Srei Infrastructure Finance Limited vs Tuff Drilling Private Limited on 20 September, 2017

Equivalent citations: AIR 2018 SC (SUPP) 81, 2018 (11) SCC 470, (2017) 6 ARBILR 430, (2017) 12 SCALE 105

Author: Ashok Bhushan

Bench: Ashok Bhushan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 15036 OF 2017
(arising out of SLP(C)No.16636 of 2015)

SREI INFRASTRUCTURE FINANCE LIMITED APPELLANT(s)

VERSUS

TUFF DRILLING PRIVATE LIMITED RESPONDENT(s

J U D G M E N T

ASHOK BHUSHAN, J.

Leave granted.

1. This appeal has been filed against the judgment dated 13.02.2015 of the Calcutta High Court by which the High Court in exercise of jurisdiction under Article 227 of the Constitution of India has set aside the Order passed by the arbitral tribunal by which the arbitral tribunal had refused to recall its Order dated 12.12.2011 terminating the Reason: of the claim by the claimant.

2. The undisputed facts of the case are: -

> The respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) for referring the dispute to arbitrator on the strength of contract entered with appellant.

> During pendency of the application under Section 11 with consent of the parties, Sri Baskar Sen, Senior Advocate, Bar-at-Law was appointed as Arbitrator. The application under Section 11 of the 1996 Act was thus dismissed as not pressed.

One-man arbitral tribunal entered into reference and called for the first sitting of the arbitral tribunal on 27.08.2011. Both the parties appeared on 27.08.2011 on which date arbitral tribunal had directed the respondent to file the statement of claim.

3. Subsequently, 19th November was fixed on which date the claimant was absent. The arbitral tribunal directed for filing statement of claim by 9th December. On 9th December, the claim could not be filed by respondent and by order dated 12.12.2011, tribunal terminated the proceedings under Section 25(a) by making the following observations: -

> "...It appears that the claimant is not interested to proceed with the reference. No cause has been shown as to why they have not filed their Statement of Claim in spite of repeated opportunities being given to them. In view of Section 25(a) of the Arbitration & Conciliation Act, 1996 the Arbitrator, therefore, has no alternative but to terminate the proceedings.
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> The arbitration proceedings in respect of the dispute in which Tuff Drilling Private Limited is the claimant which arose out of the agreement dated 21st January, 2008 pertaining to 1500 HP diesel electric rig is thus terminated..."
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> 4. The Claimant filed an application dated 20.01.2012 praying for recall of the order dated 12.12.2011 with further prayer to condone the delay in filing the statement of claim by granting necessary extension of time. In the application, reasons for non-filing of the statement of the claim and for non-appearance of the claimant on 19.11.2011 and 12.12.2011 were stated in detail. The application filed by the claimant was objected by the appellant. The appellant questioned the maintainability of the application dated 20.01.2012 on the ground that arbitral tribunal has become functus officio in view of termination of the proceedings under Section 25(a), hence the arbitral tribunal cannot recall its order terminating the proceedings. The arbitral tribunal heard both the parties and by an order dated 26.04.2012 accepted the preliminary objections of the appellant holding that in view of order terminating the proceedings, he cannot pass an order recommencing the arbitration proceedings.

The application of the respondent claimant was thus rejected. Aggrieved by the order of the arbitral tribunal dated 26.04.2012, the claimant approached the Calcutta High Court in its revisionary jurisdiction by filing C.O.No.3190 of 2012. The appellant before the High Court objected the maintainability of the application under Article 227 of the Constitution. It was further contended before the High Court that after terminating the proceedings arbitral tribunal had become functus officio and had no power to recall the order dated 12.12.2011. The High Court after considering the submissions of parties came to the conclusion that arbitral tribunal enjoys the power to recall its own order relying on the Patna High Court judgment reported in M/s Snebo Engineering Ltd. Vs.

State of Bihar and Ors., AIR 2004 Patna 33. The High Court also overruled the objections of appellant that application under Article 227 by the claimant challenging the order dated 12.12.2011 was not maintainable. The High Court after entertaining the application under Article 227 held that arbitral tribunal has power to recall its own order. The High Court set aside the order of the arbitral tribunal and remitted the matter back to the arbitral tribunal to decide the application dated 20.01.2012 filed by the respondent on merits. The appellant aggrieved by the judgment of Calcutta High Court has come up in this appeal.

5. This court on 07.07.2015 issued notice and in the meantime stayed the operation of the order passed by the Calcutta High Court. Although, the respondent was served but none appeared on behalf of the respondent. While hearing the matter on 29.08.2017, this court noticed that question of law raised in this case is important one and since no one has appeared on behalf of respondent, this court requested Shri Rakesh Dwivedi, Senior Advocate, to assist the court in deciding the issue.

6. We have heard Shri Jayant Bhushan, learned senior counsel, assisted by Shri Santanu Ghosh, learned counsel for the appellant. Shri Rakesh Dwivedi, learned senior counsel assisted by Ms. Sansriti Pathak, learned counsel, has been heard as amicus curiae.

7. Learned Counsel for the appellant submits that the arbitral tribunal had terminated the proceedings on 12.12.2011 due to non-filing of claim by the claimant in spite of opportunities having been granted to it. The arbitral tribunal had become functus officio and had no jurisdiction to recall the order dated 12.12.2011 on the application filed by the respondent claimant to recall the said order. It is further contended that against the order dated 12.12.2011 terminating the proceeding application under Article 227 of the Constitution of India was not maintainable. Learned counsel for the appellant has relied on judgment of this Court reported in Lalit Kumar V. Sanghavi Vs. Dharamdas V. Sanghavi & Ors., 2014(7) SCC 255 in support of the submissions that Writ Petition was not maintainable against the order of arbitral tribunal. It is further submitted by the appellant that remedy if any available to claimant was to file an application under Section 34 of 1996 Act for setting aside the order dated 12.12.2011.

8. Shri Rakesh Dwivedi, learned amicus curiae, submits that the termination of proceedings under Section 25(a) and termination of proceedings under Section 32(2) are two different eventualities. When the proceedings are terminated under Section 32(2), the mandate of the arbitral tribunal also terminates whereas no such consequence can be read in termination of proceedings under section 25(a). Under section 25(a), proceedings are terminated on default of the claimant to file the statement of claim. Section 32(3) would not apply to case falling under section 25(a) of the 1996 Act. The Arbitration Act, 1996 does not provide for remedy against the order under section 25(a). He contends the remedy under Section 34 is not available against such an order unless the order under Section 25(a) is also treated as an award. Learned amicus curiae submits that there seems to be legislative gap with respect to 25(a) and 32(2)(c). He submits that it is more appropriate that Order under Section 25(a) be treated as an award so as to make it amenable under Section

34. On the submissions that whether arbitral tribunal can exercise the power akin to principle underlying under Order IX Rule 13 C.P.C. Learned amicus curiae submits that arbitral tribunal can

recall an order passed under Section 25(a) on the principles underlying Order IX Rule 13 C.P.C. Learned amicus curiae in support of above submissions has also referred to judgments of Patna High Court, Delhi High Court, Madras High Court & Bombay High Court which shall be referred to while considering the submissions in detail.

9. Referring to this court's judgment in SPP Vs. Patel Engineering, it is submitted that the said case has no applicability when Section 34 and 37 of the 1996 Act are not applicable. It was pointed out by learned amicus curiae that Lalit Kumar was a case where proceedings were terminated under Section 32(2)(c). Learned amicus curiae has lastly submitted that legislative gap as is apparent in context of provisions of Section 25(a), 32 and 34 need to be stitched up in light of the object of the legislation.

10. We have considered the submissions of learned counsel for the appellant and learned amicus curiae and have perused the record. From the submissions, following issues arise for consideration in this Civil Appeal:-

> 1)Whether arbitral tribunal which has terminated the proceeding under Section 25(a) due to non filing of claim by claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?
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> 2)Whether the order passed by the arbitral tribunal under Section 25(a) terminating the proceeding is amenable to jurisdiction of High Court under Article 227 of the Constitution of India?
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> 3)Whether the Order passed under Section 25(a) terminating the proceeding is an award under the 1996 Act so as to amenable to the remedy under Section 34 of the Act?

11. The law of Arbitration was earlier governed by the Arbitration Act, 1940. The Law Commission of India and several other organisations expressed opinion that the 1940 Act needs extensive amendments to make it more responsive to contemporary requirements. In the wake of rise in commercial litigation both at domestic and international level, a need was felt for a comprehensive law to deal the subject. The United Nations Organisation on International Trade Law (UNCILTRAL) adopted a Model Law on International Commercial Arbitration in the year 1985. Taking into consideration domestic arbitration as well as international commercial arbitration, Parliament enacted the Arbitration and Conciliation Act, 1996. Main objective for introducing the legislation was to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. In Section 2 of the Act, arbitral tribunal has been defined to mean a sole arbitrator or a panel of arbitrators. The arbitral tribunal was entrusted with various statutory functions, obligations by the enactment.

12. The arbitration is a quasi judicial proceeding, equitable in nature or character which differs from a litigation in a Court. The power and functions of arbitral tribunal are statutorily regulated. The

tribunals are special arbitration with institutional mechanism brought into existence by or under statute to decide dispute arising with reference to that particular statute or to determine controversy referred to it. The tribunal may be a statutory tribunal or tribunal constituted under the provisions of the Constitution of India. Section 9 of the Civil Procedure Code vests into the Civil Court jurisdiction to entertain and determine any civil dispute. The constitution of tribunals has been with intent and purpose to take out different categories of litigation into the special tribunal for speedy and effective determination of disputes in the interest of the society. Whenever, by a legislative enactment jurisdiction exercised by ordinary civil court is transferred or entrusted to tribunals such tribunals are entrusted with statutory power. The arbitral tribunals in the statute of 1996 are no different, they decide the lis between the parties, follows Rules and procedure conforming to the principle of natural justice, the adjudication has finality subject to remedy provided under the 1996 Act. Section 8 of the 1996 Act obliges a judicial authority in a matter which is a subject of an agreement to refer the parties to arbitration. The reference to arbitral tribunal thus can be made by judicial authority or an arbitrator can be appointed in accordance with the arbitration agreement under Section 11 of the 1996 Act.

13. After noticing the objective of the enactment, we now revert to issues which have arisen in these appeals.

Issue No.I

14. Chapter V of the Act deals with the conduct of arbitral proceedings. Section 18 provides "the parties shall be treated with equality and each party shall be given a full opportunity to present his case. Section 18 contains the principle of natural justice to give full opportunity to parties to present their case.

15. Section 19 of the Act provides for determination of rules of procedure. Sub-clause (1) of Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The words "arbitral tribunal shall not be bound" are the words of amplitude and not of a restriction. These words do not prohibit the arbitral tribunal from drawing sustenance from the fundamental principles underling the Civil Procedure Code or Indian Evidence Act but the tribunal is not bound to observe the provisions of Code with all of its rigour. As per sub-clause (2) of Section 19 the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

16. Section 23 deals with claim and defence. Section 24 deals with hearing and written proceedings.

17. Section 25 deals with default of a party which provision is up for interpretation in this case and is as follows:

> "25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

(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;

(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 forefeited;

(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."

18. Chapter VI deals with Making of Arbitral Award and Termination of Proceedings. Section 32 deals with Termination of Proceedings which is quoted as below:-

"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).

(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."

19. In the present case, proceedings were terminated vide Order dated 12.12.2011 under Section 25(a). After termination of proceedings, application to recall the said order was filed by claimant on 20.01.2012, which was rejected by arbitral tribunal on the ground that it has no jurisdiction to re-commence the arbitration proceedings. Section 25 contemplates a situation when the claimant fails to communicate his statement of claim within the time as envisaged by Section 23, the arbitral tribunal has to terminate the proceedings. This section thus contemplates a situation where arbitration proceeding has not been started. The most important words contained in Section 25 are "where without showing sufficient cause – the claimant fails to communicate his statement of claim". Under Section 23(1), the claimant is to state the facts supporting his claim within the period of time agreed upon by the parties or determined by the arbitral tribunal. The question of termination of proceedings thus arises only after the time agreed upon between the parties or determined by the arbitral tribunal comes to an end. When the time as contemplated under Section 23(1) expires and no sufficient cause is shown by the claimant the arbitral tribunal shall terminate the proceedings. The question of showing sufficient cause will arise only when the claimant is asked to show cause as to why he failed to submit his claim within the time as envisaged under Section 23(1) or the claimant, on his own, before the order is passed under Section 25(a) to terminate the proceedings comes before the arbitral tribunal showing sufficient cause for not being able to submit his claim within the time. In both the circumstances, i.e. when a show-cause notice is issued to the claimant as observed above or claimant of his own shows cause for non-filing the claim within the time the arbitral tribunal shall take a call on terminating the proceedings. It is easy to comprehend that in the event, the claimant shows a sufficient cause, the arbitral tribunal can accept the statement of claim even after expiry of the time as envisaged under Section 23(1) or grant further time to the claimant to file a claim. Thus, on sufficient cause being shown by a claimant even though time has expired under Section 23(1), it is not obligatory for the arbitral tribunal to terminate the proceedings. The conjunction of the wording "where without showing sufficient cause" and "the claimant fails to communicate his statement of claim" would indicate that it is a duty of the arbitral tribunal to inform the claimant that he has failed to communicate his claim on the date fixed for that and requires him to show-cause why the arbitral proceedings should not be terminated? Opportunity to show sufficient cause for his failure to communicate his claim statement can only be given after he has actually failed to do so. Whether in a case where claimant failed to file a statement of claim and has failed also to show-cause before an order of termination of proceedings is passed, claimant is entitled to show-cause subsequent to the termination is the question which has fallen for consideration.

20. When the arbitral tribunal without sufficient cause being shown by the claimant to file the claim statement can terminate the proceedings, subsequent to termination of proceedings, if the sufficient cause is shown, we see no impediment in the power of the arbitral tribunal to accept the show-cause and permit the claimant to file the claim. The Scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by Section 23(1) has expired. Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the arbitral

tribunal by accepting the show-cause and there is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown.

21. Section 32 contains a heading "Termination of Proceedings". Sub-section (1) provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section(2). Sub- section(2) enumerates the circumstances when the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. The situation as contemplated under Section 32(2)(a) and 32(2)(b) are not attracted in the facts of this case. Whether termination of proceedings in the present case can be treated to be covered by Section 32(2)(c) is the question to be considered. Sub-clause(c) contemplates two grounds for termination, i.e.; (i) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or (ii) impossible. The eventuality as contemplated under Section 32 shall arise only when the claim is not terminated under Section 25(a) and proceeds further. The word 'unnecessary' or 'impossible' as used in clause

(c) of Section 32(2) cannot be said to be covering a situation where proceedings are terminated in default of the claimant. The word unnecessary or impossible has been used in different contexts than to one of default as contemplated under Section 25(a). Sub-section (3) of Section 32 further provides that the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and sub-section (4) of Section 34. Section 33 is the power of the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the Court to adjourn the proceedings in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the arbitral tribunal, whereas the aforesaid words are missing in Section 25. When the legislature has used the phrase "the mandate of the arbitral tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be re-commenced.

22. Learned amicus curiae has referred to judgment of this Court in Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal & Ors., 1980 (Supp) SCC 420. In that case this Court was considering the power of industrial tribunal to set aside its ex-parte award on being satisfied that there was sufficient cause. The Court also noticed that there was no specific express provision in the Act or the Rules giving the tribunal jurisdiction to do so. In Para 6, following was held:-

> "6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties.

> In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

23. It is true that power of review has to be expressly conferred by a Statute. This Court in Paragraph 13 has also stated that the word review is used in two distinct senses. This Court further held that when a review is sought due to a procedural defect, such power inheres in every tribunal. In Paragraph 13, following was observed:-

> 13. .... The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

24. In Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. & Anr., (2005) 13 SCC 777, this Court again held that a quasi- judicial authority is vested with the power to invoke procedural review. In Paragraph 19 of the judgment, following was laid down:-

> "19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi- judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi- judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one

> fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. v. Central Govt.
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> Industrial Tribunal5 it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again."
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> 25. There cannot be a dispute that the power exercised by the arbitral tribunal is a quasi-

judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the arbitral tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution in so far as the power of procedural review is concerned. We have already noticed that Section 19 provides that arbitral tribunal shall not be bound by the rules of procedure as contained in Civil Procedure Code. Section 19 cannot be read to mean that arbitral tribunal is incapacitated in drawing sustenance from any provisions of Code of Civil Procedure. This was clearly laid down in Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646. In Paragraph 98(n), following was stated:-

> "(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. "Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice." (See Industrial Credit and Investment Corpn. of India Ltd. v. Grapco Industries Ltd.)"
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> 26. We thus are of the view that principles underlying Order 9 Rule 13 can very well be invoked by the arbitrator. There is nothing on record to indicate that parties have agreed to the contrary. The issue, which has arisen for consideration has engaged attention of different High Courts from time to time. Patna High Court in M/s. Senbo Engineering Ltd. Vs. State of Bihar & Ors., AIR 2004 Patna 33, had occasion to consider the order terminating the proceedings under Section 25(a). Patna High Court after considering the provision has held that arbitral tribunal has power to review on sufficient cause being shown. In paragraph 32, following has been laid down:-

"32. I find the submissions of Mr. Chatterjee well founded. Mr. Chatterjee has relied upon the provisions of the Act itself (that is to say, the internal aids to interpretation) in support of the point that on sufficient cause being shown, the arbitral tribunal has full authority and power to recall an order under Section 25(a) of the Act. I think that one would arrive at the same conclusion on the basis of some external aids to interpretation."

27. Referring to judgment of this Court in Grindlays Bank Ltd. (supra) and Anil Sood Vs. Presiding Officer, Labour Court II, (2001) 10 SCC 534, Patna High Court further laid down in Paragraph 39 as given below:-

"39. The two Supreme Court decisions under the Industrial

Disputes Act are also a pointer in the direction that the arbitral tribunal must be held to have the power of procedural review and the authority to recall, on sufficient cause being shown, an order terminating the proceeding under Section 25(a) of the Act. The second question too is, thus, answered in the affirmative and in favour of the petitioner."

28. Delhi High Court in Awasthi Construction Co.

Vs. Govt. Of NCT of Delhi & Anr., 2013 (1) Arb. LR 70 (Delhi)(DB) has elaborately considered this issue. In Paragraph 17 and 18, following has been held:-

"17. We may in this regard also notice that the legislature, in Section 25, has not provided for termination of proceedings automatically on default by a party but has vested the discretion in the arbitral tribunal to, on sufficient cause being shown condone such default. We are of the view that no distinction ought to be drawn between showing such sufficient cause before the proceedings are terminated and after the proceedings are terminated. If the arbitral tribunal is empowered to condone default on sufficient cause being shown, it matters not when the same is shown. It may well nigh be possible that the sufficient cause itself is such which prevented the party concerned from showing it before the proceedings terminated. It would be a pedantic reading of the provision to hold that the arbitral tribunal in such cases also stands denuded. Once the legislature has vested the arbitral tribunal with such power, an order of termination cannot be allowed to come in the way of exercise thereof.

18. There is another reason for us to hold so. The emphasis of the Arbitration Act is to provide an alternative dispute resolution mechanism. The provisions of the Act ought to be interpreted in a manner that would make such adjudication effective and not in a manner that would make arbitration proceedings cumbersome. A view that the arbitral tribunal is precluded, even where sufficient cause exists, from reviving the arbitral proceedings and the only remedy available to a party is a writ petition and

> which remedy is available only in the High Court often situated at a distance from the place where the parties are located, would be a deterrent to arbitration. It is also worth mentioning that Section 19(2) of the Act permits the parties to agree on the procedure to be followed by the arbitral tribunal.

The parties may, while so laying down the procedure, provide for the remedy of review/revival of arbitral proceedings and which agreement would be binding on the arbitral tribunal. If the arbitral tribunal in such a situation would be empowered to, on sufficient cause being shown, revive the arbitral proceedings, we see no reason to, in the absence of such an agreement hold the arbitral tribunal to be not empowered to do so. If it were to be held that such power of review/recall is not available to an arbitral tribunal, the arbitral tribunal would not be competent to set aside an order under Section 25(b) also, compelling the respondent against whom proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise."

29. The Delhi High Court again reiterated the same principle in ATV Projects India Ltd. Vs. Indian Oil Corporation Ltd. & Anr., 200(2013) Delhi Law Times 553 (DB).

30. The Madras High Court in Bharat Heavy Electricals Limited Vs. Jyothi Turbopower Services Private Limited & Ors., 2017(1) Arb. LR 289 (Madras) again took the view that after terminating the proceedings under Section 25(a), the arbitral tribunal can recall the said order on sufficient cause being shown and the arbitral tribunal does not become functus officio after passing an order under Section 25(a). The Madras High Court has agreed with the view expressed by the Division Bench of the Delhi High Court as noticed above.

31. A contrary view has also been expressed by certain High Courts. The Kerala High Court in PMA Shukkur Vs. Muthoot Vehicle, (2010) Arb. LR 121 (Kerala), held that the power to set aside an ex-parte award vests in the Court, and the arbitrator does not have any concurrent power to set aside an ex-parte award.

32. We endorse the views of Patna High Court, Delhi High Court and Madras High Court as noted above, in so far as they have held that the arbitral tribunal after termination of proceedings under Section 25(a) on sufficient cause being shown can recall the order and re- commence the proceedings.

33. In the present case, the arbitral tribunal has rejected the application of the claimant by order dated 26.04.2012 taking the view that after an order is passed by him terminating the proceedings, he cannot pass the order recommencing the arbitration proceedings. In view of the above discussions, we are of the view that the arbitral tribunal committed an error in holding that it has no jurisdiction to recall an order terminating the proceedings under Section 25(a). The arbitral tribunal having not considered the cause shown by the claimant in its application, it is in the ends of justice that the arbitral tribunal be asked to consider the application filed by the claimant dated 20.01.2012 praying for recall of the order dated 12.12.2011 and to grant extension for filing the statement of claim.

34.Coming to Issue No. 2 and 3, in view of what we have said regarding Issue No. 1 that arbitral tribunal has jurisdiction to consider an application for recall of order terminating the proceedings under Section 25(a), it is not for purposes of this case. For deciding the present Civil Appeal, our answer to Issue No.1 is sufficient to dispose of the matter.

35. In result, the appeal is dismissed. The interim order dated 07.07.2015, granting stay on the operation of order dated 13.02.2015 passed by the High Court stands discharged and the arbitral tribunal shall now proceed to decide the application of claimant-respondent dated 20.01.2012 expeditiously. The parties shall bear their own costs.

36. We place on record our appreciations for the valuable assistance rendered by Mr. Rakesh Dwivedi, Sr. Advocate appearing as amicus.

.....J. (A.K. Sikri) .....J. (Ashok Bhushan) NEW DELHI;

SEPTEMBER 20, 2017

ITEM NO.1502 COURT NO.6
SECTION XVI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

(Arising out of SLP (C)No. 16636/2015) SREI INFRASTRUCTURE FINANCE LIMITED Appellant(s) VERSUS TUFF DRILLING PRIVATE LIMITED Respondent(s) Date : 20-09-2017 This matter was called on for pronouncement of judgment today.

For Appellant(s) Mr. Santanu Ghosh, Adv.

Mr. Kaushik Dey, Adv.

Ms. Manpreet, Adv.

Mr. S. K. Verma, AOR For Respondent(s) Ms. Sansriti Pathak, AOR Hon'ble Mr. Justice Ashok Bhushan pronounced the judgment of the Bench comprising Hon'ble Mr. Justice A. K. Sikri and His Lordship.

Leave granted.

The appeal is dismissed in terms of the signed reportable judgment.

(NIDHI AHUJA)
COURT MASTER

(MALA KUMARI SHARMA)
COURT MASTER

[Signed reportable judgment is placed on the file.]