

CORAM: BHARAT P. DESHPANDE, J.

DATED: 15th April, 2024

ORAL JUDGEMENT

1. Rule.
2. Rule is made returnable forthwith.
3. Heard with consent for final disposal.
4. The Petitioner preferred present petition thereby challenging the Order passed by the Commercial Court at Vasco dated 02.01.2024, thereby allowing the application filed by the Respondent under Section 29A of the Arbitration and Conciliation Act, by extending the time period for completion of arbitration proceedings by six months.
5. The Petitioner challenged such order on the ground of lack of jurisdiction of the Commercial Court to exercise power under section 29A (4) of the Arbitration and Conciliation Act.
6. Heard learned Counsel Mr. Pawan Jhabakh with Mr. Gajendra Kanekar, Mr. Aniket S. Kunde and Mr. Varun Salai, Advocates appearing for the Petitioner and Mr. Parag Rao with Mr. Ajay Menon and Ms. S. Drago, Advocates appearing for

Respondent Nos.1, 14 to 16 and 18 to 33, Mr.Pulkit Bandodkar, learned counsel appearing for Respondent Nos.2 to 8 and Mr. Shailesh Redkar, learned counsel appearing for Respondent No. 9.

FACTS

7. As dispute arose under the memorandum of family settlement dated 11.01.2021, Respondent No. 1 invoked an arbitration clause and the Arbitral Tribunal was appointed consisting of three Arbitrators, as per the agreement by the parties themselves.

8. A memorandum of family settlement was executed between the family members on 11.01.2021. A dispute arose between two groups and accordingly Group B invoked arbitration agreement by appointing Justice (Retired) Shri A.P. Lavande, Former Judge of this Court as an Arbitrator and called upon Group A to appoint their Arbitrator. On 15.06.2021, Group A appointed Justice A. V. Sawant (Former Judge) as their Arbitrator. On 29.06.2021, Justice H. L. Gokhale, (Former Judge of Supreme Court of India) accepted appointment as Presiding Arbitrator. However, on 23.08.2022 Justice H. L. Gokhale resigned and withdrew himself from the Presiding Arbitrator's Post. On 15.09.2022, Justice Anil R. Dave, (Former Judge of Supreme Court of India) was appointed

as Presiding Arbitrator by mutual agreement of the learned member Arbitrators. However, on 06.09.2023, Justice Anil Dave recused himself as a Presiding Arbitrator. Thereafter, learned Arbitrators appointed by both groups tried to appoint Presiding Arbitrator, however, there was no consensus and accordingly an application was filed before this Court in the year 2023, by Respondent No. 1 for appointment of Presiding Arbitrator. An application No. 12/2023 was decided by this Court vide order dated 31.10.2023, thereby appointing Hon'ble Justice U. U. Lalit (Retired Chief Justice of India) as the Presiding Arbitrator.

9. Since, time to complete arbitration proceedings even after extension of six months by the consent of parties, expired, there was a need for applying for extension of time with the consent of the Court and accordingly, an application was filed by the Respondent before the Commercial Court vide Civil Miscellaneous Application No. 20/2023 which was allowed by impugned order dated 02.01.2024, thereby allowing the extension for six months, which is in challenged in this Petition.

SUBMISSIONS

10. Learned counsel for the Petitioner would submit that power to extend the period of arbitration under Section 29A(4) of the said

Act lies with High Court and not before the Commercial Court or even the Principal Court of Original Jurisdiction for the simple reason that such power gives multiple options to High Court which includes the change of Arbitrators, to terminate the mandate of arbitration proceedings or even to reduce the fees of the Arbitrators. He submits that Section 11(6) of the Arbitration Act specifically gives power to the High Court in case of domestic arbitration and the Apex Court in the case of international arbitration, which are connected to the aspect of extending the period, terminating the mandate or reduction of the fees of Arbitrator. He submits that once the Arbitrator is appointed by the High Court, only the High Court will have power to regulate the proceedings including Section 29(A) of the amended Act, otherwise it would be a conflict between the authorities which needs to be avoided by approaching only the High Court in case of domestic arbitration and the Apex Court in the case of international arbitration, for the purpose of relief as provided under Section 29A of the Arbitration Act.

11. Learned counsel for the Applicant would submit that first of all an Application under Section 29A(4) filed before Commercial Court, itself, is not maintainable as said Court is not having

jurisdiction to entertain and decide Application for extension of time to complete arbitration proceeding. He would submit that definition of the word 'Court' as found mentioned therein would certainly be the High Court in case of domestic arbitration. He further submits that Section 2 deals with definitions and Sub-section (1) starts with the wording "In this part unless the context otherwise requires". He submits that these words are relevant for the purpose of understanding the meaning of the word 'Court' as found in clause (e) of sub-section 1 of Section 2 of the said Act.

12. The learned counsel for the Applicant would submit that Section 29-A was introduced by Act of 2016 with effect from 23.10.2015. According to him, this provision restricts the time limit for passing of Arbitral Award. The time limit of 12 months is fixed by sub-section 1 with regard to the matters other than international commercial arbitration. Such 12 months period shall be reckoned from the date of completion of pleadings under sub-section 4 of Section 23. The completion of the pleadings shall be within period of 6 months from the date the Arbitrator receives notice in writing of his/their appointment.

13. Learned counsel for the Applicant would submit that Section 29-A deals with various eventualities and therefore the

word 'Court' needs to be interpreted in the context of the matter as provided under section 2. He submits that said Section provides that the parties by consent may extend the period specified under sub-section (1) for making the award for further period but not extending 6 months. Thus, according to him the initial period of 12 months could be extended upto to 18 months with the consent of the parties, however, if the award is not passed within the extended period of 6 months, the only option with the parties is to opt for sub-section 4 of Section 29-A wherein there are two options i.e. termination of the mandate and secondly, extension of period by a Court. The proviso gives power to the Court that if it finds that the proceedings have been delayed for reasons attributable to the Arbitral Tribunal, then it may order reduction of fees of the Arbitrator by not exceeding 5% for each month of such delay. Similarly, the application for extension as referred in sub-section 4 cannot be simply granted on asking, but the parties must satisfy the Court by showing sufficient cause and terms and conditions to be imposed by the Court. He would further submit that 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 evidence and the material already on record and the Arbitrator's appointed under this Section shall be deemed to have received such evidence and material.

14. Learned counsel for the Applicant further submits that in view of sub-section 7 of Section 29-A, the intention of legislature clearly spelt out that in the event of Arbitrators being appointed under this Section, the Arbitral Tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed Arbitral Tribunal.

15. Learned counsel for the Applicant would thus submit that Section 11 of the Arbitration and Conciliation Act deals with appointment of Arbitrators. Such power is either given to the parties by mutual consent or in case of dispute, by the High Court or Supreme Court, as the case may be. He would thus submit that reconstitution or re-appointment contemplated under section 29-A needs to be connected with powers under Section 11 and therefore only the High Court in case of domestic arbitration and the Supreme Court in case of international arbitration will be the Court having jurisdiction to entertain any application under Section 29-A of the Arbitration and Conciliation Act and more specifically for

exercising power conferred on the Court as found in sub-section 4 to 7 of the Section 29-A.

16. Learned counsel for the Petitioner placed reliance on the following decisions:- (i) *Lots Shipping Company Limited Vs. Cochin Port Trust, 2020 SCC OnLine Ker 21443*; (ii) *Nilesh Ramanbhai Patel and ors. Vs. Bhanubhai Ramanbhai Patel and ors.(14.092018-GUJHC):MANU/GJ/1549/2018*; (iii) *K.I.P.L. Vistacore Infra Projects J.V. Municipal Corporation of the city of Ichalkarnji-2024 SCC Online Bom 327*; (iv) *Cabra Instalaciones Y. Servicios Vs. Maharashtra State Electricity Distribution Co. Ltd., 2019 SCC OnLine Bom 1437*; (v) *JP Infratech Limited Vs. EHBH Services Private Limited & Another-(2024) SCC Online ALL 444*; (vi) *Indian Farmers Fertilizers Coop. Ltd. Vs. Manish Engineering Enterprises 2022 OnLine All 150*; (vii) *Indian Power Corporation (Bodhgaya) Limited Vs. South Bihar Power Distribution Company Limited, 2023 SCC Online Pat 2922*, (viii) *Amit Kumar Gupta V. Dipak Prasad, 2021 SCC Online Cal 2174*.

17. In support of his submissions, learned counsel for the Applicant while placing reliance in the case of *K.I.P.L. Vistacore Infra Projects J.V. (supra)* would submit that learned Single Judge (Coram: Bharati Dangre J.) discussed the provisions of Section 29-

A in case of domestic arbitration and finally observed that the Court as defined in Section 2(1)(e) to partake the powers vested in the High Court to extend the mandate of the Arbitrator and substitute the Arbitrator or Arbitral Tribunal, itself.

18. Learned counsel for the Applicant while placing reliance in the case of *Cabra Instalaciones. Y. Servicios (Supra)* herein the learned Single Judge (Coram: G.S. Kulkarni, J) while considering the application under Section 29-A(4) though in the case of international commercial arbitration observed that the High Court will not have jurisdiction to entertain any application under Section 29A(4) and that the Supreme Court would be the only Court to have jurisdiction to pass such orders.

19. Learned counsel for the Petitioner while placing reliance in the case of *Lots Shipping Company Limited (supra)* wherein Division Bench of Kerela High Court deciding a reference from the learned Single Judge, discussed the scope of Section 29-A of the said Act and the word 'Court' as found in Section 2(1)(e) observed that the question to be decided is whether the term Court contained in Section 29A(4) requires a contextual interpretation apart from the meaning contained in the Section 2(1)(e)(i) of the said 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”. Finally, in para 11 the Division Bench of Kerala High Court observed that the term “Court” contained in Section 29-A(4) has to be interpreted as the ‘Supreme Court’ in the case of international commercial arbitration and as the ‘High Court’ in the case of domestic arbitration.

20. Learned counsel for the Petitioner would then submit that while placing reliance in the case of *Nilesh Ramanbhai Patel (supra)* wherein learned Single Judge of the Gujarat High Court (Coram: Akil Kureshi, J.) while deciding an application under Section 29-A(4) in case of domestic arbitration, observed that the word “Court” referred in the said Section is to be interpreted as High Court and not the Court having original civil jurisdiction.

21. Learned counsel for the Applicant while placing reliance in the case of *Jaypee Infratech Limited (supra)* wherein learned Single of the Allahabad High Court (Coram: Shekhar B. Saraf, J) while considering an application under Section 29-A(4) in case of domestic arbitration, observed that the word ‘Court’ is to be interpreted as the High Court and accordingly, the power to extend the period vests with the High Court in case of domestic arbitration proceedings. While doing so, the learned Single Judge referred the

matter to the Larger Bench by formulating the questions as there were divergent views of the Co-equal Benches.

22. Learned counsel for the Applicant while placing reliance in the case of *Indian Farmers Fertilizers Cooperative limited (supra)* wherein learned Single Judge of the Allahabad High Court (Coram: Rohit Ranjan Agarwal, J.) discussed in details powers under Section 29-A of the said Act and concluded that the High Court is the Court having jurisdiction to entertain application for extension of time.

23. Learned counsel for the Applicant would then placing reliance in the case of *Indian Power Corporation (supra)* wherein the learned Single Judge of Patna High Court (Coram: K. Vinod Chandran, C.J.) considered the question as to whether the Chief Justice or his designate empowered under Section 11 to consider the request for arbitration, can grant extension of time as required under Section 29A of the Act or is it the Principle Civil Court of original jurisdiction in the district or the High Court having original civil jurisdiction, alone who will be empowered to exercise the power under Section 29-A of the Act of 1996, answered it in para 32 that it is the High Court who has to exercise jurisdiction under Section 29-A.

24. Finally, learned Counsel for the Applicant while placing reliance in the case of *Amit Kumar Gupta (supra)* wherein learned Single of Calcutta High Court (Coram: Debanshu Basak, J.) while deciding the provisions of Section 29-A for extension of time decided that it is the High Court which has to consider such extension.

25. Per contra, Mr. Rao appearing for the Respondents would submit that the definition of the word “Court” as found in Section 29A(4) would clearly mean that the Court of original civil jurisdiction which means the Court of the District Judge or the Court empowered under the Commercial Court’s Act. He submits that in the present matter, the learned Commercial Court rightly considered this aspect of extension of period of arbitration and no interference is necessary.

26. Mr. Rao while placing heavy reliance in the case of *Mormugao Port Vs. Ganesh Benzoplast Ltd. in Writ Petition No.3/2020 decided on 15.01.2020* would submit that learned Single Judge of this Court in similar circumstances and by elaborately considering the provisions of the Act, observed that for the purpose of exercising power under Section 29A (4) of the said Act, the District Judge having jurisdiction is the proper Court to

exercise the power or extension of the period.

27. Learned counsel for the Respondent Mr. Rao while heavily placing reliance on the observations of the decision in the case of *Mormugao Port Trust (supra)* decided by the learned Single Judge of this Court (Coram: Dama Seshadri Naidu, J.) would submit that in similar circumstances and in case of domestic arbitration, it has been held that it is the Court having original civil jurisdiction in the district who is having power to extend the time under Section 29-A (4).

DISCUSSIONS

28. It is thus clear from the above decisions cited by both the sides that there are divergent views of the learned Single Judges of this Court itself in connection with interpretation of Section 29-A of the Arbitration and Conciliation Act and more particularly, the “Court”.

29. In the case of *Mormugao Port Trust (supra)* the learned Single Judge while discussing various provisions of the Act, observed and more specifically on the basis of associated Contractors case decided by the Apex Court while relying on para no. 24, the word “Court” in the context will have to be interpreted as the Court having ordinary original jurisdiction including the

High Court having the original jurisdiction in the area.

30. After the decision of *Mormugao Port Trust (supra)*, learned Single Judge in the case of *K.I.P.L Vistacore Infra Projects J.V. (supra)* while considering various provisions of the Act and decisions of the Apex Court held contrary that the word ‘Court’ found in Section 29-A would have to be interpreted in the textual meaning and in the contextual meaning as a whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.

31. In the case of *Jaypee Infratech Limited (supra)* the Allahabad High Court in the case of *Lots Shipping Company (supra)*, the Division Bench of Kerala High Court, in the case of *Nilesh Ramanbhai Patel (supra)*, learned Single Judge of Ahmedabad High Court also discussed thread bear the provisions of section 29-A with other Sections including the definition clause and more specifically with regard to domestic arbitration and found that the extension which is contemplated under Section 29-A(4) has to be interpreted as the High Court and not the District Court for the purpose of grant of such relief.

32. With utmost respect to the interpretation of the learned Single Judge in the case of *Mormugao Port Trust (supra)*, I would like to mention herein that it would be a situation of conflict in case of authorities for exercising such power, as section 29-A is not simply deciding or dealing with extension of time but it deals with various other aspects including the termination of the mandate, substitution of one of the Arbitrator or all of the Arbitrator, reduction of fees of the Arbitrator. Thus, power to substitute or re-constitute the Arbitral Tribunal as provided under sub-section 6 of Section 29-A will have to be read with Section 11 which deals with appointment of Arbitrators. There cannot be any difference with regard to appointment of Arbitrator with that of substitution of one of the Arbitrator or reconstituting the Arbitral Tribunal. The words used in sub-section 7 of the Section 29-A specifically provide the word “appointed under this section”. Thus, substitution is in fact a fresh appointment as contemplated under Section 11 of the said Act. Thus, while extending the period of Arbitration, the Court is also empowered either to substitute one or all the Arbitrators and reconstitute the Arbitral Tribunal. It practically deals with appointment of fresh Arbitrators, which is the power given to the High Court in case of domestic arbitration

as found in Section 11.

33. However, since there are two different/divergent views of two learned Single Judges of this Court on the issue of the definition of “Court” as found mentioned in Section 29A(4), the Judicial Propriety demand that the matter needs to be placed before the Larger Bench for the authoritative pronouncement on this subject.

34. In the present case there is one another angle which needs to be looked into. It is a fact that at the initial stage when Respondent No.1 invoked arbitration clause by issuing notice on 18.05.2021 and thereby appointing Arbitrator, invited the other group i.e. Group A consisting of Respondent Nos.2 to 8 to nominate their Arbitrator. Accordingly, on 15.06.2021, Group A appointed their Arbitrator. The Arbitrators appointed by Group A and Group B then by consensus appointed the Presiding Arbitrator on 29.06.2021 and accordingly, arbitration proceedings commenced by filing statement of claim on 26.07.2021 and statement of defence as well as counter claim on 30.08.2021. Thereafter, rejoinder and reply were filed by the respective parties. However, vide letter dated 23.08.2022, the Presiding Arbitrator Justice H. L. Gokhale (Retired) resigned. Thereafter, the Arbitral Tribunal was

reconstituted by consent on 15.09.2022, thereby appointing Presiding Arbitrator Shri Justice Anil R. Dave, Former Judge of Supreme Court. Since the last date of completion of arbitral proceedings was on 28.02.2023, the parties by consent extended the period by 6 months. Accordingly, the time to complete the arbitration expired on 28.03.2023. The Respondent No.1 thereafter, moved an application under section 29-A of Arbitration and Conciliation Act seeking further extension somewhere in August, 2023. This application was filed before the Commercial Court at Vasco. However, on 06.09.2023, the Presiding Arbitrator Justice Anil R. Dave resigned from the said post.

35. Since there was no consensus between the parties or between the Arbitrators appointed by the parties with regard to appointment of Presiding Arbitrator, the application was moved before this Court by Respondent No. 1 for reconstitution of Arbitral Tribunal thereby appointing Principal Arbitrator.

36. This application was allowed by this Court vide order 31.10.2023 which reads thus:-

P.C.

Learned Advocate Mr. Rao appearing for the Applicant submits that all the Respondents are served. Affidavit of service in respect to Respondent

no.21 was already filed. Affidavit of service upon Respondent nos. 5 and 43 to 50, is taken on record. Respondent no.5 is present in person. Mr. Desai, learned Counsel submitted that the representatives of Respondent nos. 31 and 35 are present in the Court and they have instructed him to appear for them. He undertakes to file Wakalatnama.

2. The Applicant is the original claimant. The Respondents were parties in statement of claim filed by the Applicant before the erstwhile Arbitral Tribunal. Vide e-mail dated 23.08.2022, the then Presiding Arbitrator Hon'ble Justice His Lordship Gokhale informed the parties that he is resigning as the Presiding Arbitrator. Thereafter, Hon'ble Justice Anil Dave (Retd.) was appointed as Presiding Arbitrator. Thereafter, Hon'ble Justice Dave informed the parties that he was recusing from the matter. Hence, this application is preferred to appoint Presiding Arbitrator.

3. The Respondents have consented to the appointment of Presiding Arbitrator. Parties have suggested the name of Hon'ble Justice U. U. Lalit (Retired Chief Justice of India), to be appointed as Presiding Arbitrator.

4. In view of the above circumstances, this application has to be allowed.

ORDER

(i) Application is allowed in terms of prayer clause

'A'.

(ii) Hon'ble Justice U. U. Lalit (Retired Chief Justice of India) is appointed as Presiding Arbitrator.

(iii) Application is disposed off.

37. It is, thus, very much clear that for the purpose of reconstituting the Arbitral Tribunal which was initially constituted with the consent of parties and thereafter by the Court under section 11(6) of the Arbitration and Conciliation Act, such reconstitution was also at the intervention of this Court. Thus, the application for appointment of Arbitrator No.12/2023 filed by the Respondent No.1 before this Court has to be construed as an application filed under Section 29-A of the Arbitration and Conciliation Act, itself. This fact goes to the root of the matter as by filing such application for appointment of Arbitrator No. 12/2023, was infact for reconstitution of the Arbitral Tribunal and by appointing the Presiding Arbitrator. Hence, such application when filed before this Court was allowed by appointing Hon'ble Justice U. U. Lalit (Retired Chief Justice of India) as the Presiding Arbitrator.

38. The question therefore, needs to be answered is that even when the Arbitral Tribunal is constituted without the intervention of the Court and the same was reconstituted with the intervention

of the Court, where an application under Section 29-A(4) of the Arbitration and the Conciliation Act would lie i.e. before the Court of the Original Jurisdiction or before the High Court in case of domestic arbitration.

39. Since, I find myself unable to agree with the view taken in the case of *Mormugao Port Trust (supra)* as discussed earlier, there is a need to refer the matter to Larger Bench as the decision in the case of *K.I.P.L. Vistacore Infra Projects J.V. (supra)* is contrary to *Mormugao Port Trust (supra)*. Thus, in order to clarify and to have authoritative pronouncement in this conflict, the registry of this Court could be directed to place the matter before the Hon'ble the Chief Justice for constitution of Larger Bench as per the Bombay High Court Appellate Rules for placing the matter on the following questions of law:-

1. In the event an Arbitral Tribunal constituted by the High Court under Section 11(6), fails to complete the proceedings within the stipulated period/extended period, where an application under Section 29-A(4) would lie i.e. the High Court or the Civil Court having original jurisdiction in case of a domestic arbitration?
2. In the event an Arbitral Tribunal consisting of three Arbitrators is constituted as per Section 11(2) i.e. with agreement

and consent of the parties, fails to complete the proceedings within the stipulated period/extended period, where an application under Section 29-A(4) would lie i.e. before the High Court or the Civil Court having original jurisdiction in the case of domestic arbitration?

40. Since, the view taken by the learned Single Judges in the case of *Mormugao Port Trust (supra)* and subsequently in *K.I.P.L. Vistacore Infrastructure J.V. (supra)*, appears to be divergent/different views and the fact that the decision in the case of *Mormugao Port Trust (supra)* was not brought to the notice while deciding the matter in case of *K.I.P.L. Vistacore Infrastructure J.V. (supra)*, the judicial propriety demand that reference be made to the Larger Bench as provided in Rule 8 of Chapter I of the Bombay High Court Sides Appellate Rules is necessary. Accordingly, registry is directed to place the matter before the Hon'ble the Chief Justice.

BHARAT P. DESHPANDE, J.