IN THE HIGH COURT OF JUDICATURE AT PATNA

REQUEST CASE No.36 of 2021

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1. India Power Corporation (Bodhgaya) Ltd., a company duly incorporated by India Power Corporation Limited under the Companies Act, 1956, having its registered address at Plot No.X-1-2 and 3, Block- EP, Sector-V, Salt Lake City, Kolkata- 700091, through its authorized representative Shri Amit Prakash, aged about 42 years, male, S/o Late D.D. Pandey, R/o Sitamadhi (Bihar).
2. India Power Corporation Limited, a company duly incorporated under the Companies Act, 1956, having its registered address at Plot No.X-1-2 and 3, Block EP, Sector-V, Salt Lake City, Kolkata- 700091, through its authorized representative Mr. Rakesh Kumar Sharma, aged about 36 years, male, S/o Shri O.P. Sharma, R/o Sikar, Rajasthan.

... ... Petitioner/s

Versus

South Bihar Power Distribution Company Limited, company duly incorporated under the Companies Act, 1956, having its registered address at Second Floor, Vidyut Bhawan, Jawaharlal Nehru Marg, Bailey Road, Patna, Bihar- 800022.

... ... Respondent/s

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with

REQUEST CASE No. 78 of 2022

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South Bihar Power Distribution Co. Ltd. having its registered office at Vidyut Bhawan, Jawahar Lal Nehru Marg, Patna-800021 through its Chief Engineer, Commercial being the authoized signatory.

... ... Petitioner/s

Versus

1. India Power Corporation Ltd. A public ltd company, having its registered office at plots X-1-2 and 3, Block EP, Sector -V, Salt Lake City, Paragnas, Kolkata, West Bengal - 700091.
2. India Power Corporation (Bodh Gaya) Ltd. A public ltd company, having its registered office at plot X-1-2 and 3, Block EP, Sector -V, Salt Lake City,

Paragnas, Kolkata, West Bengal - 700091.

... ... Respondent/s

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Appearance :
(In REQUEST CASE No. 36 of 2021)

For the Petitioner/s	:	Mr. Mrigank Mauli, Sr. Advocate Ms. Vagisha Pragya Vacaknavi, Advocate
For the Respondent/s	:	Mr. Umesh Prasad Singh, Sr. Advocate Mr. Kumar Manish, Advocate Mr. Vaibhava Veer Shankar, Advocate Mr. Anand Kumar Ojha, Advocate

(In REQUEST CASE No. 78 of 2022)

For the Petitioner/s	:	Mr. Umesh Prasad Singh, Sr. Advocate Mr. Kumar Manish, Advocate Mr. Vaibhava Veer Shankar, Advocate Mr. Anand Kumar Ojha, Advocate
For the Respondent/s	:	Mr. Mrigank Mauli, Sr. Advocate Ms. Vagisha Pragya Vacaknavi, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
CAV JUDGMENT
Date : 15-09-2023

Two request cases arising from the same contract, but seeking for different reliefs under the Arbitration and Conciliation Act, 1996 (For brevity 'Act of 1996'). The dispute has a history, which has to be stated before going into the issues raised.

2. I shall refer to the parties from their status in Request Case No. 36 of 2021. The respondent, a Company duly incorporated under the Companies Act, 1956, has licence to supply electricity in four electric supply areas i.e. (i) Patna Electric Supply Unit (PAC); (ii) Central Electric Supply Area (CESA); (iii) Magadh Electric Supply Area (MESA) and (iv)

Bhagalpur Electric Supply Area within the State of Bihar. For facilitating such supply of electricity, the respondent is also entitled to act through another entity, who is appointed as a franchisee. A competitive bidding process was initiated and petitioner No. 2 came out as the successful bidder and petitioner No. 1 was incorporated as a Special Purpose Vehicle (SPV) to be the Distribution Franchisee through a tripartite agreement. The petitioner No. 1 was to undertake and perform the obligation under the Distribution Franchise Agreement (DFA) entered into by the parties and a Letter of Intent was issued by the respondent to the petitioner No. 2. The petitioner No. 1 was thus appointed for distribution and sale of electricity in the South Bihar Region, namely, Gaya Town and the adjoining areas consisting of Electric Supply Division, Gaya (Urban), Electric Supply Sub Division, Manpur and Electric Supply Section, Bodhgaya.

3. In the implementation of the franchise agreement, disputes arose, which led to the 1st petitioner issuing arbitration notice dated 09.11.2016 in accordance with Article 17 of the DFA. Since, there was no appointment of an Arbitrator, the 1st petitioner approached this Court under Section 11 of the Act of 1996 by Request Case No. 77 of 2018, which was disposed of by Annexure-4 judgment. With the consent of the parties, the Court appointed a retired judge of this Court as an Arbitrator and the parties were directed to appear before the Arbitrator. The arbitration proceeding commenced on 12.04.2018 and the 1st petitioner filed affidavit of evidence; but the Arbitrator could not continue. For reasons not disclosed in the petition, the petitioners again approached this Court for appointment of another Arbitrator. By Annexure-5, once more, after appearance of the respondent and with their consent, a former Chief Justice of India, who was also a former Chief Justice of this Court, was appointed as the new Arbitrator. Request Case No. 14 of 2020 filed by the petitioners was hence allowed by Annexure-5, on consent.

4. The commencement of proceedings before the learned Arbitrator is evidenced by Annexure-6, upon which the respondent sought further time by Annexure-7, which was allowed. After expiry of one year, the time was extended for six months in accordance with the Act of 1996, again on consent of the parties. However, the arbitration proceedings could not be completed even within the extended period and the time was expiring on 07.08.2021, upon which the petitioners filed the present petition before this Court seeking extension of four months for completion of arbitration proceedings.

5. The respondent resisted the request, on the ground of this Court having no jurisdiction to extend the time and also challenged the arbitration proceedings initiated by the sole arbitrator, when the DFA specifically spoke of an Arbitral Tribunal of three persons. The respondent also seriously assails the consent, for waiving the conditions of the agreement which required an Arbitral Tribunal of three Arbitrators. To further urge their contentions, the respondents filed Request Case No. 78 of 2022 seeking for appointment of an Arbitral Tribunal as contemplated in the DFA.

6. The questions that arise in the above case are :-

> (i) Whether there is a proper consent by the respondent, so as to find waiver of the specific condition of the agreement for appointment of an Arbitral Tribunal of three members and if not, can it not be presumed that there is acquiescence on the part of the respondent; who participated in the arbitration proceedings for 18 months and then raised the objection again;
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> (ii) Whether the SPV, the 1st petitioner, is

competent to request for arbitration, especially since the Letter of Intent was issued to the 2nd petitioner and the disputes include claims by the respondent against the 2nd petitioner;

(iii) Whether the Chief Justice or his designate empowered under Section 11 to consider a request for arbitration, can grant extension of time as required under Section 29A of the Act of 1996 or is it the Principal 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 29A of the Act of 1996;

These are the questions that arise, in consideration of which, there are also ancillary questions that crop up, which I would consider in seriatim.

7. I have heard Sri Mrigank Mauli, learned senior counsel for the petitioners and Sri Umesh Prasad Singh, learned senior counsel for the respondents.

8. The specific clause of arbitration is found in the DFA, which is produced by the respondent as Annexure-R/A. Clause 17.2.5, on which the question of waiver and consent has to be decided, is extracted hereunder:

> "17.2.5. Any dispute arising out of, in connection with or with respect to this Agreement, the subject matter hereof, the performance or non-performance of any obligation hereunder, which cannot be resolved by negotiation between the Parties and the Dispute Resolution procedure as stated in the foregoing Articles, shall be exclusively submitted to arbitration at the request of either party upon written notice to that effect to the other party and the proceedings shall be conducted subject to the provisions of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) by a panel consisting of three arbitrators."

9. There can be no dispute that the agreement specifically provided for an arbitration under the provisions of the Act of 1996 by a panel consisting of three arbitrators. At the first instance, the then Chief Justice of this Court considering Request Case No. 77 of 2018, in which the respondent had appeared through counsel, specifically recorded consent of the parties in appointing a retired judge of this Court. Again, by Annexure-5, it is evident that Request Case No. 14 of 2020 was also disposed of, in the presence of the counsel for the respondent, wherein the appointment of an arbitrator earlier, was referred to. It was specifically observed that though a retired judge of this Court was appointed and the matter was at the stage of recording of evidence, the arbitration itself could not be continued. It was recorded that with the appreciable efforts put in by the learned counsel appearing for both the parties, the matter was amicably resolved and it has been agreed that the dispute would be adjudicated through the new Arbitrator. Now, the Arbitrator appointed has completed the term of 18 months; the extension of six months consented to by both parties and the petitioners have requested for a continuance; upon which the objection regarding the consent was raised.

10. It has to be immediately noticed from Annexure-6, the Procedural Order No. 1, passed by the learned Arbitrator. When the question of consent arose, it was answered and so recorded by the learned Arbitrator in paragraph-3 of the order, which is extracted hereunder:-

> "3. On a specific query being put, the Ld. Counsel and representatives of all the parties stated that they have no objection on any ground whatsoever to the composition of the Tribunal or to the undersigned acting as the Sole Arbitrator to arbitrate the dispute between the parties."

This is specifically pointed out by the learned Senior Counsel for the petitioners, as an acquiescence.

11. The issues were framed by the learned Arbitrator as per Annexure-6, which includes (i) the maintainability of the proceedings at the instance of the first claimant, (ii) the legality of the termination of DFA dated 31.12.2012 during the pendency of the arbitration proceedings, (iii) whether such termination has resulted in willful disobedience of the order passed by the Tribunal, (iv) whether the respondent committed breach of the terms and conditions of the DFA and the subsequent understanding recorded in the minutes of the meeting dated 14.12.2016, (v) the failure of the respondent, if any, to comply with the contractual covenants (vi) the entitlement to the quantum of award claimed, (vii) the legality of the invocation of the letter of credit and performance bank guarantee, furnished by the claimants, (viii) the interpretation of Clause (E) of DFA and whether it could shift the burden of the contract to the claimant No. 2, (ix) the counter claims, if any, of the respondent, (x) the obligation of Claimant No. 2 being the principal corporate entity to ensure the due implementation of the award, especially when Claimant No. 1 has no assets to meet the obligations under the award and (xi) the interest entitled and the costs.

12. The very same contention was raised before the learned Arbitrator and it was urged that there was neither a consent given by the respondent nor an acquiescence before the

One-man Tribunal and there is no question of a waiver of the specific terms of the agreement, which required a three-man Tribunal to be appointed. The Tribunal considered the issue under Section 16 finding itself competent to decide the issue by itself as to whether the Arbitral Tribunal has the competence and jurisdiction to proceed with the matter. Answering the contention of the respondent that there was no enforceable arbitration agreement, the Tribunal noticed the tripartite agreement and the arbitration clause in the DFA, which enables any of the three parties to raise a dispute and thus, invoke and initaite arbitration. The Tribunal also refused to accept the contention of the respondent that the SPV, the claimant No. 1 was made a party to the DFA by mistake and the reference to claimant No. 1, as a Distribution Franchisee, instead of an SPV, was a clearly wrong designation. The Tribunal held, based on authoritative texts and decisions, that the question is not as to the intention of the parties or the purpose discerned from the words used, but the reasonable meaning which a document would convey, with all the background knowledge available to the parties, in the situation in which the contract was entered into. The claimant No. 1 was referred to as a DFA and it was the intention of all the parties that it is the claimant No. 1, who would implement the franchise agreement; claimant No. 1 also being the subsidiary of claimant no. 2. The learned Tribunal categorically held that the right to initiate arbitration proceedings, arising from the tripartite agreement, confers such a right on all the three parties under the DFA. Insofar as the consent is concerned, as conceded before the High Court, it was held that not once, but twice the respondents appeared through counsel and consented to the appointment of a sole arbitrator; which is quite evident from the orders passed in the request cases disposed of by the High Court.

13. It was also found that a similar contention was raised before the sole arbitrator, earlier appointed, wherein the claimant objected to such recusal from the consent, pointing out that a consent was given and accepted by the High Court. Later, before the sole arbitrator, the respondent did not press the point of jurisdiction, accepting that they were parties before the Hon’ble Chief Justice of the High Court of Judicature at Patna and they had consented to the appointment of a sole arbitrator. Reference was made to Section 4 of the Act of 1996 to find that the specific condition in the DFA, with respect to the appointment of a Three-man Arbitral Tribunal, was waived by the respondent. It was found that the objection as to the constitution of the Arbitral Tribunal was not raised within the time prescribed in Section 16(2) of the Act of 1996, which again constitutes a deemed waiver under Section 4 of the Act of 1996. The respondent's application, under Section 13 read with 16(1) of the Act of 1996, was thus rejected.

14. On the facts, as noticed by the Arbitral Tribunal, I am convinced that there is no sustainable ground raised by the respondent to assail the consent given before the High Court, which is further buttressed by the acquiescence before the Tribunal, as recorded by the Tribunal. The consent is evident and acquiescence is clearly indicated which operates as a waiver under Section 4 of the Act of 1996.

15. The next contention raised is with respect to maintainability of arbitration at the instance of the 1st petitioner and whether the 1st petitioner can, in fact, be termed to be a Distribution Franchisee. The question also arises whether the provisions under the Insolvency and Bankruptcy Code initiated as against the 1st petitioner, would disable the 1st petitioner from continuing with the request for extension of time of the sole Arbitral Tribunal.

16. The petitioners Nos. 1 and 2 are two separate legal entities, both of whom are parties to the tripartite agreement with the respondent, in which the 1st petitioner is described as a distribution franchisee. Both these petitioners have also been impleaded in the request case, though the arbitration request itself was raised for the first time by the first petitioner before the respondent. It is admitted that against the first petitioner, an insolvency petition under the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC') is pending and there is a moratorium under Section 14 of the IBC, declared by the National Company Law Tribunal. However, Section 14 prohibits initiation/continuation of any suits or proceeding including execution against the corporate debtor, after the insolvency commencement date. This does not necessarily prohibit the corporate debtor from proceeding with recovery due to it, which in essence is the arbitration proceeding initiated by the first petitioner.

17. The petitioners have also relied on the decision of the High Court of Delhi in ***Power Grid Corporation of India v. Jyoti Structures Ltd.*** (O.M.P.) (COMM.) (397 of 2016). The Delhi High Court categorically found that the embargo of Section 14 or the moratorium implemented, is intended to prohibit debt recovery action as against the corporate debtor, but would not impair the continuation of proceedings under Section 34 of the Arbitration Act, which do not result in endangering, diminishing, dissipating or adversely impacting liquidation of the corporate debtor, which is the specific prohibition under Section 14 of the IBC.

18. The petitioners also had filed a reply to the objection filed by the respondent, before the Arbitrator, produced as Annexure-R/H by the respondent in the instant arbitration case. Again, it has been specifically pleaded that the resolution professional appointed by the National Company Law Tribunal has authorized the signatories in the above case to appear before the Arbitral Tribunal, which is approved by the Committee of Creditors in compliance with Section 21(1)(h) of the IBC. The said document is produced as Annexure-P9 in the reply affidavit dated 26.10.2021 filed in Request Case No. 36 of 2021 by the first petitioner (the said document is shown as Annexure-10 in the index, but is actually produced as Annexure-P-9) which is also dated 07.12.2019. Hence, I find no infirmity in the proceedings initiated by the first petitioner on the ground that there is a moratorium under the IBC.

19. Insofar as the initiation of arbitration is concerned, though the letter of intent has been issued to the second petitioner, the responsibility for implementation of the terms of agreement squarely falls on the first petitioner, which is a Special Purpose Vehicle, formed in terms of the agreement and in furtherance of the terms and conditions thereof. The first petitioner is also a subsidiary of the second petitioner and incorporated exclusively for the purpose of implementation of the agreement. At the risk of repetition, it has to be reiterated that the first petitioner is also described as the distribution franchisee in the agreement, which status is as conferred by the agreement, which cannot be lightly dismissed as a mistake committed by the parties to the contract.

20. In fact, a similar case had arisen between the very same respondent with respect to an identical agreement for a different area. Therein also, there was a principal to whom the contract was issued and there was a Special Purpose Vehicle constituted, as per and in furtherance of the agreement. The respondent herein, who was a party therein, had raised the very same issue of whether the SPV is a party to the agreement. It was urged that it is the Principal, to whom the Letter of Intent was issued, who is the only legal entity entitled to invoke the arbitration clause. A Division Bench of this Court in paragraph 57 of the common judgment dated 26.04.2023 in C.W.J.C. No. 20350 of 2021, Request Case No. 147 of 2018 and analogous cases dated 26.04.2023 expressed it's disinclination to decide the issue, relying on ***IVRCL Ltd. v. Alkor Petro Ltd. and Another*** reported in ***2016 SCC Online Guj 7809***. In paragraph 40 and 41 of the aforesaid decision, the Hon'ble Supreme Court had held that such disputed issues based on the clause in the arbitration agreement, is to be decided by the Arbitrator and not by Courts. Be that as it may, the Principal in that case also raised a similar contention and it was held that the Principal would be a natural party, in order to avoid future litigation and, if at all, the arbitration proceeded between the respondent awardee of the contract and the SPV, and if the later could not meet the obligations, naturally the Principal would be required to discharge its liability, as per the agreement. The obligation of the 2nd petitioner; the Principal, to ensure due implementation as also to satisfy the obligations, of and under the award is one of the issues raised by the learned Arbitrator; as noticed in paragraph-11, hereinabove. The argument regarding the first petitioner having no *locus standi* to initiate the arbitration is hence rejected.

21. The further question that arises is on the sustainability of a proceeding under Section 29A before the Chief Justice or whether it has to be initiated before the

Principal Civil Court of original jurisdiction which is the District Court.

22. I have to immediately notice that the definition clause, Section 2 of the Act of 1996 commences with the words '*In this Part, unless the context otherwise requires'* *(sic)*. It is in the context of Section 29A read with Section 11 that the word 'Court' employed in Section 29A, has to be interpreted. The Calcutta High Court, in **Amit Kumar Gupta v. Dipak Prasad; 2021 SCC OnLine Cal 217**4 at Para-17 & 18, held as under :-

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

23. The Delhi High Court, in **O.M.P. (Misc.) (Comm) No. 236 of 2019 DDA vs. M/s Tara Chand Sumit Construction Co.** decided on 12.5.2020 held so in paragraphs 28, 29 and 30 as under :-

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

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

30. Similarly, in case of International Commercial Arbitration, if one was to follow the definition of the term Court under Section 2(1)(e) and apply the same in a strict sense, then it would be the High Court exercising Original or Appellate jurisdiction which would have the power to extend the mandate and substitute the

> Arbitrator. In such a situation, the High Court would be substituting an Arbitrator appointed by the Supreme Court which would perhaps lead to the High Court over stepping its jurisdiction as the power to appoint the Arbitrator is exclusively in the domain of the Supreme Court. Thus, in the opinion of this Court, an application under Section 29A of the Act seeking extension of the mandate of the Arbitrator would lie only before the Court which has the power to appoint Arbitrator under Section 11 of the Act and not with the Civil Courts. The interpretation given by learned counsel for the respondent that for purposes of Section 29A, Court would mean the Principal Civil Court in case of domestic arbitration, would nullify the powers of the Superior Courts under Section 11 of the Act."

24. The Gujarat High Court, in the case of **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel; 2019 (2) GLR 1537** at paras 14, 15 and 16 of the judgment, held as under:-

> "14. As is well-known, the arbitration proceedings by appointment of an arbitrator can be triggered in number of ways. It could be an agreed arbitrator appointed by the parties outside the Court, it could be a case of reference to the arbitration by Civil Court in terms of agreement between the parties, it may even be the case of appointment of an arbitrator by the High Court or the Supreme Court in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. The provisions of Sec. 29A and in particular sub-sec. (1) thereof would apply to arbitral proceedings of all kinds, without any distinction. Thus, the mandate of an arbitrator irrespective of the nature of his appointment and the manner in which the Arbitral

Tribunal is constituted, would come to an end within twelve months from the date of Tribunal enters upon the reference, unless such period is extended by consent of the parties in term of sub-sec. (3) of Sec. 29A which could be for a period not exceeding six months. Sub-section (4) of Sec. 29A, as noted, specifically provides that, if the award is not made within such period, as mentioned in sub-sec. (1) or within the extended period, if so done, under sub-sec. (3) the mandate of the arbitrator shall terminate. This is however with the caveat that unless such period either before or after the expiry has been extended by the Court. In terms of sub-sec. (6) while doing so, it would be open for the Court to substitute one or all the arbitrators who would carry on the proceedings from the stage they had reached previously.

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-sec. (4) of Sec. 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-sec. (3) of Sec. 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The Court on the other hand has vast powers for extension of the period even after such period is over. While doing so, the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Sec. 2(1)(e) does not fit. It is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-secs. (4), (5) and (6) of Sec. 11 of

the Act. If therefore, there is a case for extension of the term of an arbitrator who has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-sec. (6) of Sec. 29A would be non-operatable. In such a situation, sub-sec. (6) of Sec. 29A would be rendered otiose. The powers under sub-sec. (6) of Sec. 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-sec. (6) of Sec. 29A the Legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Sec. 11 of the Act. If we, therefore, accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior Courts to appoint arbitrators under Sec. 11 of the Act and those of the Civil Court to substitute such arbitrators under Sec. 29A(6). This conflict can be avoided only by understanding the term "Court" for the purpose of Sec. 29A as the Court which appointed the arbitrator in case of Court constituted Arbitral Tribunal.

16. Very similar situation would arise in case of an international commercial arbitration, where the power to make an appointment of an arbitrator in terms of Sec. 11 vests exclusively with the Supreme Court. In terms of Sec. 2(1)(e), the Court in such a case would be the High

Court either exercising original jurisdiction or appellate jurisdiction. Even in such a case, if the High Court were to exercise power of substitution of an arbitrator, it would be transgressing its jurisdiction since the power to appoint an arbitrator in an international commercial arbitrator rests exclusively with the Supreme Court."

25. The Bombay High Court in the case of **Cabra Instalaciones Y. Services. S.A. vs. Maharashtra State Electricity Distribution Company Limited; 2019 SCC OnLine Bom 1437** at paras 7 and 8 of the judgment, held 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 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

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

26. The Kerala High Court, in **M/s Lots Shipping Company Limited vs. Cochin Port Trust Board of Trustees 2020 AIR (Kerala) 169** at paras 9 and 11 of the judgment, held as under:-

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

11. Taking note of the principle enunciated herein above and on the basis of the detailed analysis, we are inclined to hold that the term "court" used in Section 29(4) has to be given a contextual and purposive interpretation, which is to be in variance with the meaning conferred to the said term under sub-section Section 2(1)(e)(i) of the Act. The term "court" contained in Section 29(4) has to be interpreted as the 'Supreme Court' in the case of international commercial arbitrations and as the 'High Court' in the case of domestic arbitrations. Hence it is held that, either of the party will be at liberty to file an

arbitration petition before the High Court under Section 29A(5) of the Act, seeking extension of time for continuance of the arbitration proceedings in exercise of the power conferred under Section 29A(4) of the Act, in the case of any domestic arbitration. The reference is answered accordingly.

27. The Allahabad High Court, in the case of **M/s Lucknow Agencies and Another vs. U.P. Avas Vikas Parishad and others 2019 ADJ Online 0169** at paras 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, held as under:-

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

xxx xxx xxx

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

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

appointment of arbitrator.

31. Section 29-A is a substantive provision which was inserted w.e.f. 23.10.2015 for speedy disposal of cases relating to arbitration with the least Court intervention. The statement of objects and reasons to the amending Act No.3 of 2016 provided that as India had been ranked as 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

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

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

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

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

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

28. A Division Bench of this Court in the aforecited case between the very same respondent, the Principal and the SPV, with respect to an identical contract in C.W.J.C. No. 20350 of 2021, Request Case No. 141 of 2018 and analogous cases, referred to the aforesaid decisions. Therein, the arbitrators were appointed with the consent of the parties, upon which the proceeding before the High Court was withdrawn. Two arbitrators were appointed by each of the parties and the third one was appointed as a presiding arbitrator by the two appointed. The question arose whether the District Judge was correct in extending the time of the learned Arbitral Tribunal. The Division Bench held so in paragraph 86 and 87:-

86. Now, a piquant situation arises. If the power to

appoint Arbitrator has been vested with High Court and Supreme Court under Section 11 (4) of the Act, legislature would never intended its substitution under Section 29 A (6) by the court of principal civil judge as it appears from the plain reading of Section 2(e)(i). But the meaning of Court for the purpose of Section 29A would be different from what it is under Section 34 and Section 37 of the Act.

87. In the present case, though the Arbitrator was appointed by the parties themselves, but in case of any dispute they would otherwise have been appointed by the High Court or the Supreme Court as the case may be and taking cue from this provision under Section 11 (4), 11 (5) and 11 (6) of the Act, we can say that if the Principal Civil Court cannot substitute the Arbitrators, by corollary, it cannot extend the period of Arbitrator(s) under Section 29A (4). Otherwise it would give rise to conflict between the power of the High Court as well as the Supreme Court to appoint Arbitrators under Section 11 of the Act and those of the principal civil courts to substitute them under Section 29 (A) (6). Moreover initially when SBPDCL failed to appoint Arbitrator, BEDCPL approached this Court by filing Request Case No.06 of 2016 and during pendency of the aforementioned case, SBPDCL appointed its Arbitrator.

29. Relying on decisions of the various High Courts, cited hereinabove, it was held so in paragraph 91 and 92 which is extracted below :-

91. Thus, the cumulative reading of Section 2 (e), Section 11 (4) (5) (6) and Section 29 A (4) and (6) of the Act makes it crystal clear that the court which could grant extension of time could only be the court which has the

power to appoint the Arbitrators and not the Principal Civil Court which is the court for other purpose under the Act. Otherwise, the conflict between the power of the superior courts to appoint Arbitrators under Section 11 of the Act and powers of the Principal Civil Court to substitute such Arbitrators under Section 29 A (6) of the Act could not be reconciled. So, we find and hold that the learned District Judge erred while granting the extension of time to the learned Arbitral Tribunal.

92. A question may arise for consideration in the present case as the Arbitrators were not appointed by the High Court and were appointed by the parties themselves during pendency of Request Case No.06 of 2016 filed on behalf of BEDCPL for appointment of Arbitrator on behalf of SBPDCL, there ought not to be any issue for their extension or for that matter substitution under Section 29 (4) (6) of the Act. But in that case, the proceedings on this assumption that the Principal Civil Court got jurisdiction as the Arbitrators were appointed by the parties themselves would again give rise to conflicting situation. Let us take example of a situation where one of the Arbitrators has been appointed by the one of the parties and the second Arbitrator by the High Court and for substitution of either of them there could not be jurisdiction conferred upon both the principal civil court as well as on the High Court. So, to avoid such difference and conflicting cases in future it is more necessary to clear this aspect that the Principal Civil Court (the court of learned District Judge in the present case) has no jurisdiction to entertain the applications for extension of mandate of Arbitral Tribunal.

30. Hence, I find that the jurisdiction to extend the period of time, has to be exercised by this Court under Section 29A. There shall hence be an extension of the mandate of the Arbitral Tribunal by four months starting from the date of appearance of the parties before the Arbitral Tribunal, as per the extension granted by this Court.

31. Request Case No. 36 of 2021 stands allowed. In the context of the time extension having been granted to the already constituted Arbitral Tribunal, Request Case No. 78 of 2022 stands rejected.

(K. Vinod Chandran, CJ)

Sujit/Sharun

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