IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.01.2021

\+ **O.M.P. (T) (COMM.) 80/2020**

PCL SUNCON .....Petitioner

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA .....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Dr Amit George, Mr Swaroop George, Mr Amol Acharya and Mr Rayadurgam Bharat, Advocates.

For the Respondent : Ms Madhu Sweta, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner – a Joint Venture constituted by Progressive Construction Limited and SUNCON Construction Berhard, Malaysia – has filed the present petition, *inter alia,* impugning an order dated 20.04.2020 passed by the two arbitrators terminating the arbitral proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act').

2. The present application is filed under Section 14(1)(a) read with Section 15 of the A&C Act. The petitioner further prays for

substitution of the Arbitrator by an independent arbitrator appointed by this Court.

3. The arbitral proceedings were terminated because the arbitrator nominated by the petitioner had resigned and the petitioner had not taken steps to nominate another arbitrator in his place. Consequently, the arbitral proceedings could not proceed and the remaining two arbitrators constituting the Arbitral Tribunal concluded that it was impossible to continue the proceedings and, accordingly, terminated the same. The petitioner claims that there was a communication gap and the petitioner was not aware that the arbitrator appointed by it had resigned. The Arbitral Tribunal had not issued any notice to the petitioner in this regard prior to terminating the arbitral proceedings.

4. The respondent (hereinafter 'NHAI') contests the maintainability of the present petition as well as contends that the impugned order cannot be faulted.

5. The aforesaid controversy arises in the following context.

6. NHAI had invited bids for *"Four laning and Strengthening of the Existing two lanes between Km. 317 and Km. 65 on NH-2, in State of U.P. and Bihar for construction Package IV-A: Contract Agreement No. GTRIP/5."* Pursuant to the said notice inviting tenders, the petitioner submitted its bid on 15.12.2001 and it was opened on the same day. The petitioner's bid was accepted and by a letter dated 23.02.2002, the petitioner was awarded the contract for an amount of ₹3,96,47,78,901/-. A formal agreement between the parties was

executed on 28.03.2002. The works were divided into three sections. The first section was to be completed within a period of eighteen months from the date of commencement; the second section was to be completed within a period of twenty four months from the date of commencement; and the third section was to be completed within a period of thirty six months from the date of commencement, that is, by 30.03.2005.

7. The petitioner claims that certain disputes arose between the parties in respect of the said contract. NHAI claims that the petitioner did not complete the works within the stipulated time and therefore, was liable to pay liquidated damages. The petitioner invoked the arbitration clause. It claimed ₹57,84,00,000/- towards overstay/overhead charges; ₹2,50,00,000 as refund of the liquidated damages deducted by NHAI; and ₹40,04,000/- for rehabilitation of Bridge 58/1. The petitioner also claimed waiver of liquidated damages. In addition, the petitioner also claimed interest (pre-suit *pendente lite* as well as future interest) as well as costs quantified at ₹10 lacs.

8. The petitioner also filed a petition under Section 9 of the A&C Act (O.M.P. 1019/2013) seeking certain measures of interim protection. The said petition was disposed of by an order dated 09.01.2015 and the recovery of liquidated damages was stayed during the arbitral proceedings.

9. The petitioner nominated Justice E. Padmanabhan (Retd.) as its nominee arbitrator. NHAI appointed Mr. S.R. Pandey as its nominee and both the nominated arbitrators nominated Mr. B. Majumdar as the Presiding Arbitrator. With the appointment of the Presiding Arbitrator on 03.08.2015, the Arbitral Tribunal was constituted. The petitioner filed its statement of claims and NHAI also filed counter claims before the Arbitral Tribunal *inter alia* claiming ₹37,15,00,000/- as loss due to short recovery of liquidated damages; ₹60,55,04,379/- as loss of toll revenue from 20.07.2006 to 17.05.2008; and ₹24,59,03,042/- as loss of toll revenue from 18.05.2008 to 20.12.2010. In addition, NHAI also claimed interests (past *pendente lite* and future interest) in addition to costs quantified at ₹15 lacs.

10. The Arbitral Tribunal commenced hearings. In all, the Arbitral Tribunal held eight sittings. The last hearing was held on 11.10.2017. The record of the proceedings indicates that the arguments on behalf of the claimant (the petitioner herein) were heard. However, Ms. Madhu Sweta, the learned counsel for NHAI submits that the said arguments were limited to the application regarding production of additional documents and amendment of claims towards overstay/overhead charges. The Tribunal had fixed further hearings on 16.01.2018, 17.01.2018 and 18.01.2018. However, the said hearings were cancelled on account of non-availability of Justice E. Padmanabhan (Retd.). The Presiding Arbitrator had also sent letters to Justice E. Padmanabhan (Retd.) requesting him to intimate convenient dates to fix further hearings. However, it appears that the Tribunal

was unable to fix further hearings. The Presiding Arbitrator also sent a communication to the petitioner advising it to find out from Justice E. Padmanabhan (Retd.) dates convenient to him for scheduling the hearing. After receipt of the said communication, the petitioner requested Justice E. Padmanabhan (Retd.) to intimate the dates convenient to him. Apparently, he did not do so.

11. On 19.02.2019, Justice E. Padmanabhan (Retd.) sent a letter to the petitioner that the last sitting was held on 11.10.2017 and further hearings could not take place due to various reasons. He stated that due to his busy schedule, he was not able to agree on dates, which are convenient to other learned co-arbitrators and therefore, he was resigning as an arbitrator. He requested the petitioner to nominate another arbitrator in his place. Copies of the resignation letter were forwarded to the other co-arbitrators as well.

12. The petitioner did not receive any communication from the remaining two arbitrators informing it their intention to terminate the arbitral proceedings. The petitioner claims that it attempted to appoint a substitute arbitrator but the process was delayed as the persons, who were approached by the petitioner, did not consent to be appointed as an arbitrator. In addition, the authorized officer of the petitioner, who was pursuing with the matter on its behalf, abandoned his assignment due to serious illness of his wife. It is stated that the officer who was appointed in his place took some time to regularize his activities.

13. On 20.04.2020, the Arbitral Tribunal passed the impugned order terminating the arbitral proceedings under Section 32(2)(c) of the A&C Act. The petitioner claims that the said order was not communicated to it. On 22.05.2020, the petitioner sent a letter to NHAI and the arbitrators nominating Sh. Subhash I. Patel as its nominee arbitrator and requested the Presiding Arbitrator to schedule a hearing. In response to the same, the petitioner was informed about the impugned order dated 20.04.2020, under a cover of the letter dated 27.05.2020. The petitioner claims that it was for the first time that it was informed that the arbitral proceedings had been terminated on 20.04.2020.

14. The petitioner sent a letter dated 29.05.2020 requesting the Presiding Arbitrator to provide the petitioner with a copy of the impugned order dated 20.04.2020. The petitioner claims that it received a copy by mail dated 01.06.2020.

15. A plain reading of the impugned order indicates that the arbitrators had noted that hearings could not be fixed as no response had been received from Justice E. Padmanabhan (Retd.) to the communication sent by the Presiding Arbitrator. It was further noted that there was also lack of initiative on the part of the petitioner as no proposal had been made for fixing any new dates to proceed with the adjudication process. The petitioner was accordingly advised to check the convenience of Justice E. Padmanabhan (Retd.) for further hearings but while the Arbitral Tribunal was awaiting the petitioner's response, Justice E. Padmanabhan (Retd.) had by a letter dated

19.02.2019, resigned as an arbitrator and requested the petitioner to nominate another arbitrator. The arbitrators noted that more than a year had elapsed and the petitioner had not appointed an arbitrator in his place. The arbitrators noted that because of the deadlock, the continuation of proceedings had become impossible and accordingly, terminated the arbitral proceedings under Section 32(2)(c) of the A&C Act.

Submissions of counsel

16. Ms. Madhu Sweta, learned counsel appearing for NHAI contended that the present petition is not maintainable as the entire arbitral proceedings has been terminated in terms of Section 32(2)(c) of the A&C Act and this was not a case where arbitrators had withdrawn from the proceedings or mandate of any arbitrator has been terminated as contemplated under Section 14(1)(a) of the A&C Act. She submitted that the petitioner could approach the court under Section 15 of the A&C Act only in a case where the arbitrator had withdrawn from the arbitral proceedings or had become *de jure* or *de facto* unable to perform his functions. In such circumstances, a substitute arbitrator could be appointed. However, in a case where the entire arbitral proceedings have been terminated, there is no case for appointing any arbitrator under Section 15(2) of the A&C Act. She referred to the decision of the Division Bench of the Calcutta High Court in ***The India Trading Company v. Hindustan Petroleum Corporation Limited: 2016 SCC OnLine Cal 479*** and on the strength of the said decision contended that the decision of the Arbitral

Tribunal to put an end to the proceedings is a final award, which can be challenged only by way of an application for setting aside the same under Section 34(2) of the A&C Act. She contended that in view of the said decision, the recourse to an application under Section 14 of the A&C Act was not available to the petitioner.

17. In addition, she also referred to the decision of a Coordinate Bench of this Court in ***Angelique International Limited v. SSJV Projects Private Limited and Anr.: 2018 SCC OnLine Del 8287***, wherein the court had accepted the contention that the termination of proceedings in respect of the claim filed by the petitioner would amount to an arbitral award, which can be challenged only by a petition under Section 34 of the A&C Act. The court had further reasoned that termination of arbitral proceedings on the ground that the petitioner was not proceeding with the same would be akin to dismissal of a suit on the ground of non-prosecution and therefore, could be challenged only in an application under Section 34 of the A&C Act and on the limited grounds as available to an aggrieved party under the said provision.

18. Next, Ms. Sweta submitted that the petitioner was responsible for the delay in appointment of an arbitrator in place of Justice Padmanabhan (Retd.) and therefore, the decision of the Arbitral Tribunal to terminate the arbitral proceedings cannot be faulted. She further stated that in the event, the impugned order is set aside and the arbitral proceedings are commenced, the same ought to be with costs.

19. Dr. George, learned counsel appearing for the petitioner countered the aforesaid submission. He submitted that the question whether a petition under Section 14 of the Act is maintainable against an order passed by the Arbitral Tribunal in exercise of powers under Section 32(2)(c) of the A&C Act was settled by the decision of the Supreme Court in ***Lalitkumar V. Sanghavi (Dead) through LRs and Anr. v. Dharamdas V. Sanghavi and Ors.: (2014) 7 SCC 255***.

20. Dr. George further contended that it was well settled that an order terminating the proceedings under Section 32(2) of the A&C Act could not be considered as an award. He submitted that termination of the arbitral proceedings on account of non-prosecution of claims also cannot be construed as an award, which can be challenged under Section 34 of the A&C Act. He relied on the decisions of this Court in ***Economic Transport Organisation v. Splendor Buildwell Pvt. Ltd.: MANU/DE/1755/2018***; ***Bridge & Roof Co. (India) Ltd. v. Guru Gobind Singh Indraprastha University and Anr.: 2017 SCC OnLine Del 10412***; ***Puneet Kumar Jain v. MSTC Limited and Ors.: MANU/DE/7910/2017***; ***Shushila Kumari and Anr. v. Bhayana Builders Private Limited: 2019 SCC OnLine Del 7243***; ***Gangotri Enterprises Limited v. NTPC Tamil Nadu Energy Company Limited: (2017) 237 DLT 690***; ***Pandit Munshi and Associates Ltd. v. Union of India and Ors.: 2015 (2) ARB LR 40 (Delhi)***; and ***Ramesh D. Shah v. Tushar D. Thakkar: 2017 SCC OnLine Bom 9251*** in support of his contentions.

21. Next, he submitted that the decision of this Court in ***Angelique International Limited*** (*supra*) strikes a discordant note inasmuch as it holds that only a petition under Section 34 of the A&C Act would be maintainable against an order terminating the arbitral proceedings under Section 32(2)(c) of the A&C Act. He submitted that the said decision is *per incuriam* as it ignores the binding decisions of this Court in ***Bridge & Roof Co.*** (*supra*); ***Puneet Kumar Jain*** (*supra*); ***Shushila Kumari*** (*supra*); ***Gangotri Enterprises*** (*supra*) and ***Pandit Munshi*** (*supra*).

22. Lastly, he submitted that the impugned order was liable to be set aside as no preemptory notice was issued by the Arbitrators before proceeding to terminate the arbitral proceedings. However, he also conceded that the petitioner had been remiss in diligently prosecuting the arbitral proceedings and there was a considerable delay in nominating an arbitrator in place of Justice Padmanabhan (Retd.). He submitted that one of the reasons for the delay was that the schedule of fees fixed by NHAI was very low and therefore, it was very difficult to find qualified arbitrators who would be willing to accept the appointment on such fees.

Reasons and Conclusion

23. The first and foremost question to be addressed is whether the impugned order constitutes an award. As noted above, the Arbitrators had, by the impugned order, terminated the arbitral proceedings under Section 32(2)(c) of the A&C Act on account of failure on the part of

the petitioner to nominate an arbitrator to fill the vacancy resulting from the resignation of Justice E. Padmanabhan (Retd.). Recourse to a court against an award is available only under Section 34 of the A&C Act. This is clear from the plain language of sub-section (1) of Section 34 of the A&C Act which reads as :"*(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*" The use of the word 'only' in Section 34(1) of the A&C Act is significant and it clearly implies that except under Section 34 of the A&C Act, no other recourse is available against an arbitral award, to which Part-I of the A&C Act applies. The contention that the present petition is not maintainable and the only recourse available to the petitioner was to file an application under Section 34 of the A&C Act is founded on the assumption that the impugned order is an award.

24. The term 'award' is defined under Clause (c) of Sub-section (1) of Section 2 of the A&C Act, in wide terms: The said Clause defines 'arbitral award' to include an interim award. Section 31 of the A&C Act provides for the form and the content of an arbitral award. The question as to the distinction between an award and an order of an Arbitral Tribunal has been a subject matter of a number of rulings. It is now well settled that an award constitutes a final determination of a particular issue or a claim in arbitration.

25. Section 32 of the A&C Act also draws a clear distinction between a final arbitral award and orders passed by an Arbitral Tribunal. In terms of Sub-section (1) of Section 32 of the A&C Act,

arbitral proceedings stand terminated by a final award or by such orders as are specified under Sub-section (2) of the said A&C Act.

26. Section 32 of the A&C Act is relevant and is reproduced 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).
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> 2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—
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> (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,
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> (b) the parties agree on the termination of the proceedings, or
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> (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
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> (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."

27. In ***Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd: 2018 SCC OnLine Del 8678***, this Court had noted various decisions on the question as to what constitutes an award and had held as under:-

> "15. In terms of Section 32(1) of the Act, the arbitral proceedings would stand terminated by the final arbitral award or by an order of the Arbitral

Tribunal as referred to in Section 32(2) of the Act. Since the arbitral proceedings terminate on passing of the final award, it is obvious that the final award would embody a decision on all or the remaining disputes (disputes that have not been decided earlier) between the concerned parties. Section 32(2) of the Act provides an exception to the rule that arbitral proceedings would be terminated other than by passing a final award. A plain reading of Section 32(2) of the Act indicates that it, essentially, contemplates situations where it is not necessary to enter an award for settlement of the disputes or where the same becomes impossible. In terms of Clause (a) of Section 32(2) of the Act, an arbitral proceeding would come to an end with a claimant withdrawing his claim unless it is necessary to enter a final award at the instance of the respondent. Clause (b) of Section 32(2) of the Act contemplates circumstances where parties by consent seek termination of the arbitral proceedings. This may arise where the parties have resolved their difference or no longer seek to obtain an arbitral award. Clause (c) of Section 32(2) of the Act contemplates the situation where continuing the arbitral proceedings has become unnecessary or has been rendered impossible.

16. A plain reading of Section 32 of the Act indicates the fact that the final award would embody the terms of the final settlement of disputes (either by adjudication process or otherwise) and would be a final culmination of the disputes referred to arbitration. Section 31(6) of the Act expressly provides that an Arbitral Tribunal may make an interim arbitral award in any matter in respect of which it may make a final award. Thus, plainly, before an order or a decision can be termed as ‘interim award’, it is necessary that it qualifies the condition as specified under Section 31(6) of the Act: that is, it is in respect of which the arbitral tribunal may make an arbitral award.

17. As indicated above, a final award would necessarily entail of (i) all disputes in case no other award has been rendered earlier in respect of any of the disputes referred to the arbitral tribunal, or (ii) all the remaining disputes in case a partial or interim award(s) have been entered prior to entering the final award. In either event, the final award would necessarily (either through adjudication or otherwise) entail the settlement of the dispute at which the parties are at issue. It, thus, necessarily follows that for an order to qualify as an arbitral award either as final or interim, it must settle a matter at which the parties are at issue. Further, it would require to be in the form as specified under Section 31 of the Act.

18. To put it in the negative, any procedural order or an order that does not finally settle a matter at which the parties are at issue, would not qualify to be termed as "arbitral award".

19. In an arbitral proceeding, there may be several procedural orders that may be passed by an arbitral tribunal. Such orders may include a decision on whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the arbitral proceedings are to be conducted on the basis of documents and other materials as required to be decided - unless otherwise agreed between the parties – in terms of Section 24(1) of the Act. There are also other matters that the arbitral tribunal may require to determine such as time period for filing statement of claims, statement of defence, counter claims, appointment of an expert witness etc. The arbitral tribunal may also be required to address any of the procedural objections that may be raised by any party from time to time. However, none of those orders would qualify to be termed as an arbitral award since the same do not decide any matter at which the parties

are at issue in respect of the disputes referred to the arbitral tribunal."

28. In ***Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products: (2018) 2 SCC 534***, the Supreme Court considered the questions whether an award on the issue of limitation could be considered to be an interim award and whether the decision on the point of limitation was a matter of jurisdiction and therefore, be covered under Section 16 of the A&C Act. The court referred to the decision in the case of ***Exmar BV v. National Iranian Tanker Co. (The "Trade Fortitude"): [1992] 1 Lloyd's Rep. 169*** and its earlier decision in ***Satwant Singh Sodhi v. State of Punjab and Ors.: (1999) 3 SCC 487*** and held that since the award had finally determined one of the issues between the parties, the same could be considered as an interim award inasmuch as it finally determined a claim that could not be re-adjudicated all over again. The court also noted the provisions of Section 31(6) of the A&C Act, which made it clear that an Arbitral Tribunal may make an interim award on any matter with respect to which it may make a final arbitral award. The Supreme Court emphasized that the power of an arbitral Tribunal to make an interim award would extend to "*any matter with respect to which it may make a final arbitral award".* The court explained that the expression 'matter' is of a wide nature and subsumes issues at which the parties are in dispute. The court reasoned that any point of dispute between the parties, which has to be answered by an Arbitral Tribunal can be made subject matter of an interim arbitral award. The court also referred to its earlier decision in ***McDermott International Inc. v.***

Burn Standard Co. Ltd. and Ors.: (2006) 11 SCC 181 and observed that "*the aforesaid judgment makes it clear that an interim award or partial award is a final award on matters covered therein made at an intermediate stage of the arbitral proceedings.*"

29. Thus, in order for a decision of the Arbitral Tribunal to qualify as an award, the same must finally decide a point at which the parties are at issue. In cases where the same is dispositive of the entire dispute referred to the Arbitral Tribunal, the said award would be a final award, which would result in termination of the arbitral proceedings.

30. Viewed in the aforesaid context, it is clear that an order, which terminates the arbitral proceedings as the Arbitral Tribunal finds it impossible or unnecessary to continue the arbitral proceedings, would not be an award. This is so because it does not answer any issue in dispute in arbitration between the parties; but is an expression of the decision of the Arbitral Tribunal not to proceed with the proceedings.

31. The learned counsel for the NHAI had relied upon ***Angelique International Limited*** (*supra*). In that case, a Coordinate Bench of this Court had, following the decision in ***The India Trading Company*** (*supra*), reasoned that an order terminating the arbitral proceedings on account of default on the part of the claimant to proceed with the arbitration would be akin to dismissal of a suit for non-appearance and therefore, could be impugned as an award under Section 34 of the A&C Act.

32. At the core of this controversy lies the view that the decision of an Arbitral Tribunal to terminate the arbitral proceedings would by virtue of its finality constitute an arbitral award that can be challenged under Section 34 of the A&C Act.

33. In ***The India Trading Company*** (*supra*), the Division Bench of the Calcutta High Court had held that an order terminating the arbitral proceedings under Section 25(a) of the A&C Act is an award since it is a final decision, which puts an end to the arbitral proceedings. The court proceeded on the basis that the same would be sufficient to constitute the said order as an award, which can be challenged under Section 34 of the A&C Act. The relevant extract of the said decision is as under:

> "12. Termination of proceedings under Section 25(a) is a final decision which puts an end to the arbitral proceedings. The decision amounts to rejection of the claim, even though there is no adjudication on merits. It is, akin to dismissal of a suit on a technical ground, may be, non prosecution.
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> 13. There is a difference between a decision which puts an end to the arbitral proceedings and a decision whereby the arbitrator withdraws from the proceedings. Where the arbitrator withdraws from the proceedings, a substitute arbitrator may be appointed in accordance with the procedure, applicable to the appointment of the arbitrator who is replaced, but where the arbitrator puts an end to the arbitral proceedings, the claimant cannot pursue his claim.

> 14. The decision of the arbitral tribunal to put an end to the proceedings is a final award which can only challenged by way of an application for setting aside under Section 34 Sub-section (2) of the 1996 Act. Once the arbitral proceedings are terminated, the claimant cannot re-agitate the same claim by initiation of fresh proceedings since the claim would be hit by principles of constructive res judicata."

34. In ***Joginder Singh Dhaiya v. M.A. Tarde Thr. LRs: O.M.P. 370 of 2014, decided on 27.12.2014***, a Coordinate Bench of this Court took a similar view. In that case, the Arbitral Tribunal had rejected the application of the petitioner for substitution of the legal representatives as being barred by limitation. The arbitration proceedings had consequently abated. The said decision of the Arbitral Tribunal was impugned as an award by filing an application under Section 34 of the A&C Act. The court reasoned that since the arbitrator had held that the arbitration proceedings stand abated, the same had the effect of bringing about an end to the litigation and the claims raised therein. The court also noted that the impugned award had an effect of debarring the petitioner from instituting fresh proceedings on the same cause of action and therefore, would be an arbitral award in terms of Section 2(1)(c) of the A&C Act. A similar reasoning is also found in ***Angelique International Limited*** (*supra*).

35. The said reasoning runs contrary to the decision of the Supreme Court in ***Indian Farmers Fertilizer Cooperative Limited*** (*supra*). As noticed above, in that case, the Supreme Court had held that an award must finally decide a point at which the parties are at issue in

arbitration. Thus, the award (whether final or interim) must finally decide an issue for which the parties are in arbitration.

36. It is also difficult to reconcile the said reasoning in ***The India Trading Company*** (*supra*) and ***Joginder Singh Dhaiya*** *(supra)* with the view of the Supreme Court in ***Lalit Kumar V. Sanghvi (Dead) through LRs and Anr.*** (*supra*). In that case, the Supreme Court was concerned with an order passed by Arbitral Tribunal terminating the arbitral proceedings, which read as under:

> "The matter is pending since June 2003 and though the meeting was called in between June 2004 and 11-4-2007, the claimant took no interest in the matter. Even the fees directed to be given is not paid. In these circumstances please note that the arbitration proceedings stand terminated. All interim orders passed by the Tribunal stand vacated."

37. The Supreme Court held the said order to be one terminating the arbitral proceedings under Section 32(2)(c) of the A&C Act as the said order would not qualify as an order under Clauses (a) or (b) of Section 32(2) of the A&C Act. The court proceeded on the basis that Section 32 of the A&C Act is exhaustive and covers all cases of termination of arbitral proceedings. This is implicit in paragraphs nos. 11 and 12 of the said decision, which read as under:

> "11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2)

> provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.
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> 12. On the facts of the present case, the applicability of clauses (*a*) and (*b*) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (*c*) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

38. As noticed above, Section 32 of the A&C Act makes a clear distinction between an award and an order under Sub-section (2) of Section 32 of the A&C Act. Indisputably, an order under Sub-Section (2) of Section 32 of the A&C Act is not an award. It is relevant to note that that this position is accepted in ***The India Trading Company*** (*supra*) as well. In paragraph 8 of the said decision, the court has held in unambiguous terms that *"an order under Section 32(2) would not be an award."*

39. An order terminating the proceedings on failure of the claimant to file its Statement of Claims within the stipulated time, is also in the nature of an order under Sub-section (2) of Section 32 of the A&C Act

and not an arbitral award because such an order does not decide any of the points on which the parties are in issue in the arbitration.

40. In ***Neeta Lalitkumar Sanghavi and Another v. Bakulaben Dharmadas Sanghavi and Others: 2019 SCC OnLine Bom 250,*** the Bombay High Court considered the challenge to an order passed by Arbitral Tribunal rejecting the application filed by the petitioners for substitution as the legal heirs of the original claimant, under Section 14 of the A&C Act. It was contended on behalf of the respondents that the petition under Section 14 of the A&C Act was not maintainable as such an order would constitute an arbitral award. The respondents relied upon the decision of the Coordinate Bench of this Court in ***Joginder Singh Dhaiya*** (*supra*), wherein the court had held a similar order to be an award. However, the Bombay High Court, did not accept the said view and found the same to be inconsistent with the decision in the case of ***Lalitkumar V. Sangahvi*** (*supra*). The relevant extract of the said decision is set out below:

> "24. To counter this argument, Mr. Dave submitted that the impugned order passed by the sole Arbitrator was in the nature of an Award and therefore could only be challenged under Section 34 of the Act. I am unable to agree with this submission. To my mind, an Award is passed by the Arbitral Tribunal, interim or final, when it decides the lis between the parties. There has to be some adjudication on the merits of the claim or part thereof (which may include limitation) for the order passed by the Tribunal to be termed as an Award. It is not as if every order passed by the Tribunal and which

terminates the Arbitral proceedings can be termed as an Award. This is quite clear on reading Section 32 itself which contemplates that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2) of Section 32. This would clearly indicate that merely because the arbitral proceedings are terminated by an order of the Arbitral Tribunal would not necessarily make it an award. It would partake the character of an award if the lis between the parties on any issue is finally decided by the Arbitral Tribunal. In the facts of the present case, admittedly, the lis between the parties has not been decided at all. In fact, as mentioned from the narration of facts set out earlier, this litigation has a very checkered history. The impugned order rejected the application of the claimant to be formally brought on record. Having passed such an order, naturally the sole Arbitrator could not proceed any further with the arbitral proceedings, especially considering that the original claimant had expired on 7th August, 2012 and his heirs were not brought on record. There was no one to prosecute the arbitral proceedings. This order can never be termed as an arbitral award as understood under Section 34 of the Act. I must mention that the Delhi High Court in the case of *Joginder Singh Dhaiya* (supra) appears to have taken a view that where the arbitrator holds that the proceedings have abated because of not bringing the legal heirs on record, the same would amount to an arbitral award which can be challenged under Section 34 of the Act. With great respect, I am unable to agree with the reasons of the learned Single Judge of the Delhi High Court. Though the decision of the Supreme Court in the case of

Lalitkumar v. Sanghavi (supra) was brought to the attention of the Delhi High Court, it was sought to be distinguished by stating that in the facts of that case the Tribunal had terminated the arbitration proceedings as the claimant had taken no interest in the matter and it is in these circumstances that the Supreme Court held that such an order would be falling under Section 14 and 32(2)(c) of the Act and hence the remedy would be under Section 14(2). The Delhi High Court proceeded on the basis that the apparent distinction between an order and an award lies in the fact whether the decision of the Arbitral Tribunal affects the rights of the parties, concluding the dispute as to the specific issue and has finality attached to the same. The Delhi High Court held that since the order of the Tribunal had resulted in termination of the arbitration proceedings and would bar the petitioners from re-agitating the same in any other proceedings, the said order would partake the character of an award since it has finality attached to it and determined the vital rights of the parties. I am unable to agree with the reasoning given by the Delhi High Court for the simple reason that Section 32 of the Act provides for the termination of arbitral proceedings. It provides that the arbitral proceedings shall stand terminated by pronouncement of the final arbitral award or by an order of the arbitrator under sub-section (2) of Section 32. In the facts of the present case, the Arbitral Tribunal has terminated the proceedings by virtue of not bringing the petitioners on record in the arbitral proceedings. There is no pronouncement of a final arbitral award in the facts of the present case as stipulated under Section 32(1). Every order of the Tribunal terminating the arbitral proceedings can never

be terms as an award. This is clear from an ex-facie reading of section 32.

25. Furthermore, Section 34 of the Act provides for an application to be made to the Court for setting aside the arbitral award. The very heading of the above provision reflects that recourse to Section 34 is permissible only for setting aside the arbitral award on the grounds mentioned therein. It is not applicable where there is no award. As mentioned earlier, every order that terminates the arbitral proceedings would not amount to an award. There may be several situations and which are difficult to exhaustively set out, under which the Arbitral Tribunal may terminate the arbitration proceedings, as well as its mandate for reasons that this is impossible to continue with the arbitral proceedings. That would not mean that every such order would partake the character of an award. An award to my mind would be one which would decide the lis between the parties and which would have finality attached to it (subject, of course, to challenge under Section 34 of the Act). I am of the considered view, that the decision of the Supreme Court in the case of *Lalitkumar v. Sanghavi* (supra) would clearly cover the issue raised before me. I am therefore unable to agree with the reasoning of the Delhi High Court and therefore overrule the preliminary objection."

41. This court concurs with the aforesaid view. The decision in case of ***Joginder Singh Dhaiya*** (*supra*) is contrary to the decision of the Supreme Court in ***Lalitkumar V. Sanghavi*** (*supra*).

42. It is also relevant to note that in ***Angelique International Limited*** (*supra*), the court referred to the decision in ***The India Trading*** (*supra*) as a decision rendered by the Division Bench of this Court. However, the said decision was rendered by the Division Bench of Calcutta High Court. The said decision holding that an order terminating the arbitral proceedings under Section 25(a) of the A&C Act is an award, is also contrary to several decisions of this Court as noted hereinafter. In ***Bridge & Roof Co.*** *(supra)*, a Coordinate Bench of this Court had held that an application under Section 34 of the A&C Act would not maintainable against an order terminating the proceedings on account of failure of the claimant to file the statement of claim in time. The court proceeded to convert the said application to one under Section 14 of the A&C Act. Similarly, in ***Puneet Kumar Jain*** (*supra*), a Coordinate Bench of this Court held that the remedy available to the petitioner to challenge an order terminating the arbitral proceedings on account of failure on the part of the claimant to appear at the hearings and produce documentary evidence, would be to challenge the same under Section 14 of the A&C Act and not under Section 34 of the A&C Act. In a later decision in ***Economic Transport Organisation*** (*supra*), this Court had held that an order terminating the arbitral proceedings under Section 25(a) of the A&C Act was not an award and an application under Section 34 of the A&C Act to set aside the said order, is not, maintainable.

43. In this case, the impugned order passed by the arbitrators expressly states that the arbitral proceedings are terminated under Section 32(2)(c) of the A&C Act as in their view, it has become

impossible to continue the said proceedings. Indisputably, an order terminating the proceedings under Section 32(2)(c) of the A&C Act can be impugned under Section 14(2) of the A&C Act. It was contended on behalf of NHAI that even though an application under Section 14(2) of the A&C Act may be filed, the present application which is under Section 14(1)(a) and Section 15 of the A&C Act is not maintainable. This contention is unpersuasive. A plain reading of Sub-section (2) of Section 14 of the A&C Act indicates that unless otherwise agreed by parties, a party could apply to a court to decide on the question of termination of the mandate, if a controversy remains concerning any of the grounds referred to in Sub-section 14(1)(a) of the A&C Act.

44. It is also relevant to note that the impugned order has been passed by two arbitrators, as the functioning of the Arbitral Tribunal had been stalled due to the vacancy caused by resignation of the petitioner's nominated arbitrator. The impugned order is an expression of the view of the arbitrators that they are unable to continue with the proceedings on account of the default on the part of the petitioner to fill the vacancy caused by the resignation of Justice E. Padmanabhan (Retd.). It is also important to note that even though NHAI has preferred certain counter claims, it too did not take any steps to ensure that the said vacancy is filled. It was also open for NHAI to apply to the Court for the appointment of an arbitrator, however, NHAI also chose not to do so.

45. Although the arbitrators had passed the impugned order, it is not disputed that a notice that they were contemplating terminating of the proceedings was not issued to the petitioner, prior to passing of the impugned order.

46. Having stated the above, it cannot be denied that the petitioner is responsible for the delay in the proceedings as it had inordinately delayed the appointment of an arbitrator. Whilst this Court is of the view that the petitioner ought not be rendered remediless to urge its claims, NHAI's contention that the petitioner must be visited with costs is merited.

47. In view of the above, this Court considers it apposite to set aside the impugned order, albeit, subject to payment of costs of ₹25,000/-. It is so directed.

48. The petitioner has already nominated an arbitrator (Sh. Subhash I. Patel). The Arbitral Tribunal will resume the arbitration proceedings at the stage obtaining on 20.04.2020 – the date on which the arbitral proceedings were terminated. The Arbitral Tribunal shall conclude the arbitral proceedings as expeditiously as possible and preferably within one year from date. This said order is also subject to the petitioner paying NHAI the costs of ₹25,000/-, within a period of one week from today.

49. The petition is disposed of in the aforesaid terms .

VIBHU BAKHRU, J

JANUARY 12, 2021/RK