

A.P. No. 417 of 2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division
Amit Kumar Gupta
v.
Dipak Prasad

For the petitioner : Mr. Jishnu Choudhury, Advocate
Ms. Ujjaini Chatterjee, Advocate
Ms. Sreenita Ghosh, Advocate

For the Respondent : Mr. Indra Kant Jha, Advocate

Hearing concluded on : January 6, 2021

Judgment on : February 3, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has invoked the provisions of Section 29A of the Arbitration and Conciliation Act, 1996 for extension of time to conclude the reference by a period as may be deemed fit and appropriate by the Court.

2. Learned Advocate appearing for the petitioner has submitted that, the parties entered into an agreement dated April 7, 2015. Such agreement had an arbitration clause. Disputes and differences had arisen between the parties. The petitioner had invoked arbitration clause contained in such agreement by a notice dated February 3, 2018

for the resolution of the disputes and differences between the parties. The arbitration clause had allowed the petitioner to nominate its arbitrator. Arbitration clause had also permitted the respondent to nominate his arbitrator. Although the petitioner had invoked its arbitrator, the respondent failed to do so. Consequently, the petitioner approached this Hon'ble Court under Section 11 of the Act of 1996 being A.P. No. 239 of 2018 for constitution of the arbitral tribunal. By an order dated June 29, 2020, the Court had disposed of such application by constituting the arbitral tribunal. The arbitral tribunal had entered into reference on August 17, 2018 which fact the arbitral tribunal had recorded in the minutes of the meeting dated October 9, 2018.

3. Learned Advocate appearing for the petitioner has submitted that, the time to conclude the arbitral reference had lapsed on September 4, 2020. According to him, the petitioner is not at fault in the arbitral tribunal not succeeding to complete the reference within the initial time stipulated by the Act of 1996. He has submitted that, since the nominee of the petitioner was elevated as a Judge of this Hon'ble Court, the petitioner nominated its arbitrator. Constitution of the arbitral tribunal is complete. However, the arbitral tribunal is not in a

position to conclude the reference in view of the expiry of the time period.

4. Learned Advocate for the petitioner has relied upon **2019 SCC Online Bom 1437 (Cabra Instalaciones Y. Servicios v. Maharashtra State Electricity Distribution Company Limited), 2019 Volume 2 GLR 1537 (Nilesh Ramanbhai Patel & Ors. v. Bhanubhai Ramanbhai Patel & Ors.)** and **2020 Volume 2 ARBLR 505 (Delhi) (DDA v. Tara Chand Sumit Construction Co.)** in support of the contention that this Hon'ble Court has the jurisdiction to try, entertain and determine an application under Section 29A of the Act of 1996. He has submitted that,

5. Learned Advocate appearing for the petitioner has relied upon Section 29A of the Act of 1996 and submitted that, the exercise of jurisdiction by a Court named under Section 11 of the Act of 1996 is different. He has submitted that, Section 42 of the Act of 1996 is not attracted when a Court is exercising jurisdiction under Section 11 of the Act of 1996. By the same analogy, the definition of the Court as appearing in Section 2 (1)(e) of the Act of 1996 is not attracted while considering an application under Section 29A of the Act of 1996. He

has referred to Sections 14 and 15 and in particular Section 15(2) of the Act of 1996. He has submitted that, the time to make and publish the award by the arbitral tribunal be suitably extended.

6. Learned Advocate appearing for the respondent has submitted that, the last sitting of the arbitral tribunal was held on February 2, 2020. There has been delay on the part of the petitioner in approaching this Hon'ble Court. He has submitted that, the present application has been filed sometime in December 2020 while the last sitting of the arbitral tribunal was on February 2, 2020. According to him, there has been unexplained delay on the part of the petitioner in approaching the Court.

7. Learned Advocate appearing for the respondent has contended that, there is an application in Section 9 of the Arbitration and Conciliation Act, 1996 pending before the Alipore Court. By virtue of Section 42 of the Act of 1996 therefore, such court has the jurisdiction to try and entertain an application under Section 29 of the Act of 1996.

8. Learned Advocate appearing for the respondent has submitted that, the fees of the arbitral tribunal are prohibitively expensive for the

respondent to bear. Moreover the petitioner has violated orders passed by the arbitral tribunal.

9. Attention of the parties had been drawn to the judgment and order dated **December 22, 2020** passed by the High Court in **IA GA 2 of 2020 AP 243 of 2020 (Hanumandass Rajkumar Pvt. Ltd. v. Trilok Kumar Jha)**. The parties had been invited to make their respective submissions on such judgment and order, which the parties did.

10. The issue of jurisdiction that the respondent canvassed has to be considered. According to the respondent, since a petition under Section 9 of the Arbitration and Conciliation Act, 1996 had been filed and entertained by the Alipore District Court, this Hon'ble Court should not exercise jurisdiction under Section 29A of the Act of 1996, in view of Section 42 of the Act of 1996.

11. The Bombay High Court, in **Cabra Instalaciones Y. Servicios (supra)** has considered Section 29A of the Act of 1996. It has held that, Section 29A is a substantive and a comprehensive provision dealing with the time limits for making of an arbitral award and extension of such time limits. In the facts of that case, since, an international

arbitration had been involved, construing provisions of Section 29A (4) and (6), and Section 11(5) and (9) of the Act of 1996, it has held that, the High Court lacked jurisdiction to pass any orders under Section 29A of the Act of 1996.

12. In ***Nilesh Ramanbhai Patel & Ors. (supra)*** the Gujarat High Court has considered Section 29A of the Act of 1996 in the context of a domestic arbitration. It has held that, the powers under sub-section (6) of Section 29A of the Act of 1996 are of considerable significance. It has held that, since the provisions of Section 29A of the Act of 1996 empowers the Court in seisin of such proceedings to substitute an arbitrator, “court” used in Section 29A of the Act of 1996 should be understood to be the Court appointing the arbitrator.

13. The Delhi High Court in ***Tara Chand Sumit Construction Co. (supra) Tara Chand Sumit Construction Co.)*** has noticed both ***Cabra Instalaciones Y. Servicios (supra)*** and ***Nilesh Ramanbhai Patel & Ors. (supra)***. It has held that an application under Section 29A of the Act of 1996 would lie only before the Court, which has the power to appoint arbitrator under Section 11 of the Act of 1996.

14. In the facts of the present case, the parties had entered into an agreement dated April 7, 2015 containing an arbitration clause. Disputes and differences had arisen between the parties when the petitioner invoked the arbitration clause by a notice dated February 3, 2018. By such notice, the petitioner had nominated its arbitrator. On the respondent failing to nominate its arbitrator, the petitioner had invoked Section 11 of the Act of 1996 and applied before this Hon'ble Court for constitution of the arbitral tribunal by way of AP No. 239 of 2018. By an order dated June 29, 2020, this Hon'ble Court had disposed of such petition by constituting the arbitral tribunal. The arbitral tribunal had entered into reference on August 17, 2018. The time to conclude the arbitration reference had lapsed on September 4, 2020 which was within the lock down period.

15. Section 2(1)(e) of the Act of 1996 has defined "court" as used in Part I of the Act of 1996. Section 2(1) of the Act of 1996 has stipulated that, the meaning ascribed to the words under sub-sections (a) to (f) therein shall apply unless the context otherwise requires. Therefore, the meaning of the words as has been ascribed in Section 2(1) can have a different meaning when used in a section in Part I of the Act of 1996, if the context requires such word to have a different meaning than that

ascribed in Section 2(1). Section 9 of the Act of 1996 has used the word “court”. Section 11 has specified the Courts which have been empowered to appoint an arbitrator or constitute the arbitral tribunal. The word “court” has also been used in Section 29A and Section 42 of the Act of 1996.

16. Section 29A of the Act of 1996 has dealt with the time limit for arbitral award. Sub-section (1) of Section 29A has prescribed the time limit for arbitration other than international commercial arbitration. It has prescribed that endeavour should be made to dispose an international commercial arbitration within the time limit prescribed. Sub-section (2) of Section 29A has allowed the arbitral tribunal to receive additional fees if the award is made within the time limit prescribed. Sub-section (3) of Section 29A of the Act of 1996 has allowed the parties to agree to extension for making the award. However, the period of extension has been prescribed not to exceed six months. Sub-section (4) of Section 29A has empowered the Court to extend the period to complete the arbitration reference. The first proviso to such sub-section has allowed the Court to reduce the fees of the arbitral tribunal, if the Court finds that the delay is attributable to the arbitral tribunal. Second proviso has provided that, the arbitral

reference of the arbitrator shall continue till the disposal of an application under sub-section (5). The third proviso has required the Court to afford an opportunity of hearing to the arbitrator before the fees is reduced. Sub-section (5) of Section 29A has allowed the parties to make an application for extension of time to complete the reference. It has noted that, an extension to complete the reference can be granted when sufficient cause has been shown and on such terms and conditions as may be imposed by the Court. Sub-section (6) of Section 29A has allowed the Court to substitute one or all of the arbitrators. Sub-section (7) of Section 29A has stipulated that, in the event, the arbitrator or arbitrators are appointed under Section 29A then, the reconstituted arbitral tribunal shall be deemed to be in continuation of the previously appointed arbitral tribunal. Sub-section (8) of Section 29A has recognised the power of the Court to impose only actual or exemplary costs upon any of the parties. Sub-section (9) of Section 29A of the Act of 1996 has stipulated that an application under sub-section (5) of Section 29A should be disposed of by the Court as expeditiously as possible and endeavour should be made to dispose of the same within the period of 60 days from the date of service of notice on the opposite party.

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.

19. The non obstante clause of Section 42 will get attracted only when the Courts are dealing with matters other than appointment and removal of arbitrators under Section 11 and Section 29A of the Act of 1996 respectively.

20. In the facts of the present case, a petition under Section 9 of the Act of 1996 had been filed and entertained by the Alipore District Court. By virtue of Section 42 of the Act of 1996 such Court would have jurisdiction to try and determine all subsequent petitions under the Act of 1996. However, such Court is not the appointing Court of an arbitrator under Section 11 of the Act of 1996. Consequently, when the party is required to apply under Section 29A of the Act of 1996, it has to approach the High Court or the Supreme Court who has been empowered to appoint an arbitrator, as the case may be. In the facts of the present case, since the arbitral tribunal has been constituted by the

High Court, the application under Section 29A of the Act of 1996 is maintainable before this Hon'ble Court.

21. In ***Hanumandass Rajkumar Pvt. Ltd. (supra)***, the Court has considered the ongoing pandemic, the order dated March 23, 2020 and July 10, 2020 passed by the Supreme Court in Suo Motu Writ Petition (Civil) No. 3 of 2020 and having returned a finding therein that, the Supreme Court in exercise of powers under Section 142 of the Constitution of India, directed the time for publication of any arbitral tribunal stands extended until further direction, found an application under Section 29A of the Act of 1996 to be premature. It had recalled an earlier order of extending the time to complete the arbitration.

22. The parties have not brought any material on record to establish that there has been a change of view subsequent to the order dated July 10, 2020 passed by the Supreme Court in Suo Motu Writ Petition (Civil) No. 3 of 2020. Consequently, in accordance with the ratio laid down in ***Hanumandass Rajkumar Pvt. Ltd. (supra)***, although this Court has jurisdiction to try and determine this petition, it is premature.

23. AP No. 417 of 2020 is disposed of accordingly.

[DEBANGSU BASAK, J.]