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NO SECOND GO-AROUND FOR THE SAME ARBITRATION: BOMBAY HIGH COURT

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[Introduction](#)

A recent un-reported judgment of the Bombay High Court (***Fedbank Financial Service Ltd through its AO Zahid Sultan v Narendra H Shelar through his LRs & Ors***, Arbitration Application No. 34 of 2020, Order dated 24 February 2020) holds that the express termination of the mandate and denial of an extension, of a previously constituted arbitral tribunal, afford grounds to deny the appointment of a new arbitrator. While this decision is primarily founded on the Claimant's laxity in pursuing its claim and seeking extension of time, intrinsic in its reasoning is the interplay between provisions relating to the appointment of an arbitrator (Section 11), termination of the mandate of an arbitrator (Section 15) and extension of time for making an arbitral award (Section 29A) in the Arbitration Act 1996 (as amended) (Arbitration Act).

[Facts](#)

Fedbank Financial Service Limited (Applicant) invoked arbitration against one Mr Narendra Shelar and certain others (Respondents) for resolution of disputes under a loan agreement. A sole arbitrator was nominated and entered upon reference (First Arbitral Tribunal). The Applicant filed its Statement of Claim and the Respondents, their Statement of Defence. However, no steps were taken thereafter by the Applicant. This situation carried on for more than a year. The First Arbitral Tribunal accordingly ordered a closure of the proceedings and terminated its mandate. After the express termination of the mandate of the First Arbitral Tribunal, the Applicant lodged an application (under Section 29A of the Arbitration Act), for extension of time of the proceedings before the First Arbitral Tribunal (29A Application). This 29A Application was dismissed by an order dated 9 January 2020 of the Bombay High Court, on the ground of it being **infructuous** given the termination of the mandate of the First Arbitral Tribunal (***Fedbank Financial Service Ltd through its AO Zahid Sultan v Narendra H Shelar through his LRs & Ors***, Arbitration Petition No. 1271 of 2019, Order dated 9 January 2020). Thereafter, the Applicant filed another application for appointment of a new arbitrator for resolution of disputes between the Applicant and the Respondents. (emphasis supplied)

[Issue](#)

Whether a new arbitrator ought to be appointed after the termination of the mandate of the First Arbitral Tribunal due to expiry of the statutory time period?

Present Judgment

The Bombay High Court denied the appointment of an arbitrator on the ground that the Applicant cannot start the arbitration process all over again. It reasoned that the emphasis of the Arbitration Act is a speedy and time-bound disposal of disputes. The Applicant's failure to diligently prosecute its action before the First Arbitral Tribunal, and its delay in seeking an extension of time from the High Court, disentitles it from coming back to seek appointment of a new arbitrator. Importantly, the judgment holds that the express termination of the mandate of the First Arbitral Tribunal meant that the arbitral remedy of the Applicant, for the same dispute, stands closed. The application for appointment of a new arbitrator was therefore dismissed.

Comment

This decision conveys a strong and clear message. The arbitration process should not be taken lightly or for granted. At its core, this decision read with the earlier order dated 9 January 2020 clearly holds that the express termination of the mandate of an arbitral tribunal by reason of the expiry of the statutory time period set out in Section 29A may result in the permanent abandonment of the arbitration clause for the same dispute.

The foundation of the decision is the Bombay High Court's earlier order dated 9 January 2020. An analysis of the 9 January 2020 order is, therefore, necessary. The order dated 9 January 2020 held that the Section 29A Application is not maintainable since the arbitrator had prior to the filing of the application terminated his mandate. Notably, the arbitrator had terminated his mandate due to expiry of the statutory time period and not for any other reason.

The text of Section 29A(4) suggests that upon the expiry of the statutory time period, there is a deemed/ automatic termination of an Arbitral Tribunal's mandate unless the time period is extended by the Court – whether before or after the expiry of the such period. Pursuant to an amendment to Section 29A in the year 2019, there is now a proviso to Section 29A(4) which clarifies that the mandate of the arbitrator will continue during the pendency of an application under Section 29A. The general understanding, therefore, was that one can, as a matter of right, apply for an extension of timeline even after the expiry of the statutory time period. In that case, pending the application, the arbitrator's mandate would continue.

However, as noted above, the present case is not one of automatic or deemed termination but that of an express one. Two key questions that arise are (a) is such express termination permissible? If yes, (b) what is the legal effect of such termination?

The orders of the Bombay High Court answer both, albeit the first question - in implied terms, and the second one - expressly. The Bombay High Court has categorically held that where the arbitrator has expressly terminated the mandate due to expiry of the statutory time period, there is no scope for filing a Section 29A application or re-invoking the arbitration clause for the same dispute.

Critics may argue that there is no provision for express termination of mandate by an arbitrator under Section 29A and that such termination is possible only under Section 15(1)(a) and, therefore, it is possible to seek appointment of a substitute arbitrator by virtue of the provisions of Section 15(2). If this argument is accepted, the provisions of Section 29A will be rendered otiose as parties would, at least theoretically, be permitted re-invoke an arbitration clause and seek appointment of a substitute arbitrator (for the same dispute) endlessly, despite closure of a previous arbitration due to expiry of the statutory time period. As the Bombay High Court noted *"if such constant circular actions are permitted, then conceivably there would be no end to arbitration at all and no finality to the disputes."*

Section 29A is a special provision introduced to ensure the timely completion of arbitration. Section 29A(4) contemplates termination of the mandate of an arbitrator in case the proceedings are not completed within the statutory time period. The decision appear to permit for an arbitrator to expressly terminate her/his mandate on the strength of Section 29A(4), provided no application for extension is filed prior to the arbitrator terminating her/his mandate.

As for the apparent conflict with Section 15, it is well settled that special provisions of law prevail over general provisions. While Section 15 deals with an arbitrator's general powers to terminate her/his mandate, Section 29A contains a special set of provisions dealing with timely completion of an arbitration. In any case, it is also universally accepted that legislative provisions (which appear to be inconsistent) must be read harmoniously to give legal effect to the provisions rather than rendering either redundant.

The decision of the Bombay High Court is important as it re-emphasises the need to strictly follow the timelines set out in Section 29A. The other key takeaway from the decisions would be that where the claimant does not expect the arbitration to be completed within the statutory time period, the application for extension should be filed at the earliest possible opportunity without waiting until after the expiry of the statutory time period. A belated application could well be fatal as the litigants in the present matter would have come to realise.

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