

Senbo Engineering Limited Vs. State of Bihar and ors.

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Court : Patna

Decided On : Dec-12-2003

Judge : Aftab Alam, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 25

Appeal No. : CWJC No. 7551 of 2003

Appellant : Senbo Engineering Limited

Respondent : State of Bihar and ors.

Advocate for Def. : T.K. Jha, Senior Adv., A.P. Jittu, SC-II and K.K. Jha, Adv.

Advocate for Pet/Ap. : K.D. Chatterjee, Adv.

Disposition : Petition allowed

Prior history : Aftab Alam, J. 1. M/s. Senbo Engineering Limited, the petitioner before this Court, had a claim that it demanded to be referred for arbitration as provided under the contract. The State Government, the other party disputing the petitioner's claim, nominated an arbitrator. The petitioner felt that the appointment of the arbitrator was made in breach of the relevant provisions of the contract. It, therefore, moved the Chief Justice under Section 11(6) of the Arbitration and Conciliation Act, 19

Judgement :

Aftab Alam, J.

1. M/s. Senbo Engineering Limited, the petitioner before this Court, had a claim that it demanded to be referred for arbitration as provided under the contract. The State Government, the other party disputing the petitioner's claim, nominated an arbitrator. The petitioner felt that the appointment of the arbitrator was made in breach of the relevant provisions of the contract. It, therefore, moved the Chief Justice under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) making a request for appointment of an arbitrator on the plea that the nomination made by the State Government was non-est. The designated Judge took the view that since an arbitrator was already appointed, the petitioner's request for appointment of arbitrator was not fit to be accepted. The application filed by the petitioner was, therefore, dismissed. But in view of certain observation made in the order passed by the designated judge, the petitioner decided to appear before the person nominated by the State Government as arbitrator and raise the issue of maintainability of the proceedings before him (on the plea that his appointment was not in accordance with the provision of the contract). It appeared before the arbitrator only to find the doors closed; though keeping the proceedings alive in respect of the counter-claim of the State, the arbitrator had terminated it in regard to the petitioner's claim under Section 25(a) of the Act for its failure to file the statement of claim on the three dates fixed for the purpose. The petitioner then filed a petition before the arbitrator trying to make out sufficient cause for not submitting the statement of claim and praying that the arbitration proceedings in regard to its claim may not be deemed as terminated and that it may be allowed to raise the issue of maintainability of the proceedings before the arbitrator (on the ground that his nomination was not in accordance with the provisions of the Act) and further that in case the issue of maintainability was decided against it, to be given the opportunity to file its statement of claim and also to file its statement of defence in regard to the counter-claim of the other side. The arbitrator rejected the petitioner's application primarily on the ground that the arbitral tribunal had no power to recall or review an earlier order passed under Section 25(a) of the Act. Thus, finding the doors firmly closed and finding itself completely remediless, the petitioner has filed this writ petition challenging (i) the order dated 30.12.2002 passed by Shri D.K. Srivastava, Chief Engineer-cum-sole Arbitrator in arbitration

proceedings for settlement of disputes arising out of Agreement No. 1-J/1997-98 by which he terminated the proceeding in respect of his claims of the petitioner under Section 25(a) of the Act and (ii) the order, dated 30.6.2003 passed by the sole arbitrator in the same proceeding by which he rejected the petitioner's application for restoration of the proceeding in regard to his claim primarily on the ground that the arbitral tribunal had no power to recall or review an earlier order passed under Section 25(a) of the Act.

2. Mr. K.D. Chatterjee appearing on behalf of the petitioner submitted that the petitioner's notion to challenge the maintainability or validity of the proceedings before the arbitral tribunal itself on the ground that appointment of the arbitrator was made in breach of the provision in the contract, was quite mis-conceived. He pointed out that under Section 12(3) of the Act the appointment of the arbitrator could only be challenged on ground of his independence and impartiality or on the plea that he did not possess the qualifications agreed to by the parties. Any challenge to the arbitrator's appointment on the ground that it was not made in accordance with the provision of the contract was foreign to Section 12 of the Act and, therefore, it could not be raised before the arbitral tribunal under Section 13 of the Act. Mr. Chatterjee further submitted that if the petitioner had wished to pursue his challenge to the appointment of Shri D.K. Shrivastava, Chief Engineer as the sole arbitrator, the only remedy available was to challenge the order passed by the designated Judge rejecting its request under Section 11(6) of the Act as also the order of the State Government appointing Shri D.K. Shrivastava as the sole arbitrator by filing a writ petition. Mr. Chatterjee, however, clarified that this issue was now only of academic interest. He stated that the petitioner was sufficiently harassed and it no longer wanted to question the appointment of Shri D.K. Shrivastava as the sole arbitrator. All that the petitioner now wanted was that it may be allowed to submit its statement of claim and its defence to the counterclaim of the State Government and that an arbitration be made over its claim, in accordance with law.

The facts and circumstances of the case and the submissions made by Mr. Chatterjee give rise to three questions for consideration by the Court:--

(i) Whether a writ petition would be maintainable for challenging an order passed by the arbitral tribunal, terminating the proceeding under Section 25(a) and another order, refusing to recall that order and to restore the proceeding?

(ii) Whether the arbitral tribunal has the power and the authority, in an appropriate case, to recall its earlier order terminating the proceeding under Section 25(a) of the Act?

(iii) Whether in the present case the petitioner had sufficient cause for not communicating its statement of account to the arbitral tribunal on the three dates fixed for the purpose and provided the tribunal has the necessary authority, whether it is a fit case in which the tribunal ought to have exercised the power to recall its earlier order terminating the proceeding?

4. Re : Question No. (i) Mr. Chatterjee submitting that the Act did not provide any remedy against an order passed by the arbitral tribunal terminating the proceedings under Section 25(a). Hence, the only remedy available to an aggrieved party against such order was to file a writ petition under Article 226 of the Constitution. Mr. Tara Kant Jha, Senior Advocate appearing for the respondents did not dispute this position.

5. Mr. Chatterjee in support of his submission relied upon the decision of the Bombay High Court in *Anuptech Equipments Private Limited v. Ganpati Co-op. Housing Society Limited*, AIR 1999 Bom 219. In that decision, a learned Judge of the Bombay High Court, making a careful analysis of the different provisions of the Act and taking support from certain earlier decisions of the Supreme Court came to find and hold as follows :--

'To my mind on consideration of those provisions even if it be held that the tribunal is not a tribunal within the meaning of Article 226 of the Constitution, it would nevertheless be a person to whom a writ could go under Article 226 of the Constitution. I am, therefore, clearly of the opinion that where a remedy is not available to an aggrieved person and considering Section 5 of the Arbitration Act of 1996, this Court can exercise its extra ordinary jurisdiction under Article 226 of the Constitution. In passing I may mention that this exercise had to be undergone

in view of non-availability of remedy to aggrieved parties. It is true also that one of the objectives of the Act of 1996 is to minimise the supervisory role of Courts. On the other hand proceedings in arbitration involve the Civil rights of the parties. It is cardinal principle of our jurisprudence that no man should be left without a remedy. Judicial review cannot be made dependent on men who pass orders. Hierarchy of Courts is an answer to that.'

6. I am in respectful agreement with the view taken by the Bombay High Court and accepting the submission of Mr. Chatterjee, I would answer the first question in the affirmative.

7. As to the second question, Mr. Chatterjee submitted that the arbitral tribunal, in an appropriate case, had full authority and power to recall its earlier order terminating the proceeding under Section 25(a) of the Act. He in fact contended that on sufficient cause being shown, the arbitral tribunal would not only be justified but duty-bound to recall its earlier order in the interest of justice. Mr. Tara Kant Jha did not seriously contest the matter. He tried to deflect the issue by submitting that in this case the Court may not answer this question because the petitioner, in any event, did not have sufficient cause for not communicating its statement of account and this petition was, therefore, bound to fail for that reason.

8. Having regard to the submission made by Mr. Jha, it would be appropriate to first consider question No. (iii) and then, if need be, to come to question No. (ii) and I propose to examine the two questions in that order.

9. Re : Question No. (iii) In order to correctly answer the question, it would be necessary to take note of some relevant facts. The petitioner company was given the work of construction of canal syphon and in connection with the work the petitioner and the State Government in the Irrigation Department had entered into an agreement bearing No. 1-J/1997-98 for construction of a canal syphon across river Kamla at R.D. 139.10 of Western Kosi Main Canal. The agreement contained a provision for arbitration in Clause 3.48.2 which, in so far as relevant for the present, is re-produced below :--

'(i) All disputes or difference in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows.

(ii) Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration, the Chief Engineer, Water Resources Department, Darbhanga Shall send to the Contractor a list of three officers of the rank of Superintending Engineer or higher who have not been connected with the work under this contract. The contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of one officer from the list who shall then be appointed as the sole Arbitrator if contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole Arbitrator. If the Chief Engineer fails to send such a list within thirty days as stipulated, contractor shall send a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within fifteen days. If the Chief Engineer fails to do so, the contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole Arbitrator.

(iii) The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modifications thereof. The decision of the sole Arbitrator shall be final and binding on the parties thereto. The Arbitrator shall determine the amount of cost of arbitration to be awarded to either parties.

(iv) xx xx xx xx xx

(v) xx xx xx xx xx

(vi) xx xx xx xx xx

10. As usually happens in these matters in this State, disputes arose between the parties even before the completion of the work. The petitioner invoked the arbitration clause in the agreement and asked for reference of its claim of Rs. 29,22,38,290.10 to arbitration. According to the petitioner, on 12.6.2002 it sent a letter to the Chief Engineer, Water Resources Department, Government of India

giving a list of its claim in dispute, aggregating to Rs. 29,22,38,290.10 and demanding that those claims, together with interest thereon and cost of arbitration be referred to arbitration, as provided in Clause 3.48.2 of the contract.

11. The petitioner did not receive a list of three officers as stipulated in the arbitration clause in reply to its letter of 12.6.2002. It, therefore, took the matter to the next stage and by its letter of 29.9.2002 sent to the Chief Engineer a list of three former High Court Judges for selection of one among them as the sole arbitrator. In response, the petitioner received a letter, dated 26.10.2002 from the Chief Engineer. In this letter it was stated that the petitioner's second letter dated 29.9.2002 was received in the chief Engineer's office on 10.10.2002 but the receipt of the earlier letter of 12.6.2002 was denied. The Chief Engineer in his letter of 26.10.2002 further stated that since the petitioner's request for appointment of arbitration by its letter, dated 12.6.2002 had not been received in his office it was quite misconceived on the part of the petitioner to propose a list of its own for appointment of the sole arbitrator. The Chief Engineer, accordingly, gave a list of three officers, for the petitioner to choose from for appointment of the sole arbitrator. The petitioner replied to the Chief Engineer's letter of 26.10.2002 by its letter, dated 6.11.2002. In this letter it was stated that it was false and incorrect to say that its earlier letter, dated 12.6.2002 was not received in the Chief Engineer's office. It was pointed out that letter was received in the Chief Engineer's office on 5.7.2002 as appearing from the office acknowledgment, a photo-stat copy of which was enclosed with the letter. The petitioner insisted that as the Chief Engineer had failed to respond within thirty days from the receipt of the earlier letter of 12.6.2002 it was no longer open to him propose a list the eye of law. It, accordingly, submitted an application under Section 11(6) of the Act requesting the Chief Justice for appointment of Mr. Justice P.S. Sahay as the sole arbitrator. In the application it was stated that in the facts and circumstances (as noticed above) it was clear that the parties to the dispute had failed to reach the agreement to appoint an arbitrator and the Chief Engineer had failed to follow the procedure as prescribed under Clause 3.48.2 of the contract. It was further alleged that Shri D.K. Srivastava could not be said to be totally unconnected with the work; since he was monitoring the project work he could not be said to be an impartial or independent person.

12. The application under Section 11(6) of the Act was filed on 26.11.2002 and it was registered as Request Case No. 27 of 2002. From the order-sheet of the case it appears that it was listed before the designated Judge on 20.10.2002 but was adjourned to 18.1.2003 on a prayer made by the counsel for the petitioner on the ground that a copy of the reply filed by the Opposite party was served on him on that date itself. The next order shows that on 24.1.2003 it was adjourned, on prayer, to 31.1.2003 and on that date it was finally dismissed. The designated Judge appears to have taken the view that whether or not the appointment was made in accordance with the arbitration clause as contained in paragraph 3.48.2 of the agreement there was, in fact, an arbitrator appointed by the Chief Engineer. Therefore, the petitioner's prayer for appointment of someone else as the sole arbitrator was not fit to be acceded to. The relevant portion of the order is reproduced below :--

'Petitioner itself has placed on record the communication dated 9.11.2002 (Annexure-9) by which Shri Devendra Kumar Srivastava, Chief Engineer, Planning And Monitoring, Water Resources Department has been appointed as sole Arbitrator.

This application has been filed on 26.11.2002. Thus, as the Arbitrator has already been appointed prior to the filing of this application, hence prayer made by the petitioner for appointment of an Arbitrator is not fit to be acceded to.

In case, the petitioner is aggrieved by the appointment of said Shri Srivastava as an Arbitrator, nothing prevents it to bring an appropriate proceeding for that purpose.'

13. As Seen above the Request case of the petitioner remained pending from 26.11.2002 to 31.1.2003. In this period Shri D.K. Srivastava the sole arbitrator fixed three meetings of the arbitral proceeding, the first on 8.12.2002, the second on 15.12.2002 and the third on 30.12.2002 and on the third date he passed the order terminating the proceeding. On the first two dates the petitioner neither appeared nor filed any petition for time and/or stay of proceeding etc. On the third date though once again the petitioner did not appear, the sole arbitrator received from in a letter, dated 27.12.2002. In this letter no prayer for adjournment or stay

of the proceeding was made but there appears to be a suggestion that till then the petitioner was not recognising Shri Srivastava as the duly appointed sole arbitrator. The letter described, as its subject, 'purported appointment of Shri Srivastava as sole. arbitrator' and tersely informed him regarding filing of Request Case No. 27 of 2002 before the High Court which was then fixed for hearing on 18.11.2003.

On the third date (30.12.2002) the sole arbitrator terminated the arbitral proceeding so far as the petitioner's claim was concerned.

15. Mr. T.K. Jha strongly argued that the petitioner had no cause, much less any sufficient cause, for not appearing and submitting its statement of claim before the sole arbitrator. He pointed out that it was only when the petitioner failed to communicate its statement of claim on three dates that the arbitrator passed the order, terminating the proceeding in so far as the petitioner's claim was concerned. In doing so, the sole arbitrator simply followed the mandate of the law as contained in Section 25(a) of the Act because the petitioner had failed to communicate its statement of claim without showing sufficient cause. He submitted that for each date fixed in the arbitral proceeding the petitioner was given due notice but it chose not to appear and file its statement of claim. Mr. Jha was particularly critical of the petitioner's letter of 27.12.2002, addressed to the arbitrator. He pointed out that even in this letter there was no prayer for adjournment or for staying the arbitral proceeding. He scoffed at it and dubbed it as an informatory petition. Mr. Jha further pointed out that in the request case of the petitioner that was pending at that time, there was no order staying the arbitral proceeding and that being the position there was no reason for the petitioner not to appear and submit its statement of claim before the sole arbitrator.

16. In reply Mr. K.D. Chatterjee submitted that an order made by the designated Judge under Section 11(6) is in the nature of an administrative order *State of Orissa v. Gokulananda Jena*, 2003 (3) PLJR (SC) 189. He further submitted that the proceeding of the request case being administrative in nature, it was not possible for the petitioner to obtain in that case an order staying the arbitral proceeding before the sole arbitrator. As to the reason why the petitioner did not

appear on the three dates fixed in the arbitral proceeding, Mr. Chatterjee submitted that at that time the petitioner was not accepting Shri D.K. Srivastava as the duly appointed sole arbitrator. It was contesting his appointment by filing a request case before the Chief Justice. In that position the petitioner thought that by submitting its statement of claim before Shri D.K. Srivastava or by appearing before him and making a prayer for adjournment or stay of proceeding, it would subject itself to his authority and that would be fatal to its claim in the pending request case. It was for that reason that the petitioner did not appear before Shri Srivastava during the pendency of the request case and once the request case was dismissed, it appeared before him immediately. In this regard, learned counsel accepted that perhaps the petitioner would have been better advised to appear before Shri D.K. Srivastava and to take part in the proceeding making it clear that its participation was without prejudice to its claim in the request case. But the petitioner's decision not to appear before him during the pendency of the request case was based on legal advice and it was certainly not wanting in bona fides,

17. Mr. Chatterjee further contended that in retrospect it may be said that the legal advice on which the petitioner acted was not very sound or of the wisest, but, in the facts and circumstances of the case the conduct of the petitioner was not such as to attract the ultimate penalty of being rendered completely remedy less.

18. I am inclined to accept the submissions of Mr. Chatterjee. The circumstances in which the appointment of Shri D.K. Srivastava was made is noted above. It is also seen that the petitioner disputed his appointment so much so that it filed a request case before the Chief Justice for appointment of another person as the sole arbitrator.

19. In *Sarpanch Lonand Gram Panchayat v. Ramgiri Gosavi and Anr.*, AIR 1968 SC 222, the Supreme Court quoted with approval an observation of the Madras High Court to the following effect:--

'We think that Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principle which are well understood; the words

'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant.'

20. In *The State of West Bengal v. The Administrator, Howrah Municipality and Ors.*, (1972) 1 SCC 366, the Supreme Court reiterated the same meaning for the words 'sufficient cause.'

21. In the facts of this case it is evident that the petitioner's omission to communicate its statement of claim to Shri D.K. Srivastava was not attributable to any negligence, inaction or want of bona fide on his part. In the facts and circumstances of the case it must, therefore, be held that the petitioner had sufficient cause within the meaning of Section 25(a) of the Act for not communicating its statement of claim in accordance with Section 23(i) of the Act.

22. Re : Question No. (ii). This brings us to the third question and it is now to be seen whether the existence of sufficient cause may be a ground for recall of the order terminating the proceeding under Section 25(a) of the Act. Section 25 begins with the sentence :--

'Unless otherwise agreed by the parties, where without showing sufficient cause.'

23. It is, thus, evident that in case a party is able to show sufficient cause the consequences envisaged under classes (a), (b) and (c) would not follow.

24. At this stage it is important to bear in mind the distinction between the existence of sufficient cause and the sufficient cause being shown to the arbitral tribunal at the proper time. A party proceeds from place 'A' to place 'B' where the arbitral sitting is to take place, on the way it meets with an accident and for that reason it is prevented from appearing before the arbitral tribunal on the fixed date and time. Though the party undoubtedly has sufficient cause for not attending the proceeding, it would be physically impossible for it (due to the very same cause) to show the cause to the arbitral tribunal on the date fixed in the proceeding.

25. What may happen in such a situation? Since no sufficient cause is shown to the arbitral tribunal for the non-appearance of the party, the tribunal must follow

the consequences, as the case may be, under Clauses (a), (b) and (c) of Section 25. But that will be the position when later on the defaulting party appears before the tribunal and apprises it of the reason for its non-appearance which undeniably constitutes sufficient cause in the eye of law?

26. The sole arbitrator in this case has taken the view that the arbitral tribunal has no authority or power to recall an order passed under Section 25(a) and to restore the proceeding because there is no express provision under the Act giving any such power to the tribunal.

27. Mr. Chatterjee submitted that the view taken by the sole arbitrator was clearly erroneous and it would lead to grave injustice. He submitted that the different provisions of the Act sufficiently indicate that the arbitral tribunal had full powers to recall an order passed under Section 25(a) when at a later date it is shown that the party's failure to appear and/or to communicate its statement of claim was due to sufficient cause. He submitted that this power was implicit in the opening sentence of Section 25 itself in term of which the existence of sufficient cause would exclude the consequences as provided in Clauses (a), (b) and (c). He also placed before me Section 18 that reads as follows :--

'18. Equal treatment of parties.--The parties shall be treated with equality and each party shall be given a full opportunity to present his case.'

28. Mr. Chatterjee submitted that the refusal to take into account, albeit at a later stage, the sufficient cause that prevented a party from appearing on the previous date would clearly amount to denial of equality and full opportunity to the affected party. Mr. Chatterjee in particular relied upon the provisions of Section 19(3) of the Act that reads as follows :--

'19. Determination of rules of procedure.--(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.'

29. He submitted that the power given to the arbitral tribunal to conduct the proceedings in the manner it considers appropriate was sufficiently wide to

empower it to recall an earlier order passed under Section 25(a) and to restore the proceeding to be decided on merits.

30. In support of his submissions, Mr. Chatterjee relied upon certain observation made in a single Judge decision of Bombay High Court in *Atul R. Shah v. V. Vrijal Lallobhai & Co.*, AIR 1999 Bom 67, in which it was observed as follows :--

'It is however pointed out that between the words 'unless otherwise agreed by the parties, where, without showing sufficient cause,' in the beginning of the section it is contemplated that parties can agree to a different procedure in which event that will be the procedure and not the procedure set out under Section 25. The expression is without showing sufficient cause meaning thereby if sufficient cause is shown the tribunal can set the clock back and give the party an opportunity to meet any of the requirements under (a), (b) and (c).'

31. I find the submissions of Mr. Chatterjee well founded. Mr. Chatterjee has relied upon the provisions of the Act itself (that is to say, the internal aids to interpretation) in support of the point that on sufficient cause being shown, the arbitral tribunal has full authority and power to recall an order under Section 25(a) of the Act. I think that one would arrive at the same conclusion on the basis of some external aids to interpretation.

32. One may recall here that the same issue had arisen under the Industrial Disputes Act and the question was whether or not the Industrial tribunal and the labour Court had the power to recall an award made ex parte. The Industrial Disputes Act does not have any provision expressly conferring upon the industrial tribunal or labour Court the power to review or recall an earlier order or award made by it. But Section 11(1) of the Industrial Disputes Act (similar to Section 19(3) of the Arbitration and Conciliation Act) provided as follows :--

'77. Procedure and power of Conciliation Officers, Boards, Courts and Tribunals.--

(1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.'

33. Here it may also be noted that under the Industrial Disputes (Central) Rules, Rule 22 (similar to Section 25(a) of the Arbitration and Conciliation Act) provided as follows :--

'Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator may proceed ex parte.--If without sufficient cause being shown, any party to proceeding before a Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator may proceed, as if the party had duly attended or had been represented.

34. Some State Governments, namely, Assam, Madras, U.P. and Kerala framed rules under the Industrial Disputes Act for setting aside ex parte decisions of the industrial tribunal on showing sufficient cause. In cases under those State Rules there was no difficulty for the tribunal to set aside its ex parte order where the defaulting party was in a position to show sufficient cause for not attending the proceeding. But the rules of some other States, such as A.P., Maharashtra, Orissa etc. as well as the Central rules have no provision for setting aside the ex parte orders or awards.

35. In the absence of any express provision either in the Industrial Disputes Act or in the Central Rules framed thereunder, the High Courts were divided on the issue regarding the tribunal's power to set aside the ex parte order or award or restore the proceedings. (See the Law of Industrial Disputes by O.P. Malhotra, 5th Edition Vol. I, pages 848 to 849). But the conflict was finally set at rest by the decision of the Supreme Court in *Gridlays Bank Limited v. The Central Government Industrial Tribunal*, AIR 1981 SC 606. In paras 10 and 11 of that decision, the Supreme Court made the following observations :--

'10. When Sub-section (1) of Section 11 expressly and in clear terms confers power upon the Tribunal to regulate its own procedure, it must necessarily be endowed with all powers which bring about an adjudication of an existing industrial dispute, after affording all the parties an opportunity of a hearing. We are inclined to the view that where a party is prevented from appearing at the hearing due to a sufficient cause, and is faced with an ex parte award, it is as if the party is visited

with an award without a notice of the proceedings. It is needless to stress that where the Tribunal proceeds to make an award without notice to a party, the award is nothing but a nullity. In such circumstances, the Tribunal has not only the power but also the duty to set aside the ex parte award and to direct the matter to be heard afresh.

11. The language of Rule 22 unequivocally makes the jurisdiction of the Tribunal to render an ex parte award conditional upon the fulfillment of its requirements. If there is no sufficient cause for the absence of a party, the Tribunal undoubtedly has jurisdiction to proceed ex parte. But if there was sufficient cause shown which prevented a party from appearing, then under the terms of Rule 22, the Tribunal will have had no jurisdiction to proceed and consequently, it must necessarily have power to set aside the ex parte award. In other words, there is power to proceed ex parte, but this power is subject to the fulfillment of the condition laid down in Rule 22. The power to proceed ex parte under Rule 22 carries with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing.'

36. The decision further explained that the expression 'review' was understood in two distinct senses, namely, (i) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record, and (ii) a procedural review which is either inherent or implied in a Court or tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it. In this regard, the following observation was made in para 13 of the decision :--

'13. We are unable to appreciate the contention that merely because the ex parte award was based on the statement of the manager of the appellant, the order setting aside the ex parte award, in fact, amounts to review. The decision in *Patel Narshi Thakershi v. Pradymansinghji Arjunsinghji* is distinguishable. It is an authority for the proposition that the power of review is not an inherent power, in must be conferred either specifically or by necessary implication. Sub-sections (1) and (3) of Section 11 of the Act themselves make a distinction between procedure and powers of the Tribunal under the Act. While the procedure is left to be devised by the Tribunal to suit carrying out its functions under the Act, the powers of civil

Court conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of power in the sense in which the words are used in Section 11. The answer to the question is, therefore, to be found in Sub-section (1) of Section 11 and not in Sub-section (3) of Section 11. Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a mis- apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Patel Narshi Tahkershi case held that no review lies on merits unless a statute specifically provides for it obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every Court or Tribunal.'

37. The decision in Grindlays Bank, (supra) was followed more recently in Anil Sood v. Presiding Officer, Labour Court, (2001) 10 SCC 534.

38. The two Supreme Court decisions under the Industrial Disputes Act are also a pointer in the direction that the arbitral tribunal must be held to have the power of procedural review and the authority to recall, on sufficient cause being shown, an order terminating the proceeding under Section 25(a) of the Act. The second question too is, thus, answered in the affirmative and in favour of the petitioner.

39. On the basis of the discussions made above, the un- escapable conclusion is that the impugned order, dated 30.6.2003 is bad and illegal and is liable to be set aside. The earlier order, dated 30.12.2002 is similarly liable to be set aside as the petitioner has been able to show sufficient cause for its failure to communicate its statement of claim to the arbitral tribunal. The two impugned orders are accordingly set aside and the sole arbitrator is directed to allow the petitioner to file its statement of claim and its defence to the claim of the State Government and to proceed in the matter of arbitration from that stage. In order to expedite the proceeding, the petitioner is directed to appear before the sole arbitrator, with a

copy of this order, within fifteen days from today. The arbitrator shall then allow the petitioner fifteen days', time for filing its statement of claim and/or its defence in regard to the counter claim by the State Government and shall then proceed, in accordance with law.

40. In the result, this writ petition is allowed but with no order as to costs.

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