

Dispute Resolution Hotline

May 22, 2012

ARBITRATION AWARD AFTER EFFLUX OF PRESCRIBED TIME: VALID OR INVALID?

The Division Bench of the Hon'ble Bombay High Court delivered a judgment in the matter of *Bharat Oman Refineries Limited vs. Ms. Mantech Consultants*¹, held that the award passed by the Arbitrator after efflux of period prescribed in the agreement is bad in law whereby the Hon'ble Court upheld the principle laid down in *NBCC Limited vs. J.G. Engineering Private Limited*² that the contract of arbitration is an independent contract and parties to such contract (including the arbitrator) are bound by the terms of such contract.

FACTS OF THE CASE

Bharat Oman Refineries Limited ("Appellant") and M/s. Mantech Consultants ("Respondent") had entered into an agreement dated December 30, 1996 ("Agreement") by which the Respondent was required to carry out certain work in respect of inter-state pipeline project. The Agreement contained an arbitration clause. Since the Respondent had not carried out the work as per the Agreement, the parties agreed to terminate the Agreement. However, subsequently certain disputes arose between the parties to the Agreement and the Respondent invoked the arbitration clause whereby a sole arbitrator was appointed by the single judge of Hon'ble Bombay High Court in February 2001.

The arbitration clause in the Agreement is as follows:

"29.3b. The award shall be made in writing and published by the Arbitrator within two years after entering upon the reference or within such extended time not exceeding further twelve months as the Sole Arbitrator shall by a writing under his own hands appoint. The parties hereto shall be deemed to have irrevocably given their consent to the Arbitrator to make and publish the award within the period referred to hereinabove and shall not be entitled to raise any objection or protest thereto under any circumstances whatsoever."

After the arguments were concluded before the arbitrator on April 21, 2004, the arbitrator, vide letter dated March 14, 2006 requested the Respondent to send him a stamp paper for publishing the award and that he endeavoured to publish the same before March 31, 2006 or latest by April 30, 2006. The Respondent forwarded the stamp paper to the arbitrator. The award was thereafter published by the arbitrator only on August 17, 2006.

The Respondent thereafter preferred an arbitration petition before the Hon'ble High Court of Bombay for setting aside the award of the arbitrator on the ground that the award passed by the arbitrator was not in accordance with the arbitration clause in the Agreement as the arbitrator had no authority to proceed with the award after the stipulated time provided in the Agreement was over. The learned single Judge accordingly allowed the petition and set aside the award on the aforesaid ground. The learned single Judge also came to the conclusion that in view of Section 15(1) (b) of the Arbitration and Conciliation Act, 1996 ("Act"); the mandate of the arbitrator would automatically stand terminated in terms of the arbitration agreement when time limit for making the award expired.

The Appellant challenged the order of the single Judge by way of an appeal before the division bench of the Hon'ble High Court of Bombay.

ISSUE

Whether the pronouncement of an award after the efflux of time as stated in the arbitration agreement is valid?

ARGUMENTS RAISED BY THE PARTIES

The Appellant contended that the Respondent had never objected before the arbitrator that the arbitrator has no jurisdiction to proceed with the matter and on the contrary, the Respondent, by handing over the stamp paper to the arbitrator had fully participated in the proceedings and waived its right to object to the delay under Section 4 of the Act. The Appellants attempted to infer that the waiver of right to object by the Respondent tantamount to an implied agreement between the parties and that the parties to the agreement can, by mutual agreement, extend the time limit provided in the agreement. The Appellant further contended that Section 15 of the Act has no application in the instant case as the said Section has application only subsequent to the arbitration agreement and during the pendency of the proceedings before the Arbitrator.

The Respondent on the other hand contended that the arbitrator has no jurisdiction to proceed with the matter as the time limit prescribed in the Agreement was over. They further submitted that as per Section 7 of the Act, the arbitration agreement should be in writing and any extension of time thereof should also be in writing. They submitted that the arbitrator is not a party to the agreement and his mandate is terminated automatically as per the time limit provided in the agreement and the further proceeding would be without jurisdiction in terms of Sections 14 and 15 of the Act.

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Whilst passing the judgment, the Division Bench of the High Court of Bombay observed the following:

In the case of *M/s. Snehdeep Auto Centre vs. Hindustan Petroleum Corporation Ltd.*³, the award was passed after the period provided for in the agreement was over, where the extension was provided by the Court and not mutually agreed on by the parties. Whereas, in the case of *NBCC Ltd.*, the Supreme Court observed that *"The arbitrator was bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time."*

The Division Bench of the High Court of Bombay further observed in the case of *NBCC Ltd.*,

"22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time limit under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an Award. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them."

The Division Bench of the Hon'ble High Court of Bombay took the view that the time limit provided in the arbitration agreement in a given case cannot be said to have been extended by the act of one side or by conduct of one side and the arbitrator may not get jurisdiction to proceed further with the matter in the case the arbitration agreement provides a particular time limit and the same is not extendable as per the arbitration clause in the agreement.

Further, the Division Bench of the Hon'ble High Court of Bombay took a view that mere providing stamp paper for publishing arbitral award cannot be inferred as participation in the arbitral proceedings since the arguments before the arbitrator were already over. Therefore the argument of waiver as raised by the Appellant has to be rejected and the principle laid down by *Snehdeep* case in relation to waiver will have no application in the present case.

The Division Bench of the Hon'ble High Court of Bombay also stated that the object and the scheme of the Act are to secure expeditious resolution of disputes. The arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the agreed procedure. All are bound by the agreed terms. Therefore, the arbitration proceedings should be governed and run by the terms. The arbitrator, therefore, cannot go beyond the arbitration agreement clauses. The speedy and alternative solution to the dispute just cannot be overlooked. Delay occurred, if any, may destroy the arbitration scheme itself.

The Division Bench of the Hon'ble High Court of Bombay, while dismissing the present appeal held that where (a) the Arbitration Agreement prescribes a period within which the Award was to be passed and (b) the said period has expired and has not been extended by mutual consent of the parties, - the award passed by the Arbitrator after efflux of such period is bad in law and contrary to the agreed terms by which the parties as well as the Arbitrator are bound.

CONCLUSION AND ANALYSIS

It is also pertinent to discuss the present case in conjunction with the decision of the Hon'ble Delhi High Court in the recent case of *Peak Chemical Corporation Inc. vs. National Aluminium Co. Ltd.*⁴, wherein the Hon'ble Delhi High Court had held that since:

1. *the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, and the detailed reasons issue-wise; and*
2. *the dispute between the parties has been pending since 1996;*

It would not be in the interests of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination and since the learned Arbitrator who passed the impugned Award has since expired, a fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far.

Please refer to our hotline dated **February 12, 2012** for detailed understanding of the abovementioned case.

Therefore, in the event there is no time stipulated in the agreement for the pronouncement of arbitral award and if the award is passed after un-reasonable delay, the Courts would still consider the factors as set out in *Peak vs. Nalco* before holding that the award is against the public policy of India and provide additional time for the arbitral award to be announced.

The present case however, proceeds on the principle that if the arbitration agreement prescribes a period within which the award is to be passed, any award passed beyond such period would be bad in law unless the parties have mutually agreed to extend this period.

Looking at the diverse stances taken by various Courts, one must bear in mind that the interpretation of law and precedents should be in light of the facts and circumstances at hand. The law is binding if facts are similar and not when facts are different. The fact based decision cannot be treated as precedents, especially when those are distinct and distinguishable.

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You can direct your queries or comments to the authors

¹ Appeal No. 702/ 2011 in Arbitration Petition No. 477 of 2006

² (2010) 2SCC 385

³ Appeal No. 143 of 2012 in Arbitration Petition No.430 of 2008, Bombay High Court

⁴ O.M.P. No. 160/2005, High Court of New Delhi

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Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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