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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 27th September, 2021

+ **O.M.P.(MISC.)(COMM.) 104/2021**

M/S BKFC AND CO.

..... Petitioner

Through: Mr. L.B. Rai and Mr. Manish Vashist,
Advocates.

versus

M/S TRANSPARENT ENERGY SYSTEM PVT. LTD.

..... Respondent

Through: Mr. Rohit Gupta, Advocate with Mr.
Aatreya Singh, Mr. Prashansa
Agarwal and Ms. Progoti Bose,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 29A(4) and (5) of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as '*the Act*'] seeks an order of extension of the mandate of the Arbitral Tribunal by a period of six months, for passing the arbitral award.

2. The Respondent, in its reply raises several objections, and particularly objects to the maintainability of the petition. It is contended that the petition is wholly unnecessary and misconceived; Section 29A is only applicable prospectively to the arbitration proceedings which commenced on or after 23rd October 2015. The constitution of the present arbitral tribunal as well as the commencement of the arbitration proceedings happened well before the

aforementioned date. The parties have not expressly agreed to the amended provisions.

3. The Petitioner, on the other hand, insists that the present petition is maintainable and the amended Section 29A is applicable. On the strength of the expression - *“This submission shall be deemed to be submissions to Arbitration within the meaning of the Indian Arbitration Act 1940 or any statutory modification thereof”* - contained in the arbitration clause, it is argued that the parties have agreed to apply the statutory amendments to the Arbitration and Conciliation Act, 1996, and no fresh express agreement is necessary. Reliance is placed upon the judgment of this Court in ***Ratna Infrastructure Projects Private Limited v. Meja Urja Nigam Private Limited***.¹

4. The Court has heard the counsel for the parties. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, provides as follows:

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

5. Subsequent to judgment relied upon by the Petitioner, there is an authoritative decision of the Supreme Court, in ***S. P. Singla Constructions Private Limited v. State of H.P.***,² which deals with the proposition in law advanced by the Petitioner. In the said judgment, the Supreme Court also had

¹2017 SCC OnLine Del 7808.

² 2019 2 SCC 488.

the occasion to consider the decision in ***Ratna Infrastructure*** (*supra*). The Court, however did not comment on the correctness of the judgment in ***Ratna Infrastructure*** (*supra*), yet decided the legal question by holding that the expression - “*Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause*” - contained in an arbitration clause, is not indicative of an agreement between the parties to apply the provisions of the Amended Act.

6. The factual situation in the present case is somewhat similar to one that arose in the case of ***S. P. Singla*** (*supra*). The relevant portion of the arbitration agreement contained in clause 7.23 of the Tender document relied upon by the Petitioner to contend that there is an agreement, as contemplated under Section 26 of the Amendment Act of 2015, reads as under:

“Upon every or any such reference in the cost of and incidental to the reference in the award respectively shall be in the direction of the Arbitration, or Arbitrators or the Umpire who may determine the amount thereof, or direct the same to be texted as between attorneys and client or between attorney and client or such between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be submissions to Arbitration within the meaning of the Indian Arbitration Act 1940 or any statutory modification thereof. The award of the Arbitrator, Arbitration Act 1940 or any statutory modification thereof.”

In ***S. P. Singla*** (*supra*), the proviso read as under:

“Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding

under this clause.”

The Supreme Court, *inter alia*, held that:

“ as suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the Amended Act cannot be invoked.”

7. In fact, a Co-ordinate Bench of this Court in **ABB India Limited v. BHEL**,³ – in a proceeding under Section 14(1)(a) of the Act for termination of mandate of arbitrator and appointment of a substitute arbitrator – considered both **Ratna Infrastructure**(*supra*) as well as **S P Singla** (*supra*), and did not agree with the proposition canvassed by the Petitioner. Therein, the Court after examining the two decisions, held as under:

“36. While examining the applicability, to the present case, of S.P. Singla Constructions Pvt Ltd, it has to be remembered that, unlike the present case, the caveat in the arbitral Clause (65) of the GCC, in that case, made “the Arbitration Act, 1940 or any statutory modification or re-enactment thereof.. for the time being” applicable. On the strength of this clause, SPSCCL was seeking, not only to make the 1996 Act applicable, but to also make, applicable, Section 12(5) of the 1996 Act, which came into effect only on 23rd October, 2015. The issue before the Supreme Court was, therefore, whether Section 12 (5) of the 1996 Act, which came into effect only on 23rd October, 2015, could be regarded as a “provision of the Arbitration Act, 1940 or any statutory modification or re-enactment

³ Judgment dated 2nd November, 2020 in O.M.P. (T) (COMM.) 48/2020 & I.A. 7876/2020.

thereof... for the time being”.

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57. No doubt, in **S. P. Singla Constructions Pvt. Ltd**, the Supreme Court observed, towards the commencement of para 16 of the report, that it was not inclined to go into the merits of the contentions, of SPSCCL, relying the applicability of the earlier decisions of this Court in **Ratna Infrastructure Projects Pvt Ltd**, or to examine the correctness of the said decision. Had the Supreme Court not chosen to enter any further observations or findings, the matter might have been different. As it is, however, the Supreme Court proceeded, in the same paragraph, to hold that the proviso to Clause 65 of the GCC in that case, could not be taken as an agreement between the parties, so as to make Section 12(5) of the 1996 Act, applicable.

58. What is said by the Supreme Court constitutes declaration of the law under Article 141 of the Constitution of India, and not what is unsaid. It is the exposition of the law, by the Supreme Court, which binds.

59. The discipline of Article 141 does not permit me, therefore, to ignore the declaration of the law, contained in para 16 of **S.P. Singla Constructions Pvt Ltd**, merely because of the cautionary opening sentences in the said paragraph. The Supreme Court, in the said paragraph, categorically held that "the proviso in clause 65 of the General Conditions of Contract cannot be taken to be the agreement between the parties so as to apply the provisions of the Amended Act". Additionally, the Supreme Court has observed, in the very same paragraph, that the applicability of Section 12(5) of the 1996 Act also stood ruled out by Section 26 of the 2015 Amendment Act, as the arbitral proceedings, had commenced in 2013, i.e., much prior to 23rd October, 2015. The Supreme Court having, in **Parmar Construction Company**, found the decision in **S.P. Singla Constructions Pvt Ltd** to constitute a valuable precedent, the reliance, by the respondent, on the said decision, must be taken to be justified.

60. In any event, as already noted hereinabove, the present case is, in any event, covered by **Parmar Construction Company**.

61. Ms. Lal sought to distinguish the decision in **Parmar Construction Company** on the ground that the arbitration clause in that case did not contain the words "and for the time being in force".

62. In my view, this distinction, even if semantically significant, is of no real conceptual consequence. I do not find any significant difference

between a provision which makes the 1996 Act, with its statutory modifications and enactments, applicable, and, a provision which makes the 1996 Act, with its statutory modifications and enactment, for the time being in force, applicable. The expression "with its statutory modifications and enactments", or any other such like expression, itself glances towards the future. The words "for the time being in force" appear to me, to be practically in the nature of a superfluity, probably inserted ex abundanti cautela. It is axiomatic that only those provisions can apply, which are in force at the time of application. A provision which has ceased to be in force cannot be made applicable, even by contract between the parties."

8. In response to the above, counsel for the Petitioner, in rejoinder submissions, states that the judgment in **ABB India Limited** (*supra*) has been "interfered" by the Supreme Court, as an appeal was preferred against the same; said SLP has been entertained, and is presently listed for final determination.⁴

9. In the considered opinion of the Court, the clause relied upon by the Petitioner nowhere spells out any agreement between the parties. The expression "*This submission shall be deemed to be submissions to Arbitration within the meaning of the Indian Arbitration Act 1940 or any statutory modification thereof*" does not constitute as an agreement under Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015. Further, the issue urged in the present petition – i.e., whether the Arbitration Agreement herein, as worded, would satisfy the requirement of the applicability of the 2015 Amendment to the Act - has clearly not been accepted by the Courts. [In **S. P. Singla** (*supra*) and **ABB India Limited** (*supra*)]. Therefore, this Court finds no occasion to take a different view from the one taken by a Co-ordinate Bench of this Court.

⁴Special Leave to Appeal No. 3275/2021.

10. Besides, the Court finds merit in the contention of the Respondent that the proceedings between the parties have been continuing since 2015, and the Petitioner has approached this Court, seeking extension of the mandate of the Arbitral Tribunal, only in 2021. If the understanding was that Section 29A was applicable, the Petitioner should have approached this Court much earlier in time.

11. Moreover, the contention of the Petitioner that the judgment of this Court in **ABB India Limited** (*supra*) has been interfered with, merely because an SLP has been entertained by the Apex Court, is completely frivolous, as there is no stay granted against the said judgment.

12. The present petition has no force in it, and accordingly, the same is dismissed with cost of Rs. 10,000/- to be paid to the High Court of Delhi (Middle Income Group) Legal Aid Society [DHCMILAS] within a period of two weeks from today, for making submissions which are completely frivolous and contrary to existing position taken by the Courts.

13. Needless to say, the Court has only examined the question of applicability of Section 29A; all other objections urged by the Respondents are left open.

14. The Petition is dismissed.

SANJEEV NARULA, J

SEPTEMBER 27, 2021/nd