

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 179 OF 2022

Indicus Software Pvt. Ltd. through
Authorised Signatory Mr. Shridhar
Kulkarni

...Petitioner

Vs.

Infinite Uptime India Pvt. Ltd.

...Respondent

Mr. Siddharth Wakankar a/w. Aishwarya Bapat, for the Petitioner.
Ms. Meenaz Kakalia i/b. V. G. Sreeram, for the Respondent.

**CORAM : MANISH PITALE, J.
DATE : 13th APRIL 2023**

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P.C.

1. The present petition is filed under Section 29-A of the Arbitration and Conciliation Act, 1996, for extension of mandate of the sole arbitrator. It is significant to note that initially the sole arbitrator was appointed by order dated 28/6/2021, passed by a learned Single Judge of this Court in Arbitration Petition No.60/2021, by exercising power under Section 11 of the said Act.

2. It appears that the said arbitrator recused from the proceedings, as a consequence of which Arbitration Petition No.83/2021, had to be filed by the petitioner seeking

appointment / substitution of the arbitrator.

3. By order dated 22/10/2021, passed in Arbitration Petition No.83/2021, this Court substituted the arbitrator by appointing another sole arbitrator for resolution of disputes between the parties. As per paragraph 4(iv) of the said order, this Court directed that the substituted arbitrator would make an endeavour to conclude the Reference within six months from the date of the first hearing.

4. It is an admitted position that the period of six months expired, but the proceedings before learned arbitrator did not reach finality. The respondent subsequently raised an objection before the learned arbitrator that the proceedings could no longer continue, in the light of the aforementioned direction given by this Court to conclude the proceedings within six months of the first hearing. In that light, by a communication issued by the learned arbitrator, it was informed to the parties that extension of at least three months would be required for concluding the proceedings.

5. It is in this backdrop, that the present petition was filed under Section 29-A of the said Act, for extension of mandate of the learned arbitrator.

6. The respondent has appeared through counsel and an affidavit-in-reply has been placed on record. Apart from

indicating that it is the petitioner who is responsible for delay in the proceedings before the learned arbitrator, the respondent has raised an issue of jurisdiction, claiming that this Court lacks jurisdiction to entertain the present petition and that a proceeding for extension of mandate ought to be filed before the Principal Civil Court of Original Jurisdiction, which in the present case would be the District Court at Pune.

7. Mr. Wakankar, learned counsel appearing for the petitioner submitted that there is no substance in the objection, as preliminary issue of jurisdiction, raised on behalf of the respondent, for the reason that in the present case the arbitrator was initially appointed under Section 11 of the said Act and thereafter, the substituted arbitrator was also appointed by this Court by exercising power under Section 15 of the said Act. It is submitted that as per law clarified by this Court in its judgments in the case of *Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Ltd.*¹ and in the case of *Magnum Opus IT Consulting Pvt. Ltd. Vs. Artcad Systems*,², as also the Delhi High Court in *DDA Vs. Tara Chand Sumit Construction Co.*³, once the arbitrator is appointed by the High Court exercising power under Section 11 of the said Act, any prayer for extension of the mandate can lie only before the High Court and not before the District Court, notwithstanding

¹ (Judgment and Order dated 29/7/2019 passed in Commercial Arbitration Petition (L) No.814/2019)

² 2022 SCC Online Bom 2861

³ 2020 SCC Online Del 2501

the definition of 'Court' specified in Section 2(1)(e) of the said Act. On this basis, it is submitted that the preliminary objection is without any substance.

8. As regards the aspect of delay, it is submitted that the petitioner is not to blame for the same. In fact, the respondent had filed an application challenging the jurisdiction of the learned arbitrator, which was required to be decided first and thereupon the proceedings could continue before the learned arbitrator. It is submitted that thereafter, till the time the mandate of the learned arbitrator expired, the proceedings reached an advanced stage and that therefore, in the interest of justice, this Court may extend the mandate of the learned arbitrator.

9. Ms. Kakalia, learned counsel appearing for the respondent on the other hand sought to distinguish the judgments upon which the learned counsel appearing for the petitioner placed reliance. It was submitted that in the case of *Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Ltd. supra*, and *Magnum Opus IT Consulting Pvt. Ltd. Vs. Artcad Systems (supra)*, this Court was considering proceedings arising out of international commercial arbitrations and that the judgment of the Delhi High Court has only persuasive value and it would not be binding on this Court. It was submitted that a bare perusal of provisions of the said Act

particularly, Section 2(1)(e), 11, 14 and 29-A thereof, would show that if proper meaning is to be given to the contents of Section 29-A of the said Act, reference to 'Court' has to be the District Court in the facts of the present case, in the backdrop of definition of 'Court' under Section 2(1)(e) of the said Act. It is submitted that therefore, the prayer for extension of mandate under Section 29A of the said Act can be made only before the District Court at Pune and not before this Court.

10. By inviting attention of this Court to the contents of the reply affidavit, it is submitted that the chronology of events is given to indicate as to manner in which the petitioner had delayed proceedings before the learned arbitrator and that therefore, it could not lie in the mouth of petitioner that the mandate deserved to be extended. On this basis, it was submitted that the present petition may be dismissed.

11. Having heard the learned counsel for the rival parties, it would be appropriate to first consider the preliminary objection concerning jurisdiction. A perusal of the judgments relied upon by the learned counsel appearing for the petitioner would show that this Court and the Delhi High Court considered the anomalous situation that would occur if the contention raised on behalf of the party challenging jurisdiction of the High Court is to be accepted, concerning an application under Section 29-A of the said Act for extension of mandate of the arbitrator.

12. In the case of *Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Ltd. (supra)*, this Court was undoubtedly concerned with an international commercial arbitration. But, the reasoning in the said judgment cannot be ignored, merely because of that reason. This Court, after referring to the contentions raised on behalf of the rival parties, held that in the facts of the said case, the application under Section 29-A of the Act seeking extension of mandate of the arbitral tribunal ought to be filed before the Supreme Court. This Court found that when the appointment of the arbitral tribunal was by an order of the Supreme Court under Section 11 of the said Act, since the dispute concerned an international commercial arbitration, a proceeding seeking extension of mandate of the arbitral tribunal ought to lie before the same Court i.e. the Supreme Court. While adopting the said view, this Court also referred to the fact that under section 29-A of the said Act, the Court also exercises power of substituting the arbitral tribunal. It was held that the said aspect had a bearing on the question of jurisdiction that arose before this Court. In this backdrop, it was held that when the arbitral tribunal was appointed by an order passed under Section 11 of the said Act, the prayer for extension of mandate of the arbitral tribunal ought to lie before the same Court, which in the facts of the said case, happened to be the Supreme Court.

13. In the case of *Magnum Opus IT Consulting Pvt. Ltd. Vs. Artcad Systems (supra)*, this Court was not concerned with an international commercial arbitration, but it was concerned with the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). In the said case, the appointment of the arbitral tribunal was obviously not on the basis of an application filed under Section 11 of the said Act. Instead, the arbitration proceeding was initiated under Section 18 of the MSMED Act. In such circumstances, this Court found that an application seeking extension of mandate would lie before the Principal Civil Court of Original Jurisdiction i.e. the District Court at Nashik. But while reaching the said conclusion, this Court observed that the arbitral tribunal in the said case was neither appointed under Section 11 of the said Act nor substituted by order of this Court. On this basis, the decision in the case of *Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Ltd. (supra)*, was distinguished and it was held that the District Court would have jurisdiction.

14. In the case of *DDA Vs. Tara Chand Sumit Construction Co. (supra)*, the Delhi High Court had considered a similar question. After referring to Section 2(1)(e), 11 and 29-A of the said Act, the Delhi High Court concluded that when the arbitral tribunal is appointed by the High Court on an application filed under Section 11 of the said Act, any application under Section

29-A thereof, for extension of mandate of the arbitral tribunal, ought to be filed before the High Court. The Delhi High Court also took note of the fact that Section 29-A of the said Act, also provides for a power to substitute the arbitrator and that it would be anomalous that the arbitrator is appointed by the High Court while exercising power under Section 11 of the said Act, and there is also power in the High Court to substitute such an arbitrator, but the application for extension of mandate of the said arbitrator could be filed before the District Court.

15. This Court agrees with the view expressed in the aforesaid judgments of this Court in the case of *Cabra Instalaciones Y. Servicios, S.A. Vs. Maharashtra State Electricity Distribution Company Ltd. (supra)*, *Magnum Opus IT Consulting Pvt. Ltd. Vs. Artcad Systems (supra)* and the Delhi High Court in the case of *DDA Vs. Tara Chand Sumit Construction Co. (supra)*. It is found that when the arbitrator / arbitral tribunal is appointed by an order of the High Court under Section 11 of the said Act, an application seeking extension of mandate under Section 29-A of the said Act, can be filed only before the High Court. This is in order to avoid the anomalous situation of the mandate of the arbitrator / arbitral tribunal appointed by this Court being extended or extension of mandate being refused by the District Court under Section 29-A of said Act. If only the appointment of the arbitrator or arbitral tribunal is without intervention of the

High Court or the Supreme Court, as the case may be, under Section 11 of the said Act, the Principal Civil Court of Original Jurisdiction would have the power to entertain an application under Section 29-A of the said Act, for extension of mandate of the arbitrator / arbitral tribunal.

16. In the present case, admittedly, this Court appointed the sole arbitrator by order dated 28/6/2021, passed in Arbitration Petition No.60/2021. But when the sole arbitrator recused, by order dated 22/10/2021 in Arbitration Petition No.83/2021, this Court substituted the sole arbitrator. Therefore, the application for extension of mandate under Section 29-A of the said Act, could have been filed only before this Court. Hence, the preliminary objection pertaining to jurisdiction, raised on behalf of the respondent, is rejected.

17. In so far as reasons seeking extension of mandate are concerned, this Court finds that the proceedings before the learned arbitrator have indeed reached an advanced stage. Although, the respondent claims that the petitioner is solely to blame for delay in the said proceedings, this Court finds that the respondent had filed an application challenging the jurisdiction of the learned arbitrator, which had to be decided first. Therefore, it would not be proper to accept the contention of the respondent that the petitioner deliberately delayed the proceedings before the learned arbitrator. It is already noted that

the learned arbitrator communicated to the parties that an extension of at least three months would be required for completing the arbitral proceedings. This Court is satisfied that sufficient grounds are made out for grant of extension of mandate of the learned arbitrator and that it would be in the interest of justice to extend the mandate of the learned arbitrator.

18. In view of the above, this petition is allowed. The mandate of the learned arbitrator is extended by a period of six months from today. The petition stands disposed of.

MANISH PITALE, J.