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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 4th December, 2019.

Pronounced on: 12th May, 2020.

+ **O.M.P. (MISC.) (COMM) 236/2019**

DDA

..... Petitioner

Through: Ms. Kanika Singh, Advocate.

versus

M/S TARA CHAND SUMIT CONSTRUCTION CO. ... Respondent

Through: Mr. S.K. Jain with Mr. Akshu Jain,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

O.M.P. (MISC.) (COMM) 236/2019

1. With the consent of the parties, arguments have been heard on the main petition also.

I.A. No.11418/2019

2. This is an application filed on behalf of the petitioner under Section 151 CPC seeking recall of order dated 31.07.2019.

3. Petitioner had filed the present petition under Section 29A of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for extension of mandate of the learned Arbitrator. The Court had issued notice to the respondent. Respondent filed its reply and objected to

the maintainability of the petition before this Court on the ground of lack of pecuniary jurisdiction as the value of claims was less than ₹ 2 Crores.

4. When the matter was listed on 31.07.2019, learned counsel for the petitioner submitted that the amount of claims and counter claims in the arbitration proceedings was below the pecuniary jurisdiction of this Court and, accordingly, sought leave to withdraw the petition, with liberty to file the same before the Court of competent jurisdiction. The petition was, accordingly, dismissed as withdrawn granting the liberty sought.

5. Present application seeks recall of the Order dated 31.07.2019.

6. The contention of learned counsel for the petitioner/applicant is that power to extend the mandate of an Arbitrator under sub-Section (4) of Section 29A of the Act, beyond the period of 12 months or further extended period in terms of sub-Section (3), rests with the Court. Tribunal can extend the mandate by 6 months beyond the initial 12 months, with the consent of the parties, but any further extension of mandate can only be by the Court. Court has vast power of extension of the period, even after such period is over and while doing so, Court can substitute one or all of the Arbitrators, as provided under Sections 29(6) and 29(7) of the Act. It is argued that reading the aforesaid provisions, the inescapable conclusion is that the term 'Court' in Section 29A would be the High Court, in case of domestic arbitration, which has exclusive power to appoint an Arbitrator and not the District Court, as per Section 2(1)(e) of the Act.

7. It is further argued that the said interpretation finds force from the fact that it would be inconceivable that Legislature would vest the power in the Principal Civil Judge to substitute an Arbitrator, who may have

been appointed by the Supreme Court or the High Court. Even otherwise, it would be wholly impermissible since powers of appointment of Arbitrators, when invoked, vest only in the Supreme Court or the High Court, as the case may be, in terms of sub-Sections (4), (5) and (6) of Section 11 of the Act and hence, the Civil Court cannot be given the power to extend the mandate of the Arbitrator, so appointed.

8. Learned counsel, in order to substantiate this argument, submits that the power of extending the mandate of an Arbitrator also includes power to substitute the Arbitrator. If in a given case and for valid reasons, the Court while extending the mandate of the Arbitrator finds that it is so necessary, it can substitute the Arbitrator in the same proceedings. Surely, this power is only with the Supreme Court or High Court given the nature of Arbitration, and in case it is to be held that the Civil Court can extend the mandate of the Arbitrator, then it would be required to be held that the Civil Court while extending the mandate, if so required, can also substitute the Arbitrator. This would be clearly in the teeth of the provisions of Section 11 of the Act. A Court which does not have the power to appoint an Arbitrator can certainly not have the power either to substitute the Arbitrator or even to extend the mandate of the Arbitrator under Section 29A of the Act, to say the least. Learned counsel submits that this conflict can be resolved by understanding the term 'Court' for the purpose of Section 29A, as the Supreme Court/High Court exercising power under Section 11 of the Act and any other interpretation would be contrary to the entire Scheme of the Act.

9. It is also pointed out that in fact several Courts below have been rejecting applications under Section 29A of the Act on this very ground

that only Supreme Court or the High Court would have the power to extend the mandate of the Arbitrator, as the power to appoint the Arbitrator lies only with the Supreme Court or the High Court, as the case may be.

10. On the merits of the case, learned counsel submits that the present is a fit case for extension of mandate of the existing Arbitrator as the arguments of both parties were nearly concluded. Most of the period of 12 months during the arbitration proceedings had elapsed due to the dilatory tactics adopted by the respondent herein. It is not in the interest of either party if the mandate of the Arbitrator is terminated at this stage and a substitute Arbitrator is appointed, as is being suggested by the respondent before the Court. The whole purpose of resorting to arbitration for resolving the disputes between the parties is that the proceedings are concluded as expeditiously as possible. It is, therefore, prayed that the petition be allowed by this Court and mandate of the Arbitrator be extended.

11. Learned counsel relies on a judgment of the Gujarat High Court in the case of ***Nilesh Ramanbhai Patel and Ors. v. Bhanubhai Ramanbhai Patel and Ors., Misc. Civil Application (O.J.) No.1 of 2018 in Petition under Arbitration Act No.56 of 2016, decided on 14.09.2018***, as also of the Bombay High Court in ***Cabra Instalaciones Y Servicios, S.A. v. Maharashtra State Electricity Distribution Company Limited, 2019 SCC Online Bom 1437***, to argue that in both the judgments, it has been held that the power to extend the mandate of the Arbitrator lies only with the Supreme Court or the High Court, as the case may be, under Section 11 of the Act.

12. Respondent has not filed a separate reply to the present application but submitted that he would rely on the reply filed to the main petition before the same was withdrawn by the petitioner.

13. Respondent has objected to the present application on two grounds. Learned counsel argues that the claim amount, excluding interest and cost, is ₹ 17,79,545/- and, thus, this Court does not have the pecuniary jurisdiction to entertain the present petition. He submits that learned counsel for the petitioner had clearly admitted to this fact and had, therefore, withdrawn the petition, with liberty to approach the Court of competent jurisdiction and it is not open to the petitioner to now seek a recall of the order, once the petition has been withdrawn.

14. The next contention of the learned counsel for the respondent is that he would have no objection to the extension of time for completion of the proceedings and passing of the Award, provided the Court exercises power under Section 29A(6) of the Act and substitutes the present Arbitrator with a new Arbitrator. He submits that the present Arbitrator has been deliberately delaying the proceedings, in connivance with the petitioner herein, who is the respondent before the Arbitrator. The Arbitrator made the mandatory Declaration under Section 12 of the Act, after about 11 months of his appointment, on 10.01.2018. The petitioner did not timely comply with the order dated 09.03.2018, of the learned Arbitrator, by which the Arbitrator had directed the petitioner to supply certified copies of the final bill paid to the Claimant, after which only the respondent was to submit his Statement of Facts *i.e.* within four weeks after receipt of the documents. Petitioner filed incomplete documents on 23.08.2018, which, in any case, was after filing of the

Statement of Facts by the respondent, on 05.05.2018 and Counter Statement by the petitioner, on 16.07.2018. Respondent filed an application on 28.11.2018 for calling of Junior Engineer as a witness, who had received the final bill from the respondent. No objection was raised by the petitioner to the said application and nor were any directions passed to file a reply by the Arbitrator. On 11.12.2018, the Arbitrator compelled the respondent to advance arguments without complete documents being filed by the petitioner. Subsequently, on 13.12.2018, the Arbitrator vide email directed the petitioner to file its reply within 15 days to the application, which was then filed on 29.12.2018. After considering the reply, the Arbitrator vide email dated 01.01.2019 directed the respondent to furnish the name of the Junior Engineer whom the respondent wanted to call as a witness. The respondent furnished the name on 02.01.2019, but vide email dated 09.01.2019, the Arbitrator abruptly refused to call the witness. This attitude of the Arbitrator compelled the respondent to move an application under Section 13 of the Act. Respondent, therefore, submits that the application be dismissed and no extension of time be granted, unless the Arbitrator is substituted by the Court.

15. In support of his contention that the District Court would have the jurisdiction to entertain the present petition and that this Court does not have pecuniary jurisdiction, learned counsel for the respondent has relied on the judgment of the Bombay High Court in the case of **Chief Engineer v. Devdatta P. Shirodkar, 2018 SCC Online Bom 368**, as well as the judgment of the Allahabad High Court in **Jai Bahadur Singh v. State of U.P., 2019 SCC Online All. 3068**, wherein the respective High Courts

refused to entertain the petitions as being not maintainable, leaving it to the petitioners to approach the concerned District Courts.

16. Learned counsel for the petitioner, in rejoinder, has argued that the proceedings before the Arbitrator were at the stage of reserving the case for passing of the Award. Substitution of an Arbitrator cannot be sought as a matter of right and the respondent even on merits has no ground to seek such a substitution. In support of this, learned counsel relies on a judgment of this Court in ***NCC Ltd. v. Union of India, 2018 SCC Online Del 12699***. She further argues that perusal of the record of the Arbitrator would clearly indicate that it was the respondent who was avoiding adjudication of the disputes on merits. The Arbitrator was appointed on 10.01.2018 and fixed a schedule for completion of pleadings vide letter dated 23.01.2018. Respondent filed its Statement of Claim after four months *i.e.* on 05.05.2018. In total, seven hearings were held before the Arbitrator. On the first hearing, respondent stated that he had sent the rejoinder, but neither the Arbitrator nor the petitioner had received the same and the hearing was adjourned. During the second hearing on 15.09.2018, counsel for the respondent was absent and the matter was adjourned to 29.10.2018. After 10 months from the date of the Arbitrator entering upon reference, respondent filed an application raising objections and seeking a declaration under Section 12(1) of the Act from the Arbitrator. Third hearing was held on 29.10.2018, when again the main counsel for the respondent did not reach for the hearing and continued to raise objections about his appointment. Fourth hearing was held on 22.11.2018, when counsel for the respondent conceded that the objections raised against the appointment of the Arbitrator stood settled

and the proceedings may continue. Part arguments were addressed by both the parties and the proceedings were adjourned to 11.12.2018 for further arguments. On 28.11.2018, respondent filed an application for calling of the concerned Junior Engineer as a witness regarding verification of submission of the final bill. This was nothing but a delaying tactic, after most of the arguments had been concluded. Nevertheless, the Arbitrator heard arguments on the application and dismissed the same vide Order dated 09.01.2019. During the sixth hearing on 18.01.2019, respondent moved an application under Section 13 of the Act, requesting the Arbitrator to terminate its mandate through a proxy counsel. Arbitrator fixed the date for hearing of the said application, but none appeared on behalf of the respondent.

17. Learned counsel for the petitioner further submits that a letter dated 02.02.2019 was given by the respondent to the Arbitrator stating that 12 months period under Section 29A of the Act had elapsed on 23.01.2019 and, thus, after recording the entire history of the proceedings and taking note of the objection by the respondent, the Arbitrator had no option but to suspend the proceedings, in the absence of consent by the respondent, for extension of time. The entire chronology, thus, shows that it was the respondent who had delayed the proceedings and is wrongly blaming the petitioner and the Arbitrator.

18. Insofar as the judgments relied upon by the respondent are concerned, learned counsel for the petitioner has sought to distinguish them. She submits that the judgment in the case of **Chief Engineer** (*supra*) is not applicable, as there was no dispute therein as to whether the High Court or the District Court would have jurisdiction for extension of

mandate of the Arbitrator under Section 29A of the Act, since neither of the parties had taken any objection, as is taken by the respondent herein. She submits that this would be clear from reading of Para 6 of the said judgment, which reads as under:

“6. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. It is apparent from the facts as set out that the earlier Arbitrator retired without passing any award and thereafter the petitioners failed to appoint any Arbitrator in his place and therefore, the respondent were required to approach this Court. This Court found that the appropriate remedy for the respondent is to approach the learned District Judge, as the mandate of the Arbitrator had expired. Section 29-A of the Act makes it clear that an Arbitrator is required to make the award within a period of 12 months from the date the arbitral tribunal enters upon the reference and which period can be extended by consent for a further period of six months. Under sub Section 4 of Section 29-A, 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) terminates unless the Court has, either prior to or after the expiry of the period so specified, extended the period. Sub Section 5 of Section 29-A provides that such extension of period under sub-Section (4) can be ordered on the basis of an application of any of the parties and the Court can grant such extension for sufficient cause and on such terms as may be imposed. Sub Section 6 of Section 29-A is material which provides 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. It was not disputed during the course of arguments at bar that the District Court would have jurisdiction to appoint/substitute an Arbitrator in the place of the Arbitrator whose mandate had lapsed. If that be so, the impugned order cannot be said to be without jurisdiction. Mr. Amonkar, the learned counsel for the

petitioners submitted that the application under Section 29-A of the Act was not maintainable, as the said Section was introduced by the amendment in the year 2015. I am afraid that such an contention was never raised before the learned District Judge. In any event, the petitioners have not raised any ground about the suitability of Mr. Borkar as being the Arbitrator to decide on the dispute between the parties. The impugned order certainly does not result into any manifest injustice to the petitioners. In that view of the matter, I decline to entertain the petition, which is accordingly dismissed with no order as to costs.”

19. Insofar as the judgment in the case of **Jai Bahadur Singh** (*supra*) is concerned, it is argued that the said judgment does not decide the issue of jurisdiction of Civil Courts to extend the mandate of the Arbitrator or substitute them under Section 29A of the Act, which really is the controversy in the present petition.

20. I have heard learned counsels for the parties.

21. The main controversy that arises for consideration in the present application is whether the petition, as filed earlier and subsequently withdrawn by the petitioner, is at all maintainable in this Court or the power to extend the mandate of the Arbitrator lies with the Civil Court of original jurisdiction in terms of the definition of the term ‘Court’ in Section 2(1)(e) of the Act. In order to decide the said issue, it is important to take note of certain provisions of the Arbitration and Conciliation Act, 1996 which are as under:

“2. Definitions:

(1) In this Part, unless the context otherwise requires, —

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(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;

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29A. Time limit for arbitral award.—

(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.

(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.

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11. Appointment of arbitrators.—

(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, upon request of a party, by [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(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, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement

on the appointment procedure provides other means for securing the appointment.

22. Section 11(5) and (6) of the Act relate to appointment of Arbitrators by the High Court or the Supreme Court, as the case may be and details the procedure to do so, therein. In case of International Commercial Arbitration, the power of appointment is vested only with the Supreme Court while in other arbitrations, High Court has the power to make appointment in terms of sub-Sections (5) or (6) of the Act.

23. Section 29A came to be inserted in the Statute by the Amending Act 3 of 2016 with effect from 23.10.2015. The Section has been extracted above. Perusal of the Section indicates that it provides for timelines within which the Award has to be made, including the timeline up to which the Tribunal can extend the mandate with the consent of the parties. The power of the Court to extend the mandate has no timelines, as is clear from reading the relevant provision. One of the important provisions of this Section is the power of the Court to substitute one or all of the Arbitrators, while extending the mandate.

24. Sub-Section (1) of Section 29A provides a time limit of 12 months within which the Award shall be made. Prior to the Amendment of 2019, the starting point of the 12 months was the date when the Arbitral Tribunal entered upon reference, but post 2019 Amendment, the commencement date is when the pleadings before the Arbitral Tribunal are completed. Sub-Section (3) enables the Arbitral Tribunal to extend the period of 12 months by a further period of six months, with the consent of the parties. Sub-Section (4) of Section 29A provides that if the Award is not made within the statutory period of 12 months or the

extended period under sub-Section (3), the mandate of the Arbitrator shall terminate, unless the Court, either prior thereto or after the expiry of the period, extends the mandate. The extension, of course, would be granted on an application by any of the parties, but only for sufficient cause and on such terms and conditions as may be imposed by the Court and this is so stipulated in sub-Section (5) of Section 29A.

25. Section 29A of the Act, incorporates an important provision by way of sub-Section (6) and which, in my opinion, is relevant for deciding the controversy in the present case. This provision confers on the Court a significant power of substituting one or all of the Arbitrators, while extending the mandate under sub-Section (4), if the need arises and in case, such substitution is made by the Court, the Arbitral proceedings shall continue from the stage already reached and on the basis of evidence or material, already collected. Therefore, when it comes to the time limits for passing the Award or the extension of mandate, the Section is a complete Code in itself.

26. When one looks at the definition of the term ‘Court’ under Section 2(1)(e) of the Act, it is clear that in case of International Commercial Arbitration, the Court would mean 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 the *sui* or the High Court having jurisdiction to hear appeals of Courts subordinate to that High Court. However, in cases of arbitration other than International Commercial Arbitration, Court would be 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 questions forming subject matter of the arbitration if the same had been the subject matter of the suit. This definition has been substituted by way of the Amendment Act 3 of 2016, which came into effect from 23.10.2015.

27. If the definition of the term ‘Court’ is looked into, no doubt the contention of the respondent seems plausible that the power to extend the mandate of the Arbitrator would lie with the Principal Civil Court. However, on a careful analysis, in my opinion, this interpretation would lead to complications and would perhaps be in the teeth of the powers of the Courts under Section 11 of the Act. Thus, the question that poses a challenge is, whether the term ‘Court’ can be interpreted differently in the context of Section 29A. In my view, sub-Section (1) of Section 2 of the Act itself gives that answer, as it begins with the expression “*in this part, unless the context otherwise requires*”.

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 overstepping 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.

31. Petitions under Section 11 of the Act are filed irrespective of the pecuniary jurisdiction of the Court and the same analogy would apply to the petitions under Section 29A of the Act. There is, thus, no merit in the contention of the learned counsel for the respondent that this Court has no pecuniary jurisdiction to entertain the petition, the value of the claims being below Rs. 2 Crores.

32. I am fortified, in my view, by the judgment of the Gujarat High Court in the case of **Nilesh Ramanbhai Patel** (*supra*), relevant paras of which read as under:

“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(l)(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(i)(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."

33. A somewhat similar controversy arose before the Bombay High Court in the case of ***Cabra Instalaciones Y Servicios, S.A.*** (*supra*), where the dispute was with respect to the maintainability of the petition under Section 29A of the Act. Since the said case related to International Commercial Arbitration, the Arbitral Tribunal had been appointed by the Supreme Court exercising power under Section 11(5) of the Act. The Bombay High Court was of the view that when the Arbitrators are

appointed by the Supreme Court, the High Court exercising power under Section 29A of the Act cannot make an appointment of a substitute Arbitral Tribunal or substitute any member of the Tribunal, as prescribed under sub-Section (6) of Section 29A, as it would be the exclusive power and jurisdiction of the Supreme Court, in view of the provisions of Section 11(5) of the Act. Relevant para of the judgment reads as 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 29A 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 29A. 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.”

34. Insofar as the judgments relied upon by the respondent are concerned, learned counsel for the petitioner has rightly distinguished both. In the case of **Chief Engineer** (*supra*), the parties had not disputed during the course of the arguments that the District Court would have jurisdiction to appoint/substitute the Arbitrator in place of the Arbitrator whose mandate had lapsed. In view of the above, the issue involved in the present case in fact did not even arise for consideration. In any case, as aforesaid, this Court is in agreement with the two judgments cited by the petitioner, as a proposition of law. Insofar as the judgment in the case of **Jai Bahadur Singh** (*supra*) is concerned, this was a case where a writ petition had been filed before the Allahabad High Court and all that the Court observed was that since the period of six months had also expired, issuance of a writ of mandamus was not possible and any further extension was possible only if the parties sought such extension in accordance with provisions of Section 29A of the Act, before the Civil Court of competent jurisdiction. The issue of competence of a Civil Court to entertain a petition under Section 29A was neither raised nor decided by the Court. Both the judgments, therefore, have no application to the present case.

35. For the reasons stated above, the application is allowed. Order dated 31.07.2019 is recalled. Petition is restored to its original number.

36. Insofar as the objection of the respondent to the continuation of the present Arbitrator is concerned, in my view, the same also has no merit. There is no dispute between the parties that the proceedings had reached the stage where most of the final arguments were concluded and the proceedings had been adjourned for remaining arguments. At this stage,

for the Court to substitute the Arbitrator would cause an unnecessary financial burden on the parties. Respondent has not been able to make out a case for substitution of the present Arbitrator. The best course of action, in the interest of the parties, would be to extend the mandate of the present Arbitrator by a period of four months for completion of the Arbitral proceedings and passing of the Award.

37. There are allegations and counter allegations made by the respective counsels as regards the delay in the proceedings. It is made clear that no further adjournments will be sought by either of the parties on the date fixed by the Arbitrator for concluding the arguments. The Arbitrator would fix the hearing as per the mutual convenience of parties.

38. Petition is accordingly allowed. The mandate of the Arbitrator is extended by a period of four months from today. Period between 24.01.2019 and today is hereby regularised.

39. No orders as to costs.

JYOTI SINGH, J

May 12, 2020

srb