



ELP Arbitration Weekly Alert

May 22, 2019

SC RULES: THE TRIBUNAL CANNOT RECALL ITS ORDER TERMINATING THE ARBITRATION PROCEEDINGS PASSED UNDER SECTION 32(2)(C) OF THE ARBITRATION & CONCILIATION ACT, 1996

Sai Babu v. M/s Clariya Steels Pvt. Ltd¹(May 1, 2019)

¹ Civil Appeal No. 4956 of 2019, Arising out of Special Leave Petition (C) No. 20641 of 2017

BACKGROUND

Recently, the issue which arose for determination before Supreme Court was whether an arbitral tribunal can recall its order terminating the arbitration proceedings under section 32(2)(c)² of the Arbitration and Conciliation Act, 1996 (“**the Act**”).

FACTS

In the matter of an arbitration between Sai Babu (“**Sai**”) and M/s Clariya Steels Pvt. Ltd. (“**Clariya**”), the Ld. Sole Arbitrator (“**Ld. Arbitrator**”) terminated the arbitration proceedings under section 32 (2)(c) of the Act vide an order dated May 4, 2017 (“**Termination Order**”). An Application dated May 5, 2017 was filed before the Ld. Arbitrator for recall of the Termination Order (“**Application for Recall**”). The Ld. Arbitrator found merit in the Application for Recall and recalled the Termination Order by its order dated May 18, 2017 (“**Recall Order**”).

Aggrieved by the Recall Order, Sai filed a writ petition under Articles 226 and 227 of the Constitution of India (“**Writ Petition**”) before the Karnataka High Court (“**High Court**”) and prayed for setting aside of the Recall Order. By its order dated June 14, 2017 (“**HC Order**”), the High Court upheld the Recall Order and rejected the Writ Petition.

Aggrieved by the HC Order, Sai filed a special leave petition before the Supreme Court. The question before the Supreme Court was regarding the validity of the Recall Order.

OBSERVATIONS OF THE COURT

The Supreme Court perused its observations in *SREI Infrastructure*³, wherein it had determined whether the arbitral tribunal has jurisdiction to consider an application for recall of its order terminating the arbitration proceedings under section 25 (a)⁴ of the Act upon sufficient cause been shown by the claimant in the arbitration. In *SREI Infrastructure*⁵, the Supreme Court juxtaposed section 25 (a) of the Act with section 32 of the Act, and *inter alia* observed as follows:

- The conjunctive usage of the phrase “*where without showing sufficient cause*” and “*the claimant fails to communicate his statement of claim*” in section 25(a) of the Act indicates that the tribunal is duty bound to inform the claimant that he has failed to communicate his statement of claim and to call upon the claimant to show cause why the arbitral proceedings should not be terminated; and such an opportunity to show “*sufficient cause*” under section 25(a) of the Act can only be given after the claimant has failed to file the statement of claim;
- The eventuality envisaged in section 32 of the Act shall only arise when the claim has not terminated under section 25 (a) of the Act and proceeds further;
- The usage of the words “*unnecessary*” or “*impossible*” as used in section 32(2) (c) of the Act envisages situations other than where proceedings have been terminated due to default of the claimant (as provided under section 25 (a) of the Act i.e. failure to communicate statement of claim); and

² “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.”

³ *SREI Infrastructure v. Tuff Drilling Private Limited*, (2018) 11 SCC 470

⁴ “25. 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;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited];

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.”

⁵ *SREI Infrastructure v. Tuff Drilling Private Limited*, (2018) 11 SCC 470

- While the legislature has used the terms “*mandate of the Arbitral Tribunal shall terminate*” in section 32(3) of the Act, it has omitted the same in section 25 of the Act. Therefore, the implied objective of the said omission would be that if the claimant shows “*sufficient cause*” under section 25 (a) of the Act, the proceedings can be recommenced.

Noting and relying upon the above distinction drawn in *SREI Infrastructure*⁶ between the mandate of the arbitrator terminating under section 32 of the Act and the proceedings coming to an end under section 25 of the Act, the Supreme Court concluded that “*this court has clearly held that no recall application would, therefore, lie in cases covered by section 32 (3)*”.

CONCLUSION

- Based on the above findings, the Supreme Court allowed the appeal and set aside the HC Order.
- Nurturing the objective of section 32 of the Act, the Supreme Court accepted Sai’s plea and did not allow recall of the Termination Order.
- In the interest of time and with the consent of both parties, the Supreme Court appointed a substitute arbitrator (under section 15(2) of the Act) to determine the disputes between the parties which may have continued to exist despite a termination of the arbitration proceedings and the mandate of the arbitrator. This is a proactive approach taken by the Supreme Court and is in furtherance of the objective of the Act i.e. speedy resolution of disputes.

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⁶ *SREI Infrastructure v. Tuff Drilling Private Limited*, (2018) 11 SCC 470