$~65(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM(M) 92/2021 & CM APPL.4050 /2021

MS VAG EDUCATIONAL SERVICES ..... Petitioner
Through: Ms. Tanya Agarwal, Adv.

versus

AAKASH EDUCATIONAL SERVICES LTD ..... Respondent
Through: Ms.Qausar Khan, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT(O R A L)

% 12.10.2022

1. Ms. Qausar Khan appears for the respondent in this matter and submits on instructions that she has no objection if this petition is disposed off on the basis of the submissions advanced by Ms.Tanya Agarwal, learned Counsel for the petitioner and on the basis of the material on record.

2. Accordingly, I have heard Ms.Agarwal and proceed to dispose of the matter on the basis of the record available with the Court.

3. The issue in controversy is brief. Arb.Case No. 110/18, which was continuing between the petitioner and the respondent before a learned Sole Arbitrator, was withdrawn by the respondent, as the claimant in the arbitral proceedings on 21st September 2019. The order passed by the learned Sole Arbitrator on the said date reads thus:

"Arbitration Case No. 110/18

AESL V. VAG Educational Services Ltd.
21.9.2019

Pr: Sh. Shwaney Singh Meena A/R with Ms. Namita Adv. for the claimant

Shri Mahesh Chandra Gupta Adv for the NC/ Respondent with Shri Vishal Gupta

In view of the submissions of the A/R and Ld. Counsel for the claimant the present matter is dismissed as withdrawn.

Order announced and dictated in open tribunal

File be kept on record.

21.9.2019
SC Rajan
Sole Arbitrator"

4. Subsequently, the respondent, as the claimant in the arbitral proceedings, moved an application seeking recall of the afore-extracted order dated 21st September 2019. It was sought to be contended, therein, that no consent, for withdrawal of the arbitral proceedings, had been granted either by the authorised representative or by the "proxy Counsel" who was present on behalf of the respondent-claimant.

5. However, during the pendency of the said application, an affidavit was filed by the Counsel representing the respondent-claimant, adopting an entirely different stand. In the said affidavit, it was sought to be contended that the learned Counsel had inadvertently signed the withdrawal order sheet of the arbitral proceedings, as her

instructions, from her Senior Counsel were to withdraw another matter pending before the same learned Sole Arbitrator.

6. As such, the affidavit effectively gave up the plea, in the application, that the order dated 21st September 2019, of the learned Sole Arbitrator, terminating the arbitral proceedings as withdrawn, was passed in error or without authorisation. Learned Counsel for the respondent-claimant accepted responsibility for having signed the withdrawal application, but pleaded that it was owning to an inadvertent mistake.

7. By the impugned order dated 18th January 2020, the learned Arbitrator allowed the afore-noted application of the respondent-claimant and restored the arbitral proceedings, observing that a party could not be permitted to be prejudiced owing to fault of Counsel. However, the learned Arbitrator took exception to the assertions in the application which, he felt, questioned his impartiality in the proceedings. He, therefore, recused from the proceedings and allowed parties to appoint an alternate arbitrator.

8. The said order dated 18th January 2020 formed subject matter of challenge in the present petition instituted under Article 227 of the Constitution of India.

9. I had initial misgivings regarding the maintainability of the present petition, predicated on the judgments of the Supreme Court in ***SBP & Co. v. Patel Engineering Ltd. and Anr.***[1] and ***Bhaven***

[1] **(2005) 8 SCC 618**

Construction v. Executive Engineer Sardar Sarovar Narmada Nigam[2]. However, having heard Ms. Agarwal, learned Counsel for the petitioner and on a careful perusal of the said decisions, the situation which obtained in those cases appears distinguishable from that which obtains in the present case. The position of law which emerges from the decisions in ***SBP***[1] and ***Bhaven Construction***[2] which has also been adopted in earlier decisions rendered by me, is that interlocutory orders passed during arbitral proceedings cannot be challenged under Article 227 of the Constitution of India, as the grounds on which such orders are sought to be challenged would be available as grounds to challenge the final award which may come to be passed in the arbitral proceedings. In such circumstances, the decisions in ***SBP***[1] and ***Bhaven Construction***[2] require the challenger to await the passing of final award in the arbitral proceedings and to reserve the grounds on which the interlocutory order is sought to be challenged for being urged in the challenge to the final arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 Act ("the 1996 Act"), should such occasion arise.

10. The situation that obtains in the present case is clearly distinct. The Court, in the present case, is seized with the issue of whether an arbitral tribunal which has terminated the arbitral proceedings as withdrawn could, thereafter, entertain an application for recall of the said order and revive the arbitral proceedings.

[2] **(2022) 1 SCC 75**

11. The legal position that emanates from the statute, in this regard, appears fairly clear. Section 32 of the 1996 Act deals with "termination of proceedings" and 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).
>
> (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."

12. A case in which the claimant withdraws his claim and, on that basis, the arbitral proceedings are terminated, falls within Section 32(2)(a). Sub-section (3) of Section 32 ordains that, with the termination of the arbitral proceedings, the mandate of the arbitral proceedings would also terminate. This is made subject only to Section 33 and Section 34(4) of the 1996 Act, which read thus:

"**33. Correction and interpretation of award; additional award.—**

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a

correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

34 Application for setting aside arbitral award. —

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it 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."

13. Section 33 applies either where a party requests an arbitral tribunal to correct computation errors, clerical or typographical errors or other errors of a similar nature, or where the parties, by agreement between themselves, request the arbitral tribunal to give an interpretation on a specific point or a part of the Award rendered by it. Quite clearly, the application filed by the respondent, seeking recall of the order dated 21st September 2019 does not attract either of these exigencies. Section 34(4) is a provision whereunder the court, before which an arbitral Award is challenged, may adjourn the proceedings so as to permit the Arbitral Tribunal to eliminate grounds on which the Award would otherwise be likely to be set aside. That provision too, quite obviously, does not apply in the present case.

14. As such, the present case attracts, with all its rigour, Section 32(3) of the 1996 Act.

15. By operation of Section 32(3), the mandate of the learned Sole Arbitrator terminated on 21st September 2019. Once the mandate of an arbitrator terminates, the arbitrator is rendered *functus officio*. He has no jurisdiction, thereafter, to entertain any application or pass any orders in the proceedings. The limited orders which an arbitrator, whose mandate stands terminated, may pass, are restricted to orders under Section 33 of the 1996 Act, which, as already noted, does not apply in the present case.

16. The sequitur is obvious. The learned Arbitrator, at the time of passing the impugned order, was *coram non judice*, as his mandate stood terminated on 21st September 2019.

17. The impugned order, therefore, has been passed without jurisdiction and, accordingly, cannot be allowed to remain. Resultantly, the order dated 18th January 2020, passed by the learned Sole Arbitrator is quashed and set aside. The order dated 21st September 2019 shall revive.

18. This petition is accordingly allowed in the aforesaid terms with no orders as to costs. Miscellaneous applications stand disposed of.

C. HARI SHANKAR, J.

OCTOBER 12, 2022/kr