IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Appeal No. 17 of 2023 a/w connected matters

Reserved on : 17.07.2023

Date of decision : 31.07.2023

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1. Arb. Appeal No. 17 of 2023

Balak Ram and others ..Applicants/Appellants

Versus

NHAI ..Non applicant/Respondent

2. Arb. Appeal No. 16 of 2023

Balak Ram and another ..Applicants/Appellants

Versus

NHAI ..Non applicant/Respondent

3. Arb. Appeal No. 18 of 2023

Jai Lal ..Applicant/Appellant

Versus

NHAI ..Non applicant/Respondent

4. Arb. Appeal No. 19 of 2023

Shiv Kumar ..Applicant/Appellant

Versus

NHAI ..Non applicant/Respondent

5. Arb. Appeal No. 21 of 2023

Ravita and others ..Applicants/Appellants

Versus

NHAI ..Non applicant/Respondent

Coram :-
Ms. Jyotsna Rewal Dua, Judge
Whether approved for reporting? Yes

For the Applicants/ Appellants: Mr. Varun Rana, Advocate.

For the Non Applicants : Respondent: Ms. Shreya Chauhan, Advocate

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Jyotsna Rewal Dua, Judge

All these appeals involve common question of law and facts, hence are taken up together for adjudication. For convenience, facts from OMP(M) No. 9 of 2023 are being considered hereinafter.

2. The case

2(i) Land, building, trees etc. of the applicants-appellants situated in Mohal Gamohu, Tehsil Sundernagar, District Mandi were acquired by the

competent authority-Land Acquisition for National Highways Authority of India (NHAI). The acquisition was for construction of building and maintaining the four lane road i.e. NH-21 (Kiratpur to Ner Chowk). The award was finally passed on 01.09.2015 under Section 3(G) of the National Highways Act 1956. The market value of the acquired land was determined at Rs. 5,68,000/- per bigha irrespective of its classification. All payable statutory benefits were assessed separately as per the Right to Fair Compensation and Transparency in Land Acquisition, Re-habilitation and Re-settlement Act 2013.

2(ii) The applicants-appellants preferred petition under Section 3 (G) (5) of the National Highways Act before the Arbitrator i.e. Divisional Commissioner Mandi seeking enhancement of the compensation. Other similarly situated persons, whose lands were acquired under the same award, also preferred petitions under Section 3(G) (5) of the NH Act before the Arbitrator.

The Arbitrator decided all the petitions vide a common award dated 05.09.2017. Market value of the acquired land was enhanced from Rs. 5,68,000/- per bigha to Rs. 17,00,000/- per bigha alongwith all statutory benefits.

2(iii) Respondent-National Highways Authority of India (NHAI) moved application under Section 34 of the Arbitration and Conciliation Act before the learned District Judge, Mandi with a prayer for setting aside the award dated 05.09.2017. The NHAI contended that Arbitrator had erred in enhancing the amount awarded by the Competent Authority Land Acquisition. Present applicants-appellants also moved their application under Section 34 of the Act seeking further enhancement in the awarded compensation.

The learned District Judge on 07.01.2022 allowed the application moved by the respondent NHAI holding that the Arbitrator had erred in proceeding ahead with the matter after expiry of one year from the date of

entering the reference without taking either the express consent of the parties or without seeking an extension from the Court as required under Section 29A of the A&C Act. Consequently, the award dated 05.09.2017 passed by the Arbitrator was set aside.

The applicants-appellants are aggrieved against the judgment dated 07.01.2022 passed by the learned District Judge.

3. Applications under Section 5 of the Limitation Act for condoning the delay (OMP(M) Nos. 6, 9, 10, 11 & 12 of 2023)

All the appeals preferred by the respective applicants-appellants against the judgment passed by the learned District Judge are barred by limitation. The applicants-appellants have invoked Section 5 of the Limitation Act for condoning the delay.

3(i) The first and foremost question to be decided is whether Section 5 of the Limitation Act is applicable to the instant appeals instituted under Section 37 of the A&C Act. According to the applicants-appellants, Section 5 of

the Limitation Act can be invoked for condoning the delay in filing the appeals under Section 37 of the A&C Act. This proposition of law is disputed by the learned counsel for the respondent-NHAI in its reply.

I have heard learned counsel on the above issue.

3(i) (a) It will be appropriate to first refer to Section 37 of the Arbitration and Conciliation Act, 1996.

*"37**. Appealable orders.—***

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under

this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

Instant appeals have been filed under Section 37 (1) (c) of the Arbitration and Conciliation Act.

3(i) (b) (2021) 6 SCC 460 [Government of Maharashtra (Water Resources Department) Represented by Executive Engineer Versus **Borse Brothers Engineers and Contractors Private Limited]** inter-alia holds that Section 5 of the Limitation Act is applicable for condoning the delay in filing appeals under Section 37 of the Arbitration and Conciliation Act, 1996. Relevant paras from the judgment are as under :-

"23. Section 37 of the Arbitration Act, when read with section 43 thereof, makes it clear that the provisions of the Limitation Act will apply to appeals that are filed under section 37. This takes us to Articles 116 and 117 of the Limitation Act, which provide for a limitation period of 90 days and 30 days, depending upon whether the appeal is from any other court to a High Court or an intra-High Court appeal. There can be no doubt whatsoever that section 5 of the Limitation Act will apply to the aforesaid appeals, both by virtue of section 43 of the Arbitration Act and by virtue of section 29(2) of the Limitation Act.

27. Even in the rare situation in which an appeal under section 37 of the Arbitration Act would be of a specified value less than three lakh rupees, resulting in Article 116 or 117 of the Limitation Act applying, the main object of the Arbitration Act requiring speedy resolution of disputes would be the most important principle to be applied when applications under section 5 of the Limitation Act are filed to condone delay beyond 90 days and/or 30 days depending upon whether Article 116(a) or 116(b) or 117 applies. As a matter of fact, given the timelines contained in sections 8, 9(2), 11(4), 11(13), 13(2)-(5), 29A, 29B, 33(3)-(5) and 34(3) of the Arbitration Act, and the observations made in some of this Court's judgments, the object of speedy resolution of disputes would govern appeals covered by Articles 116 and 117 of the Limitation Act.

32. Thus, from the scheme of the Arbitration Act as well as the aforesaid judgments, condonation of delay under section 5 of the Limitation Act has to be seen in the context of the object of speedy resolution of disputes.

35. It may also be pointed out that though the object of expeditious disposal of appeals is laid down in section 14 of the Commercial Courts Act, the language of section 14 makes it clear that the period of six months spoken of is directory and not mandatory. By way of contrast, section 16 of the Commercial Courts Act read with the Schedule thereof and the amendment made to Order 8 Rule 1 CPC would make it clear that the defendant in a suit is given 30 days to file a written statement, which period cannot be extended beyond 120 days from the date

of service of the summons; and on expiry of the said period, the defendant forfeits the right to file the written statement and the court cannot allow the written statement to be taken on record. This provision was enacted as a result of the judgment of this Court in Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344.

42. For all these reasons we reject the argument made by Shri George that the application of section 5 of the Limitation Act is excluded given the scheme of Commercial Courts Act.

43. The next important argument that needs to be addressed is as to whether the hard and fast rule applied by this Court in N. V. International Vs. State of Assam, (2020) 2 SCC 109 is correct in law. Firstly, as has correctly been argued by Shri Shroti, N.V. International (supra) does not notice the provisions of the Commercial Courts Act at all and can be said to be per incuriam on this count. Secondly, it is also correct to note that the period of 90 days plus 30 days and not thereafter mentioned in section 34(3) of the Arbitration Act cannot now apply, the limitation period for filing of appeals under the Commercial Courts Act being 60 days and not 90 days. Thirdly, the argument that absent a provision curtailing the condonation of delay beyond the period provided in section 13 of the Commercial Courts Act would also make it clear that any such bodily lifting of the last part of section 34(3) into section 37 of the Arbitration Act would also be unwarranted. We cannot accept Shri Navare's argument that this is a mere casus omissus which can be filled in by the Court.

> *63.* ***Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13(1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches.***"

In the above judgment, Hon'ble Apex Court has already held that Section 5 of the Limitation Act is applicable to the appeals preferred under Section 37 of the A&C Act. Point is answered accordingly in favour of the appellants.

3(i) (c) In terms of Article 116 of the Limitation Act, the appeal to this Court from the judgment passed by learned District Judge could have been preferred within 90 days

from the date of judgment. The impugned judgment was passed on 07.01.2022. There is a delay of about two months in preferring the appeals. According to the averments made in the application, the applicants-appellants were not informed by their counsel about passing of the judgment at the relevant time ; They were under the bonafide belief that as and when the judgment would be passed, their counsel would intimate them ; It was only when they inquired about the case from their counsel on 27.04.2022 that they came to know about the judgment having already been passed on 07.01.2022 ; Thereafter steps were taken to institute the present appeals. The respondents-non applicants though have opposed condoning the delay, however, in the given facts and circumstances, taking into consideration the averments in the applications and in the interest of justice, equity and good conscience, I am inclined to condone the delay of about a couple of months taken in

the institution of appeals. Hence, the delay, as occurred in instituting the appeals is condoned.

3(i) (d) OMP(M) Nos. 6, 9, 10, 11 & 12 of 2023 are allowed and stand disposed of.

4. Arbitration Appeal Nos. 17,16, 18,19 and 21 of 2023
Be registered.

Merits of the appeal

4(i) Learned District Judge in the impugned judgment has set aside the award passed by the Arbitrator primarily on the ground that the same was non-compliant to Section 29A of the A&C Act ; The mandate of arbitration stands terminated if the award is not made within the period of 12 months from the date Arbitral Tribunal enters upon the reference. It has further been held that the reference petition was received by the Arbitrator on 08.07.2016. The award, therefore, was required to be pronounced by 07.07.2017. The award was, however, announced on 05.09.2017. By this time, the mandate of the Arbitrator stood terminated by operation of law. It was

thus concluded by the learned District Judge that proceedings conducted by the Arbitrator including the award pronounced by him after 07.07.2017 were without jurisdiction. It was also held that there was no express consent of the parties in terms of Section 29A (3) for extending the period for making the award by a further period of six months. No extension in time for making the award was granted by the Court. Therefore, the award that was passed by the Arbitrator after expiry of one year without there being express consent of the parties to extend the period or any order by the Court under Section 29A (4) extending the period, was not in consonance with law. Accordingly, the award passed by the Arbitrator was set aside. Liberty was granted to the parties to apply for extension of time if permissible in law.

4(ii) I have heard learned counsel on both sides on the above issue. My observations are as under :-

4(ii) (a) Section 29A of the A&C Act as it existed in the year 2016 (brought into force with effect from 23.10.2015 by Act 3 of 2016-2015 Amending Act) reads as under :-

> ***"29A. Time limit for arbitral award.—***
>
> *(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*
>
> *Explanation.- For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.*
>
> *(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.*
>
> *(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.*
>
> *(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.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

As per Section 29A(1) of the Arbitration and Conciliation Act, the award has to be made within a period of 12 months from the date the Arbitral Tribunal enters upon the reference. Section 29A(3) provides for extension of the period specified in sub section (1) for a further period not exceeding six months by the consent of the parties.

An arbitral award, therefore, can be made within a period of 12 months from the date the Arbitrator enters upon the reference. The parties can extend this period by consent for a further period not exceeding six months. An award made beyond 12 months under Section 29A(1) or 18 months under Section 29A(3) shall not be valid.

4(iii) The court can extend the mandate of the Arbitral Tribunal as per Section 29A(4). In the instant case, the Arbitrator entered upon the reference on 08.07.2016. Permissible period of 12 months within which the award could have been validly pronounced under Section 29A(1) lapsed on 07.07.2017. However, both the contesting parties continued with the proceedings. None of the parties objected to the arbitration proceedings conducted by the Arbitrator beyond 07.07.2017. From the conduct of the parties, a tacit consent on their part for extending the period of arbitration can be inferred. Under Section 29A(3), parties by consent can extend the period of

arbitration not exceeding six months. In the instant case, the Arbitral Tribunal passed the award within 2 months after the expiry of 12 months. The fact that respondent-NHAI had consented to the continuation of proceedings beyond 12 months is apparent from the fact that even while agitating against the award passed by the Arbitrator, it had not taken any such ground before the learned District Judge that the award passed by the Arbitrator was bad in the eyes of law on the count that mandate of the Arbitral Tribunal had lapsed on 07.07.2017. It was a case of implied consent on part of respondent-NHAI. In this regard, it would be appropriate to refer to **AIR 2002 SC 1157 (Inder Sain Mittal** Vs. **Housing Board, Haryana and others).** Relevant para from the judgment is as follows :-

> *"13. In the case on hand, it cannot be said that continuance of the proceedings and rendering of awards therein by the Arbitrator after his transfer was in disregard of any provision of law much less mandatory one but, at the highest, in breach of agreement. Therefore, by their conduct by participating in the arbitration proceedings without any protest the parties would be deemed to have waived their right to*

challenge validity of the proceedings and the awards, consequently, the objections taken to this effect did not merit any consideration and the High Court was not justified in allowing the same and setting aside the award."

In **ARBP No. 28 of 2020 M/s SARA International Pvt. Ltd.** Vs. **South Eastern Railways & Another**, the Orissa High Court has held as under :-

"18. Further, the contentions of the both the parties reveal that the learned Arbitral Tribunal on 30.11.2019 recorded consent of the learned counsel for the respective parties that the proceedings of the Tribunal will be governed under the amended provisions of Section 29A in 2019 Amendment Act and therefore the period for making the award can be reckoned from 27.08.2019 i.e. the date when the pleadings were completed. However, the opposite parties are now disputing such consent stating that no oral or written consent was given on their behalf to agree to the said proposition. The said denial of the opposite parties cannot make any difference for three reasons. Firstly, the learned counsel who was duly authorized on their behalf to plead the proceedings before the Tribunal has actually consented to the same and even if it is accepted, this being a consent in law, could not bind the opposite parties that they were not governed by the Amendment Act of 2019, the issue has to be decided as per applicable law. Secondly, the Arbitral Tribunal proceeded beyond one year from the date of entering upon the reference i.e. after 02.02.2020, even it is assumed that undeniable fact is that the opposite parties participated in the proceedings on 02.02.2020, 03.03.2019 and 04.03.2020 without raising any objection with regard to termination of the mandate of the Tribunal. The opposite parties even filed their affidavits before the Arbitral Tribunal, on 18.03.2020 for being treated as examination in chief. Their conduct thus shows that they

acquiesced in such consent. Thirdly, the amendment in Section 29 A vide the Amendment Act, 2019 being procedural in nature in any case has to be read as retrospective in nature."

4(iv) In view of above discussion on facts & law, it has to be held that consent of the parties envisaged under Section 29A(3) of the 2015 Arbitration & Conciliation Act for extending the arbitral period need not necessarily be either express or in writing. There can be a deemed consent, an implied consent of the parties, which can be gathered from their acts and conduct. Their acquiescence in proceeding with the arbitration case beyond twelve months without raising any objection to the continuation of proceeding does amount to consent. On the basis of such consent, the arbitral award if passed within a further period of six months would be a valid award. In the given facts, consent of the parties to continue the arbitral proceedings beyond the period of one year (12 months) from the date the Arbitrator entered upon the reference, is writ large. The award was passed by the Arbitrator within further period of two months. The award was thus saved

by Section 29A(3) of the Act as it was passed within the period permitted under Section 29A (3) of the Act. The conclusion drawn by learned District Judge about the award being illegal having been passed beyond the mandated period, therefore, being illegal, cannot be justified.

Under Section 29A(3) of the Arbitration and Conciliation Act, there is no requirement that consent of the parties has to be expressed and that too, in writing.

5. For the aforesaid reasons, the impugned judgments passed by the learned District Judge cannot be sustained. Accordingly, these appeals are allowed. The impugned judgments in Arbitration Appeals No. 17, 16, 18, 19 and 21 of 2023 are set aside. The matters are remanded back to the learned District Judge Mandi for afresh consideration and decision of applications moved by the parties under Section 34 of the Arbitration & Conciliation Act on their own merits in accordance with

law. The appeals stand disposed off in the aforesaid terms. Pending applications, if any, also stand disposed off.

31st July, 2023 (K) **Jyotsna Rewal Dua ,**
Judge