminated on 7th January, 2016 as noted above. A perusal of the afore-noted order reveals the reason for termination of the proceedings being the Petitioner's failure to pay the full fees of the learned Arbitrator. The present petition has been filed on 27th August, 2020. The petition is therefore, ex-facie barred by limitation. The Petitioner has sought to explain the delay by filing an affidavit dated 3rd October, 2020. Essentially, the primary reason cited for the delay is the financial difficulty faced by the Petitioner. The said reasons, are reproduced herein below:

"g) That, due to sudden financial losses suffered in Indian Oil Corporation Ltd. Project in 2015, the bank accounts of the deponent company were declared as NPA and as a consequence, on 17/06/2016, the Deponent company received a statutory legal notice from Dewan Housing Finance Corporation Ltd. for winding up of the company under section 434 of the Companies Act, 1956 against the outstanding debt amount of Rs.

2,87,23,133/- due to which the Deponent organization including its directors went into financial crisis which continued over a long period of time and were not in the position to take any steps against the alleged award dated 07/01/2016 but innumerable calls were made to clarify and talk to the Arbitrator but none of the calls were answered or reciprocated. The copy of the legal notice dated 17/06/2016 from Dewan Housing Finance Corporation Ltd. for winding up of the company under Section 434 of the Companies Act, 1956, is hereby annexed with the present affidavit as Annexure E.

h) That, on 11.02.2017, the Deponent Company's managing director was taken aback by shock and sudden demise of his father due to which he was unable to focus on the Deponent Company or its daily and day-to-day affairs. Due to this, the other directors were under pressure and excess responsibility to take care of the company in the absence of their Director and keep it afloat. The death certificate of Lt. Shri Parsa J. Lalwani, the father of the managing director of the deponent company is annexed with the present affidavit as Annexure F.

i) That on 07.08.2017, adding to the woes of the Deponent Company, a letter was received from the bank (Punjab National Bank, Kirti Nagar) in regards to the serious irregularities, financial as well as non-financial credit facilities citing various urgent issues which needed attention from the Deponent Company's end. During this time the Deponent Company was so deep in financial distress and suffered severe loss but still several calls were made to the Ld. Arbitrator in requesting the arbitrator to pronounce the award on merits. The copy of the letter dated 07.08.2017, issued by the Punjab national bank is hereby annexed with the present affidavit as Annexure G.

j) That furthermore, on 03.10.2017, a notice under section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, was received from the bank, for repayment of money due on the Deponent Company. In case of default the Deponent Company and its directors were under the risk of facing legal consequences. The copy of the notice dated 03.10.2017, is annexed with the present affidavit as Annexure H.

k) That, the Deponent Company's condition was deteriorating by the day and a possession notice was served to the Deponent company on 04.01.2018, from the Punjab National Bank due to default in paying the loan amount due to the bank. The company was barely surviving and this was another blow to the directors of the company due to which it was impossible to focus anywhere else. The possession notice dated 04.01.2018 issued by the Punjab National Bank due to default in paying the loan amount due to the bank is annexed with the present affidavit as Annexure I.

l) That, as the Deponent Company was managing to get out of the financial distress and even tied up with the bank to provide them time to repay the loans, in November 2018, Demonetization was announced in the country which not only affected the Deponent Company severely but created a liquidity crunch at other project sites where the work slowed down. That this further led towards more downfall as the staff had to be cut and only limited people were working to the best of their abilities along with the directors of the Deponent company to maintain the situation which was achieved with so much difficulty but also keep the company afloat and out of bankruptcy.

m) That, after demonetization, new GST Rules were introduced by the Government due to which the already delayed bills of the Deponent Company from running projects were further delayed for payment by clients due to the change in their systems which were to be upgraded as per the new GST TAX Law.

n) That considering the financial condition of the company as stated above, the Deponent company was nowhere in a position to shift their focus or concentrate on anything else other than just managing the company and its staff as the liabilities were increasing by the day in the form of loans

and maintenance, salaries and various other labor cost and miscellaneous expenses. The directors were not in a position to focus on any other area and were concentrating on completion of projects in hand from where only financial stability could be achieved back in the company."

5. The aforesaid reasons, in the opinion of the Court, do not satisfactorily explain the delay in approaching the Court. Concededly, the Petitioner was aware of the order of termination passed by the learned Arbitrator. The Petitioner has sought to explain the delay by calculating the period of limitation from the date of knowledge, which, in view of this Court, is not correct. Yet, even if the date of knowledge is considered to be the starting point of limitation, the present petition is clearly barred by time. This Court in the case of Tarun Kr. Jain vs. M.C.D. 1, has held that in respect of a petition under Section 14 or 15 of the Act, in the absence of any limitation period described under the Act, the residuary provision i.e., Article 137 of the Limitation Act, 1963 would govern the period of limitation. The relevant portion of the said judgment reads as under:

"12. I cannot agree with this submissions in the light of the plain reading of the Section 14(1)(b) of the Act. It provides that the mandate of the arbitrator shall terminate if he withdraws from his office. The order dated 18th October, 2006 is a clear withdrawal from his office by the learned arbitrator. It is only when a controversy remain between the parties, concerning any of the grounds referred to in Clause (a) of Sub-section (1) of Section 14 (which deals with the de jure and de facto inability to perform his functions by the arbitrator, or where the arbitrators alleged to have failed to act without undue delay) that the parties can approach the court to decide whether or not the termination of mandate has taken place. The parties are not expected to approach the court to seek an order for termination of the mandate of the arbitrator, even in cases where arbitrator has withdrawn from his office. Section 14(2) has no application to a case falling under Section 14(1)(b).

13. The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of entry No. 137 of the schedule to the Limitation Act. The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the passing of the order dated 8th October, 2006. Therefore the Petitioner should have approached the court for appointment of substitute arbitrator by 17th October, 2009.

14. Reliance placed by Mr. Singla on Section 15(2) of the Act is (2011) ILR 4 Delhi 530; MANU/DE/2071/2011 again misplaced. All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely. The said process has to be initiated within the period of limitation prescribed by law."

6. In appeal, the Division Bench in Tarun Kumar Jain v. Municipal Corporation of Delhi vide order dated 30th August, 2011, affirmed the view of the learned Single Judge and held as under:

"The contention of the Appellant is that he was not aware of the passing of the Orders for taking appropriate steps for re-reference. As it happens, an Award came to be passed by the learned Arbitrator in AA No.193/2005 on 25.09.2007. Even if we are to accept the version of the Appellant, which we must record we find fanciful, at least on 25.09.2007, the Appellant would have become aware that as far back as on 18.10.2006 the learned Arbitrator had ended the reference by putting the Appellant to notice that steps for re-reference should be taken viz-a-viz A.A.202/2005 and 203/2005. It is not in dispute that steps should have been taken within three years of the passing of the Order dated 18.10.2006. Law does not permit the party concerned to unilaterally compute the period of Limitation from the date of knowledge of the passing of the appropriate Order. In this case, since the period of Limitation commences on 18.10.2006, three years would end on 17.10.2009. Therefore, assuming that the Appellant would have gained knowledge of the Orders dated 18.10.2006 after the period of Limitation had expired, the position in law would be that he would seek condonation of delay or enlargement of time as the case may be. As we have already observed, we cannot compute Limitation from the date of knowledge. This is the view of the learned Single Judge in the impugned Order with which we are in respectful agreement.

FAO (OS) 412/2011 Appeal is without merit and dismissed."

7. Therefore, the present petition is clearly barred by time. Counsel for the Respondent has also drawn the attention of this Court to the recent decision of the Supreme Court in Bharat Sanchar Nigam Limited & Anr. vs. M/s Nortel Networks India Pvt. Ltd., 3. The said judgment, rendered in the context of Section 11 of the Act holds that the period of limitation on filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963.

8. The Petitioner has contended that the Court can also condone the delay under Section 5 of the Limitation Act, 1963 and can entertain the present petition even if the same has been filed beyond the period prescribed under Article 137. The aforesaid contention does not prima facie appear to be correct and although the parties have been briefly heard on the aspect of applicability of the Section 5 of Limitation Act, yet the Court is not venturing into this question, as on merits, the reasons disclosed in the affidavit do not satisfy this Court that there is sufficient cause for condonation of delay. The affidavit contains vague and general allegations and there is no material placed on record to substantiate the said pleas. In the opinion of the Court, financial difficulty faced by the Petitioner does not qualify as sufficient cause to condone the delay, as the non-payment of the small amount of arbitral fee cannot be justified by citing financial distress. The Petitioner has been clearly negligent and there is no ground to condone the delay.

9. In view of the above, the present petition is barred by limitation and 2021 SCC Online SC 207 accordingly the same is dismissed.

SANJEEV NARULA, J MARCH 15, 2021 nd