

AFR
Reserved on 04.03.2022
Delivered on 11.03.2022

Court No. - 10

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 5 of 2022

Applicant :- Indian Farmers Fertilizers Cooperative Ltd.

Opposite Party :- M/S Manish Engineering Enterprises

Counsel for Applicant :- Sushmita Mukherjee

Counsel for Opposite Party :- Dharmendra Shukla

Hon'ble Rohit Ranjan Agarwal,J.

1. Heard Sri Manish Goyal, learned Senior Advocate, assisted by Ms. Sushmita Mukherjee, learned counsel for the applicant and Sri Anil Tiwari, learned Senior Advocate assisted by Sri Dharmendra Shukla, Advocate for the opposite party.

2. This is an application under Section 29A of Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "the Act"*) for extending the mandate of Substitute Sole Arbitrator on the expiry of time limit for publication of the award.

3. Brief history of the case is necessary for better appreciation, which is as under :

4. The respondent had entered into a contract with the applicant on 05.11.1998 for executing work of Rs.10,68,596/-. The work was to be completed by 05.03.1999. As the respondent failed to complete the work within the time fixed, he was required to submit final bill, which according to applicant, he failed to do so. On 20.10.2004, respondent invoked the arbitration clause. He filed an application under Section 11 of the Act on 18.12.2005, which was numbered as C.M.A.A. No.20 of 2005. On 03.11.2014, the application was allowed and one Mr. Justice Sheetla Prasad Srivastava, a former Judge of this Court, was appointed as Sole Arbitrator. He entered into the reference on 02.12.2014, but due to his ill health, he recused on 18.03.2015.

5. Thereafter, the Court appointed Mr Justice Prakash Krishna, a former Judge on 22.11.2017, who unfortunately passed away. Thereafter this Court on 28.05.2018 appointed one Mr. Justice S.P. Mehrotra, a retired Judge of this Court, as Sole Arbitrator, who entered into the reference on 07.10.2018. On 10.11.2018, respondent filed his Statement of Claims, while applicant filed his Statement of Defence on 22.12.2018. On 12.01.2019, time was granted for filing of rejoinder affidavit. The period of one year for publishing award, as contemplated under Section 29A of the Act, commenced on 01.03.2019 and ended on 28.02.2020. The parties agreed and submitted joint memorandum as per Section 29-A (3) of the Act on 14.09.2019 extending the period for another six months which was accepted by the Arbitral Tribunal. An application for amending Statement of Claims and the rejoinder was made by the respondent on 27.07.2019.

6. An application for summoning the records filed by the respondent was disposed of on 05.01.2020, which was partly allowed to some extent. On 01.02.2020 respondent moved an application making allegation against the Sole Arbitrator and praying for his recusal. Vide order dated 29.02.2020, the Sole Arbitrator recorded that he did not wish to continue as Arbitrator and withdrew himself.

7. In between, the respondents had approached this Court through Arbitration and Conciliation Application No.36 of 2016 filed under Section 11 (4) of the Act for appointment of Arbitrator. The said application was dismissed on 26.11.2018, leaving it open to the respondents to adopt procedure under Section 11 of the Act to the extent it may be available. On 12.03.2020 applicant appointed one Justice P.K.S. Baghel, former Judge of this Court as Substitute Arbitrator. He entered the reference on 15.03.2020.

8. As the lockdown was imposed throughout the country, the Substitute Arbitrator started hearing on 18.06.2021. An application was moved by the respondent for recalling the order dated 05.01.2020 passed by the predecessor of the Sole Arbitrator and for re-hearing of the application for summoning of records. On 11.10.2021, the recall application was rejected on the ground that Substitute Arbitrator did not have the power to recall the order passed by his predecessor. On 29.10.2021, respondent filed a recusal application against the Substitute Sole Arbitrator. The said application was rejected on 29.10.2021. On the same day, application for amendment of Statement of Claims and rejoinder was allowed. Physical amendment was carried out by the respondent on 06.12.2021. The respondent, on the next date i.e. 13.12.2021 moved an application informing the Arbitral Tribunal that the term of the Tribunal had expired on 01.10.2021. According to the applicant, out of the period of six months available to the Substitute Arbitrator, a major part was spent on the application for recall. It is further averred that the Statement of Claims and Statement of Defence have already been filed by the parties and hearing can be expedited in case the time period is extended.

9. Sri Manish Goyal, learned Senior Advocate appearing for the applicant submitted that initially the Arbitrator was appointed by this Court exercising power under Section 11(4) of the Act. It was due to certain unfortunate reasons that thrice the arbitral panel was changed and now, as the pleadings have already completed by the parties and only final arguments are to be done, and, in view of the mandate of Section 29A(5) and (6) of the Act, if the term of the Substituted Arbitrator is extended, the arbitral proceedings can be concluded.

10. According to him, the word 'Court' as occurring in sub-section (5) and (6) of Section 29-A is the High Court and not the principal Civil Court of original jurisdiction in a district, as defined under

Section 2(1)(e) of the Act. In the context of Section 29A of the Act, which has prescribed the substantive provision for the completion of arbitral award and the time limit to do so, the meaning of word ‘Court’ as used therein, has to be understood. According to him, under sub-section (6) of Section 29-A the Court has been empowered to substitute the arbitrator(s) in re-constituting the Arbitral Tribunal, if so required. While the power of appointment of Arbitral Tribunal has been prescribed in Section 11 of the Act.

11. In the present case, as the High Court had exercised jurisdiction under Section 11 of the Act in the appointment of the Arbitrator, thus the extension of time limit prescribed for completing the arbitration, as provided under Section 29A of the Act also vest with the High Court and not with the principal Civil Court.

12. He has relied upon the decision of Calcutta High Court in case of **Amit Kumar Gupta vs. Dipak Prasad 2021 SCC Online Cal 2174**. Relevant paras 17 and 18 of the judgment are extracted hereas under:

“17. The meaning of the word “court” as ascribed in Section 2(1)(e) of the Act of 1996 is subject to the requirement of the context. In the context of Section 29A of the Act of 1996 which has prescribed a substantive provision for completion of the arbitral award and the time limit to do so, the meaning of the word “court” as used therein has to be understood. Under sub-section (6) of Section 29A of the Act of 1996, the Court has been empowered to substitute the arbitrator or the arbitrators in reconstituting the arbitral tribunal if so required. The power of appointment of an arbitral tribunal has been prescribed in Section 11 of the Act of 1996. Section 11 of the Act of 1996 has prescribed two appointing authorities given the nature of the arbitration. In the case of an international commercial arbitration, the authority to appoint an arbitrator, has been prescribed under Section 11 of the Act of 1996 to be the Supreme Court. In the case of a domestic arbitration, Section

11 of the Act of 1996 has prescribed that the appointing authority shall be the High Court.

18. In my view, the word “court” used in Section 29A of the Act of 1996 partakes the character of the appointing authority as has been prescribed in Section 11 of the Act of 1996 as, the Court exercising jurisdiction under Section 29A of the Act of 1996 may be required to substitute the arbitrator in a given case. Such right of substituting can be exercised by a Court which has the power to appoint. The power to appoint has been prescribed in Section 11. Therefore, the power to substitute should be read in the context of the power of appointment under Section 11.”

13. Reliance has also been placed upon decision of Delhi High Court in **O.M.P. (Misc.) (Comm) No. 236 of 2019 (DDA vs. M/s Tara Chand Sumit Construction Co.)** decided on 12.5.2020. Relevant paras 28, 29 and 30 of the judgment are extracted hereasunder :

“28. Power to extend the mandate of an Arbitrator under Section 29A(4), beyond the period of 12 months and further extended period of six months only lies with the Court. This power can be exercised either before the period has expired or even after the period is over. Neither the Arbitrator can grant this extension and nor can the parties by their mutual consent extend the period beyond 18 months. Till this point, interpreting the term 'Court' to mean the Principal Civil Court as defined in Section 2(1)(e) would, to my mind, pose no difficulty. The complexity, however, arises by virtue of the power of the Court to substitute the Arbitrator while extending the mandate and this complication is of a higher degree if the earlier Arbitrator has been appointed by the High Court or the Supreme Court. Coupled with this, one cannot lose sight of the fact that the Legislature in its wisdom has conferred the powers of appointment of an Arbitrator only on the High Court or the Supreme Court, depending on the nature of arbitration and as and when the power is invoked by either of the parties. There may be many cases in which while extending the mandate of the Arbitrators, the Court may be of the view that for some valid

reasons the Arbitrators are required to be substituted, in which case the Court may exercise the power and appoint a substituted Arbitrator and extend the mandate.

29. In case a petition under Section 29A of the Act is filed before the Principal Civil Court for extension of mandate and the occasion for substitution arises, then the Principal Civil Court will be called upon to exercise the power of substituting the Arbitrator. In a given case, the Arbitrator being substituted could be an Arbitrator who had been appointed by the Supreme Court or the High Court. This would lead to a situation where the conflict would arise between the power of superior Courts to appoint Arbitrators under Section 11 of the Act and those of the Civil Court to substitute those Arbitrators under Section 29A of the Act. This would be clearly in the teeth of provisions of Section 11 of the Act, which confers the power of appointment of Arbitrators only on the High Court or the Supreme Court, as the case may be. The only way, therefore, this conflict can be resolved or reconciled, in my opinion, will be by interpreting the term 'Court' in the context of Section 29A of the Act, to be a Court which has the power to appoint an Arbitrator under Section 11 of the Act. Accepting the contention of the respondent would lead to an inconceivable and impermissible situation where, particularly in case of Court appointed Arbitrators, where the Civil Courts would substitute and appoint Arbitrators, while extending the mandate under Section 29A of the Act.

30. Similarly, in case of International Commercial Arbitration, if one was to follow the definition of the term Court under Section 2(1)(e) and apply the same in a strict sense, then it would be the High Court exercising Original or Appellate jurisdiction which would have the power to extend the mandate and substitute the Arbitrator. In such a situation, the High Court would be substituting an Arbitrator appointed by the Supreme Court which would perhaps lead to the High Court over stepping its jurisdiction as the power to appoint the Arbitrator is exclusively in the domain of the Supreme Court. Thus, in the opinion of this Court, an application under Section 29A of the Act seeking extension of the mandate of the Arbitrator would lie only before the Court which has the power

to appoint Arbitrator under Section 11 of the Act and not with the Civil Courts. The interpretation given by learned counsel for the respondent that for purposes of Section 29A, Court would mean the Principal Civil Court in case of domestic arbitration, would nullify the powers of the Superior Courts under Section 11 of the Act.”

14. He then placed before the Court the decision rendered by Gujarat High Court in the case of **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel 2019 (2) GLR 1537** wherein the Court had taken the similar view. Relevant paras 14, 15 and 16 of the judgment are extracted hereas under :

“14. As is well-known, the arbitration proceedings by appointment of an arbitrator can be triggered in number of ways. It could be an agreed arbitrator appointed by the parties outside the Court, it could be a case of reference to the arbitration by Civil Court in terms of agreement between the parties, it may even be the case of appointment of an arbitrator by the High Court or the Supreme Court in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. The provisions of Sec. 29A and in particular sub-sec. (1) thereof would apply to arbitral proceedings of all kinds, without any distinction. Thus, the mandate of an arbitrator irrespective of the nature of his appointment and the manner in which the Arbitral Tribunal is constituted, would come to an end within twelve months from the date of Tribunal enters upon the reference, unless such period is extended by consent of the parties in term of sub-sec. (3) of Sec. 29A which could be for a period not exceeding six months. Sub-section (4) of Sec. 29A, as noted, specifically provides that, if the award is not made within such period, as mentioned in sub-sec. (1) or within the extended period, if so done, under sub-sec. (3) the mandate of the arbitrator shall terminate. This is however with the caveat that unless such period either before or after the expiry has been extended by the Court. In terms of sub-sec. (6) while doing so, it would be open for the Court to substitute one or all the arbitrators who would carry on the proceedings from the stage they had reached previously.

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-sec. (4) of Sec. 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-sec. (3) of Sec. 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The Court on the other hand has vast powers for extension of the period even after such period is over. While doing so, the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Sec. 2(1)(e) does not fit. It is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. If therefore, there is a case for extension of the term of an arbitrator who has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-sec. (6) of Sec. 29A would be non-operatable. In such a situation, sub-sec. (6) of Sec. 29A would be rendered otiose. The powers under sub-sec. (6) of Sec. 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-sec. (6) of Sec. 29A the Legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Sec. 11 of the Act. If we, therefore, accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior

Courts to appoint arbitrators under Sec. 11 of the Act and those of the Civil Court to substitute such arbitrators under Sec. 29A(6). This conflict can be avoided only by understanding the term "Court" for the purpose of Sec. 29A as the Court which appointed the arbitrator in case of Court constituted Arbitral Tribunal.

16. Very similar situation would arise in case of an international commercial arbitration, where the power to make an appointment of an arbitrator in terms of Sec. 11 vests exclusively with the Supreme Court. In terms of Sec. 2(1)(e), the Court in such a case would be the High Court either exercising original jurisdiction or appellate jurisdiction. Even in such a case, if the High Court were to exercise power of substitution of an arbitrator, it would be transgressing its jurisdiction since the power to appoint an arbitrator in an international commercial arbitrator rests exclusively with the Supreme Court."

15. According to Sri Goyal, the question whether the meaning of word 'Court' would be High Court while exercising powers under Section 29A was also dealt with by the Bombay High Court in the case of **Cabra Instalaciones Y. Servicios. S.A. vs. Maharashtra State Electricity Distribution Company Limited** 2019 SCC OnLine Bom 1437. Relevant paras 7 and 8 of the judgment are extracted hereas under :

"7. On a plain reading of Section 29A alongwith its sub-sections, it can be seen that for seeking extension of the mandate of an arbitral tribunal, these are substantive powers which are conferred on the Court and more particularly in view of the clear provisions of sub-section (6) which provides that while extending the period referred to in sub-section (4), it would be open to the Court to substitute one or all the arbitrators, which is in fact a power to make appointment of a new/substitute arbitrator or any member of the arbitral tribunal. Thus certainly when the arbitration in question is an international commercial arbitration as defined under Section 2(1)(f) of the Act, the High Court exercising power under Section 29A, cannot make an appointment of a substitute

arbitral tribunal or any member of the arbitral tribunal as prescribed under sub-section (6) of Section 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

8. Thus, as in the present case once the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, in my opinion, this Court lacks jurisdiction to pass any orders under Section 29-A of the Act, considering the statutory scheme of Section 29-A. It would only be the jurisdiction of the Supreme Court to pass orders on such application under Section 29-A of the Act when the arbitration is an international commercial arbitration. The insistence on the part of the petitioner that considering the provisions of sub-section (4), the High Court would be the appropriate Court to extend the mandate of the arbitral tribunal under Section 29-A, would not be a correct reading of Section 29A as the provision is required to be read in its entirety and in conjunction with Section 11(9) of the Act.”

16. He placed before the Court judgment of Division Bench of Kerala High Court rendered in **M/s Lots Shipping Company Limited vs. Cochin Port Trust Board of Trustees 2020 AIR (Kerala) 169**. Relevant paras 9 and 11 of the judgment are extracted hereas under :

“9. Question to be decided is whether the term “court” contained in Section 29A(4) requires a contextual interpretation apart from the meaning contained in Section 2(1)(e)(i) of the Act. A contextual interpretation is clearly permissible in view of

the rider contained in sub-section (1) of Section (2), “unless the context otherwise requires”. As argued by the counsel on either side and as submitted by the learned Amicus Curiae, a contextual interpretation is required since the power conferred on the court under Section 29A, especially under sub-sections (4) and (5), are more akin to the powers conferred on the Supreme Court and the High Court, as the case may be, under Sections 11(6), 14 & 15 of the Act, for appointment, termination of mandate and substitution of the arbitrator. It is pointed out that, the amendments introduced in the year 2015, with effect from 23.10.2015, has recognized the judgment of the Constitutional Bench of the apex court in SBP & Company v. Patel Engineering Company Ltd. (2005) 8 SCC 618 and conferred the power of appointment on the Supreme Court or the High Court. The amendment has not in any manner enhanced the power of the principal civil court, which continues only with respect to matters provided under Sections 9 and 34 of the Act. It is significant to note that the orders passed by the principal civil court of original jurisdiction under Sections 9 and 34 are made appealable under Section 37 of the Act. So also, order if any passed refusing to refer the parties to arbitration under Section 8 of the Act, was also made appealable under Section 37(1)(a) of the Act. Section 29A was introduced to make it clear that, if the arbitration proceedings is not concluded within 18 months, even if the parties have consented for an extension, it cannot be continued unless a judicial sanction is obtained. The power to grant extension by the court is introduced under an integrated scheme which also allows the court to reduce the fees of the arbitrator or to impose cost on the parties and/or to substitute the arbitrator(s). The power of extension is to be exercised on satisfying “sufficient cause” being made out. In all respect, such power conferred under Section 29A for permitting extension with respect to the proceedings of arbitration, is clearly akin to the powers conferred under Sections 14 & 15 of the Act. The absence of any provision for an appeal with respect to the exercise of such power under Section 29A, in the nature as mentioned above, would indicate that the power under Section 29A is not to be exercised by the principal civil court of original jurisdiction. Otherwise, it will create anomalous situation of

identical powers being exercised in a contrary manner, prejudicial to the hierarchy of the courts. In a case where appointment of an arbitrator is made under Section 11(6) of the Act by the High Court or the Supreme Court, as the case may be, it would be incongruous for the principal civil court of original jurisdiction to substitute such an arbitrator or to refuse extension of the time limit as provided under Section 29A, or to make a reduction in the fees of the Arbitrator. Therefore a purposive interpretation becomes more inevitable.

11. Taking note of the principle enunciated herein above and on the basis of the detailed analysis, we are inclined to hold that the term “court” used in Section 29(4) has to be given an contextual and purposive interpretation, which is to be in variance with the meaning conferred to the said term under sub-section Section 2(1)(e)(i) of the Act. The term “court” contained in Section 29(4) has to be interpreted as the ‘Supreme Court’ in the case of international commercial arbitrations and as the ‘High Court’ in the case of domestic arbitrations. Hence it is held that, either of the party will be at liberty to file an arbitration petition before the High Court under Section 29A(5) of the Act, seeking extension of time for continuance of the arbitration proceedings in exercise of the power conferred under Section 29A(4) of the Act, in the case of any domestic arbitration. The reference is answered accordingly.”

17. He has also placed before the Court Arbitration and Conciliation (Amendment) Act, 2015. In the Statement of Objects and Reasons it has been provided that as India has been ranked at 178 out of 189 nations in the world in contract enforcement, thus to facilitate quick enforcement of contract, the amendments were introduced in the year 2015.

18. Opposing the application, Sri Anil Tiwari, learned Senior Advocate appearing for the respondent raised a preliminary issue relating to maintainability of the application under Section 29A(5) of the Act before this Court. According to him, the word “Court” occurring in the different sections of the Act means the Court as

defined under section 2(1)(e) of the Act, which means the principal Civil Court of original jurisdiction in a district. According to him, after the amendment was made in the Act in the year 2015, Section 14 mandated that once the mandate of an Arbitrator stood terminated, he was to be substituted by another Arbitrator to be appointed by the Court. Thus, the word ‘Court’ used either in Section 14, 15 or 29A(5) and (6) is the ‘Court’ as defined under Section 2(1)(e) of the Act and not this Court. He has placed reliance upon the decision of Apex Court in the case of **Garhwal Mandal Vikas Nigam Ltd. vs. Krishna Travel Agency (2008) 6 SCC 741**. Relevant paras 8 and 9 of the judgment are extracted hereas under:

“8. Apart from these four cases, which have been brought to our notice, the position of law is very clear that in case the argument of learned counsel is accepted, that would mean that in every case where this Court passes an order, be it on appeal from the order passed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court will become a Principal Civil Court of Original Jurisdiction. If the argument is further taken to its logical conclusion that would mean that the parties will have to approach this Court by making an application under Section 34 i.e. for setting aside the award. The expression “court” used in Section 34 of the Act will also have to be understood ignoring the definition of “court” in the Act.

9. There is another facet of the problem. The party will be deprived of the right to file an appeal under Section 37(1)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under Section 11(6) of the Arbitration and Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under Section 11(6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1)(e) of the 1996 Act. That is certainly not the

intention of the legislature. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original Jurisdiction. Thus, the parties will have the right to move under Section 34 of the 1996 Act and to appeal under Section 37 of the 1996 Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the 1996 Act.”

19. He then placed before the Court the judgment of Apex Court in the case of **Nimet Resources Inc. and another vs. Essar Steels Ltd. (2009) 17 SCC 313**. Relevant paras 11 and 13 of the judgment are extracted hereas under :

“11. As a “court” has been defined in the 1996 Act itself, an application under Section 14(2) would be maintainable only before the Principal Civil Court which may include a High Court having jurisdiction but not this Court.

13. The definition of “court” indisputably would be subject to the context in which it is used. It may also include the appellate courts. Once the legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act. It is well settled that meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning.”

20. He then relied upon decision of Apex Court in the case of **Bharat Coking Coal Limited vs. Annapurna Construction (2008) 6 SCC 732**.

21. Reliance has also been placed upon decision of Apex Court in the case of **State of Maharashtra vs. Atlanta Limited (2014) 11 SCC 619**. Relevant paras 24, 24.1, 24.2 and 24.3 of the judgment are extracted hereas under :

“24. We shall first endeavour to address the submissions advanced at the hands of the learned counsel for the appellants,

with reference to Section 15 of the Code of Civil Procedure. In terms of the mandate of Section 15 of the Code of Civil Procedure, the initiation of action within the jurisdiction of Greater Mumbai had to be “in the court of lowest grade competent to try it”. We are, however, satisfied, that within the area of jurisdiction of the Principal District Judge, Greater Mumbai, only the High Court of Bombay was exclusively the competent court (under its “ordinary original civil jurisdiction”) to adjudicate upon the matter. The above conclusion is imperative from the definition of the term “court” in Section 2(1)(e) of the Arbitration Act:

24.1. *Firstly, the very inclusion of the High Court “in exercise of its ordinary original civil jurisdiction”, within the definition of the term “court”, will be rendered nugatory, if the above conclusion was not to be accepted. Because, the “Principal Civil Court of Original Jurisdiction in a district”, namely, the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. The submission advanced by the learned counsel for the appellant cannot therefore be accepted, also to ensure the inclusion of “the High Court in exercise of its ordinary original civil jurisdiction” is given its due meaning. Accordingly, the principle enshrined in Section 15 of the Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act.*

24.2. *Secondly, the provisions of the Arbitration Act, leave no room for any doubt, that it is the superior-most court exercising original civil jurisdiction, which had been chosen to adjudicate disputes arising out of arbitration agreements, arbitral proceedings and arbitral awards. Undoubtedly, a “Principal Civil Court of Original Jurisdiction in a district”, is the superior-most court exercising original civil jurisdiction in the district over which its jurisdiction extends. It is clear that Section 2(1)(e) of the Arbitration Act having vested jurisdiction in the “Principal Civil Court of Original Jurisdiction in a district”, did not rest the choice of jurisdiction on courts subordinate to that of the District Judge. Likewise, “the High Court in exercise of its ordinary original jurisdiction”, is the*

superior-most court exercising original civil jurisdiction, within the ambit of its original civil jurisdiction. On the same analogy and for the same reasons, the choice of jurisdiction will clearly fall in the realm of the High Court, wherever a High Court exercises “ordinary original civil jurisdiction”.

24.3. Under the Arbitration Act, therefore, the legislature has clearly expressed a legislative intent different from the one expressed in Section 15 of the Code of Civil Procedure. The respondent had chosen to initiate proceedings within the area of Greater Mumbai, it could have done so only before the High Court of Bombay. There was no other court within the jurisdiction of Greater Mumbai, where the respondents could have raised their challenge. Consequently, we have no hesitation in concluding that the respondent by initiating proceedings under Section 34 of the Arbitration Act, before the Original Side of the High Court of Bombay, had not violated the mandate of Section 2(1)(e) of the Arbitration Act. Thus viewed, we find the submission advanced at the hands of the learned counsel for the appellants, by placing reliance on Section 15 of the Code of Civil Procedure, wholly irrelevant.”

22. As far as question of jurisdiction under Section 42 of the Act is concerned, reliance has been placed upon decision in the case of **State of West Bengal and others vs. Associated Contractors (2015) 1 SCC 32**. Paras 11, 13 and 25 of the judgment are extracted hereas under :

“11. It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words “in any reference” are substituted with the wider expression “with respect to an arbitration agreement”. It will also be noticed that the expression “has been made in a court competent to entertain it”, is no longer there in Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression “with respect to an arbitration agreement” widens the scope of Section 42 to

include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.

....

13. *It will be noticed that whereas the earlier definition contained in the 1940 Act spoke of any civil court, the definition in the 1996 Act fixes “court” to be the Principal Civil Court of Original Jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court.*

...

25. *Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:*

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

23. Lastly, a decision of coordinate Bench of this Court in the case of **M/s Lucknow Agencies and Another vs. U.P. Avas Vikas Parishad and others 2019 ADJ Online 0169**.

24. Learned counsel did not make any other submission and does not dispute the fact that initial appointment of Arbitrator was by this Court exercising power under Section 11(4) of the Act.

25. I have heard the rival submissions and perused the material on record. With the consent of counsels for the parties, the matter is being decided at the admission stage itself.

26. The present application has been filed for extending the time for arbitral award which has been objected by the respondent on the

ground of maintainability. The sole question, which arises for consideration is :-

“whether the application moved under Section 29A of the Act for extending the time for arbitral award is maintainable before this Court or the principal Civil Court as defined under Section 2(1)(e) of the Act.”

27. Section 29A of the Act for the first time was inserted by Act No.3 of 2016 w.e.f. 23.10.2015 in the Arbitration and Conciliation Act 1996. Again, by Act 33 of 2019, the section 29-A was amended.

28. Before proceeding to decide the issue in hand, a cursory glance of provision of Section 2(1)(e), 11(4), (5), (6) and 29-A is necessary for better appreciation of the case, which are extracted hereas under :

“(e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;”

“11. Appointment of arbitrators.-

...

(4) If the appointment procedure in sub-section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

“29A. Time limit for arbitral award.--*(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:*

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already

on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.”

29. From the reading of Section 2(1)(e) it is clear that in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction or the High Court, which exercises its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, shall be the court.

30. While, section 11 provides for power of appointment of arbitrators. Sub-section (2) provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. It is where the parties failed to arrive in the appointment of arbitrators that the power has been vested with the High Court with the appointment of arbitrators for domestic arbitration and the Supreme Court in the matters of international commercial arbitration. Sub-sections (4), (5) and (6) read together provide the manner in which these two superior courts step in, in the appointment of arbitrator.

31. Section 29-A is a substantive provision which was inserted w.e.f. 23.10.2015 for speedy disposal of cases relating to arbitration with the least Court intervention. The statement of objects and reasons to the amending Act No.3 of 2016 provided that as India had been

ranked as 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

32. Sub-section (1) of Section 29A provides for the period within which the arbitration proceedings are to be completed i.e. 12 months. Further sub-section (3) of Section 29A takes care that in case the award is not made as per sub-section (1), by the consent of the parties, the period can be extended for further six months.

33. The Act puts a cap upon extension beyond period of eighteen months and sub-section (4) of Section 29A provides that in case the award is not made within the extended period, it is only the Court on the application of the parties may extend the period. Sub-section (6) of Section 29A is of great relevance as it provides the power to the Court to substitute one or all the arbitrators and the arbitral proceedings shall continue from the stage already reached and on the basis of evidence and material already on record.

34. Thus, the power to substitute the arbitrator as mandated in sub-section (6) of Section 29A vest only with the Court. This provision cannot be read in isolation but with Section 11, which provides for appointment of arbitrator.

35. Once the appointment of arbitrator or arbitral Tribunal has been made by the High Court or the Supreme Court exercising power under sub-sections (4), (5) and (6) of Section 11 then the power to substitute the arbitrator or the Arbitral Tribunal only vest with the said

appointing authority i.e. High Court or Supreme Court, as the case may be.

36. The argument raised from the side opposite that the word ‘Court’ occurring in Section 2(1)(e) means the principal Civil Court and not the High Court cannot be accepted, as once the appointment was made by the High Court exercising power under Section 11, the power to substitute an arbitrator cannot vest under sub-section (6) of Section 29A with the principal Civil Court.

37. The Calcutta High Court in **Amit Kumar Gupta (supra)** had in categorical terms held that the power to substitute the arbitrator given in sub-section (6) of Section 29A has to be read with the power of appointment under Section 11. The same view has been reiterated by the Gujarat High Court in case of **Nilesh Ramanbhai Patel (supra)**.

38. The Division Bench of Kerala High Court in case of **M/s Lots Shipping Company Limited (supra)** had clearly held that the power to grant extension by Court is introduced under an integrated scheme which also allows the Court to reduce the fees of the arbitrators or to impose cost on a party and/or to substitute the arbitrators. The power of extension is to be exercised on satisfying the “sufficient cause” being made out. According to the Court, the powers conferred under Section 29A for permitting extension with respect to proceedings of arbitration, is clearly akin to the powers conferred under Section 14 and 15 of the Act.

39. The Court further recorded that the absence of any provision for an appeal with regard to the exercise of powers under Section 29A, would be indicative of the fact that power under Section 29A is not to be exercised by principal Civil Court of original jurisdiction.

40. The anxiety of respondent’s counsel as to the Section 42 of the Act read with Section 2(1)(e) has no relevance in the scheme of the

Act while dealing with Sections 11 and 29A of the Act, as Section 42 will get attracted only when the Courts are dealing matters other than that of appointment and removal of arbitrators. The section clearly provides that where any application in respect of an arbitration agreement is made to the Court, that Court alone has jurisdiction over the arbitral proceedings and all the subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

41. In case of **Garhwal Mandal Vikas Nigam Ltd. (supra)**, the Apex Court while clarifying the position as to the challenge of an award made by an arbitrator appointed by the High Court or Supreme Court under Section 11 shall be made under Section 34 of the Act of 1996 before the principal Civil Court of original jurisdiction as contemplated under Section 2(1)(e) of the Act.

42. Thus the argument from the side opposite as to the award cannot be challenged before the principal Civil Judge made by the arbitrator appointed by this Court has been dealt in extenso by Hon'ble Apex Court in the judgment referred above.

43. Here, we are concerned with the extension of time limit for the arbitral award under Section 29A, wherein an arbitrator has been appointed by the High Court exercising power under Section 11 of the Act. Section 42 will not be attracted and it is only the High Court which has the power to grant extension to the Arbitral Tribunal for making award.

44. Reliance placed on the various decisions by the respondent's counsel relate to the definition of the word "court" under Section 2(1) (e) prior to the amendment of year 2015. In none of the judgment placed before the Court Sections 11 and 29A of the Act has been taken into consideration.

45. As far as decision of coordinate Bench of this Court in case of **M/s Lucknow Agencies and Another (supra)** is concerned, the arbitrator was appointed by the Housing Commissioner and not by the High Court exercising power under Section 11 of the Act. The Court while considering the provisions of Section 29A(4) and (5) held that it was the principal Civil Court where the application for extension of time for arbitral award was maintainable and not before the High Court. In the said judgment there was no consideration as to sub-section (6) and (7) of Section 29A of the Act. The said decision is distinguishable on the facts of the present case.

46. In the present case this Court exercising power under Section 11 of the Act has appointed the arbitrator way back in the year 2014.

47. Thus, the question framed above stand answered holding that the application for extension of time for arbitral award moved under Section 29A is maintainable before this Court

48. Considering the facts and circumstances of the case, a case under Section 29A(4) and (5) of the Act is made out for extending the mandate of the arbitrator

49. The application stands allowed. The mandate of the arbitrator is extended by a period of four months from today. The period between 01.10.2021 and today is hereby regularized.

Order Date :- 11.3.2022

Kushal