

## Dispute Resolution Hotline

October 13, 2017

### APEX COURT RULES ON INHERENT POWER OF ARBITRAL TRIBUNALS FOR PROCEDURAL REVIEW

Supreme Court holds that:

- An arbitral tribunal has inherent power to recall its order of termination in the event of default in filing statement of claim.
- Argument of tribunal being *functus officio* stands dealt with insofar as proceedings where termination is due to default in filing statement of claim.

#### INTRODUCTION:

In a recent decision in Srei Infrastructure Finance Ltd. (“**Srei Infrastructure**”) vs. Tuff Drilling Private Limited (“**Tuff Drilling/Claimant**”),<sup>1</sup> the Supreme Court (“**Court**”) has held that in the event an arbitral tribunal terminates the proceedings under Section 25(a) of the Arbitration & Conciliation Act, 1996 (“**A&C Act**”), it can recall its order if sufficient cause is shown by the claimant for committing default in filing its statement of claim. The Supreme Court held that if the arbitral tribunal is empowered to condone default on sufficient cause being shown, this can be done by the tribunal recalling its order after the proceedings are terminated.

#### FACTS:

As per the first preliminary meeting between the Sole Arbitrator and the parties on August 27, 2011, the Tuff Drilling was required to file its Statement of Claim by November 19, 2011. The Claimant failed to submit the SOC. The date for submission was extended to December 9, 2011. The Claimant failed again in making its submission. On December 12, 2011, the tribunal terminated the proceedings in view of Section 25(a) of the A&C Act<sup>2</sup>.

On January 20, 2012, the Claimant filed an application stating reasons for delay in detail, praying for condonation of delay in filing the SOC and recall of the order of termination. On April 26, 2012, the Tribunal rejected the Claimant’s application on the ground that it had become *functus officio* and consequently could not recall its order of termination.

Aggrieved by the Tribunal’s order, the Claimant filed a revision application under Art. 227 of the Constitution before the Calcutta High Court. The High Court held that 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 Claimant’s application on merits. Aggrieved by the Calcutta High Court judgment, the Original Respondent approached the Supreme Court in appeal.

#### ISSUES:

- 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?
- 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?

#### JUDGMENT:

The Court upheld the decision of the Calcutta High Court and held that the arbitral tribunal can recall the order and re-commence the proceedings after termination of proceedings under **Section 25(a)** on sufficient cause being shown by the Claimant. It directed the tribunal to proceed to decide the Claimant’s application expeditiously. The reasoning of the Court is encapsulated below.

#### **The scheme of Section 25(a)**

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**Section 25** empowers an arbitral tribunal to terminate the proceedings upon failure of the Claimant to communicate his SOC within the time as envisaged by **Section 23**, unless sufficient cause is shown by the Claimant. The Court considered that conjunction of the words “*where without showing sufficient cause*” and “*the claimant fails to communicate his statement of claim*” imposes a duty on the tribunal to inform the claimant to show-cause why the arbitral proceedings should not be terminated. The Tribunal had done so. However, the Court stated that 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. Hence, it did not matter if the cause was shown before or after termination of the proceedings under Section 25(a). The Court held<sup>3</sup> that an arbitral tribunal is not denuded from accepting the cause and allowing the submission of SOC after an order under Section 25(a).

#### **Termination under Section 25(a) versus Section 32(2)(c):**

The Court made a comparative analysis of termination under Sections 25(a) and under Section 32(2). Whilst Sections 32(2)(a) and 32(2)(c) were not applicable to the present case, the Court delved into Section 32(2)(c) – where a tribunal may terminate proceedings if it finds that the continuation of the proceedings has for any other reason become ‘*unnecessary*’ or ‘*impossible*’. The Court held that these terms did not cover a situation of ‘*default*’ as under Section 25(a). Further, Section 32(2) would come into play when a situation under Section 25(a) is absent i.e. the proceedings have continued. The Court also sought aid from Section 33(3) which reiterates termination of the ‘*mandate of the arbitral tribunal*’. The absence of these words in Section 25(a) further reinforces the legislative intent and purpose in making a distinction between the two provisions.

#### **Ancillary powers of the arbitral tribunal: Power of Review**

The Court drew a comparison between ancillary powers of an industrial tribunal to set aside its *ex-parte* award on being satisfied that there was sufficient cause, despite absence of an express provision under the Industrial Disputes Act, 1956. The Court held 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, unless there is any indication in the statute to the contrary.

While recognizing that power of review has to be expressly conferred by a statute, the court held that power of review of merits is distinguishable to review of procedure. A quasi-judicial authority is vested with inherent powers to invoke procedural review. When a party establishes that the procedure followed by the quasi-judicial authority suffers from illegality vitiating the proceeding, the order passed is liable to be recalled and reviewed.

The Court also analyzed Section 19(2) of the A&C Act which permits the parties to agree on the procedure to be followed by the arbitral tribunal. The Court held that this provision permitted parties to agree upon a remedy of review/revival of arbitral proceedings in the arbitration agreement. Consequently, the Court opined that while parties could agree to such a review, there was no reason to denude a tribunal from reviving the arbitral proceedings already terminated – in the absence of such agreement.

#### **Order IX Rule 9 of Code of Civil Procedure, 1908**

The Court held that the tribunal could rely on Order IX Rule 9 of the Code of Civil Procedure, 1908<sup>4</sup> in setting aside an order of dismissal where sufficient cause is shown after the order. The Court held that under **Section 19** of the A&C Act<sup>5</sup>, the tribunal is not bound by the procedure laid down under the Code. However, it is not incapacitated from relying on the CPC. It can also 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. The Court held that principles of Order IX Rule 9 could therefore be invoked by the arbitrator.

#### **Scheme of the A&C Act**

Delving into the object and purpose of the A&C Act, the Court held that upon denuding the arbitral tribunal from recalling its termination order under Section 25(a), the parties would only be left with the remedy to approach the High Court under its writ jurisdiction. This would be contrary to the object and purpose of the A&C Act to provide effective dispute resolution. Going a step further, the Court held that if the tribunal was denuded from its power to recall its decision under Section 25(a), it would also be denuded from recalling or reviewing a decision under Section 25(b) where the respondent fails to communicate its Statement of defence and the tribunal continues with the proceedings – leaving the respondent to approach the High Court by way of a writ petition.

#### **ANALYSIS:**

Shutting the door on the oft heard argument of the arbitral tribunal being *functus officio*, this judgment reiterates the purport of Section 5 of the A&C Act<sup>6</sup> which remains central to effectuating speedy and effective dispute resolution under the A&C Act. Courts in India are increasingly adopting the policy of minimal court intervention in arbitration proceedings, thereby leaving a lion’s share of the proceedings emanating out of arbitration to be dealt with by the arbitral tribunals themselves, wherever appropriate.

The judgment recognizes the critical distinction between power of review on merits – a statutory

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power, as opposed to powers of a tribunal to review procedure – an inherent power. This distinction significantly cuts down the scope of court interference where procedural defects arise in matter. Being procedural in nature, these defects can be effectively cured by the forum involved and reduce the scope of court intervention. By extending the power of procedural review to arbitral tribunals and vesting an arbitral tribunal with ancillary inherent powers, the Supreme Court has taken a wide step towards empowerment of arbitral tribunals. This judgment also places arbitral tribunals at a pedestal equal to quasi-judicial authorities – entailing equal applicability of principles governing procedure.

– Kshama Loya Modani & Sahil Kanuga

You can direct your queries or comments to the authors

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<sup>1</sup> Civil Appeal No. 15036 of 2017, decided on September 20, 2017

<sup>2</sup> Section 25(a): “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;”

<sup>3</sup> Relying on the decision of the Delhi High Court in *Awasthi Construction Co. vs. Govt. Of NCT of Delhi*, 2013 (1) Arb. LR 70 (Delhi)(DB).

<sup>4</sup> Order IX Rule 9:“(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.”

<sup>5</sup> Section 19: “(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872). (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

<sup>6</sup> Section 5: “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

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