



WEB COPY



Application No.2388 of 2023

Application No.2388 of 2023

ABDUL QUDDHOSE, J.

1.V.V. Ganesan

2.H.R. Shah

3.N.J. Nooruddin

4.N.J. Asgar

5.V.G. Venkataraan

... Applicants

Vs.

P.N. Balasubramanian

... Respondent

This application has been filed under Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter called as 'the Act'), seeking extension of time for the Arbitral Tribunal to pronounce the Arbitral Award.

2. The period for completion of the arbitration has admittedly got expired. The applicants are the claimants and the respondent is the



Application No.2388 of 2023

respondent in the arbitration, the dispute arising out of a Shareholders Agreement. A dispute had arisen out of the Shareholders Agreement and the same was referred to an Arbitrator appointed by this Court under Section 11 of the Act. The Sole Arbitrator appointed by this Court had acted upon the reference and the arbitration is in the stage of cross-examination of the respondent's witness. Since the statutory period of completion of the arbitration has come to an end, this application has been filed seeking for extension of time for the Arbitrator to pronounce the Arbitral Award.

3. A counter-affidavit has been filed by the respondent raising a preliminary objection with regard to the maintainability of this application on the ground that some of the applicants are habitual residents of foreign country and therefore, as per the definition in Section 2(1)(f)(i) of the Act, the arbitration being an International Commercial Arbitration, the Sole Arbitrator appointed by this Court does not have the jurisdiction to conduct the arbitration and any appointment of an Arbitrator pursuant to the arbitration clause



Application No.2388 of 2023

contained in the Shareholders Agreement, can be made only by the Hon'ble Supreme Court as per the provisions of Section 11(9) of the Act.

4. Heard Mr.Pranav V. Shankar, learned counsel for the applicants and Mr.G. Raja Kumar, learned counsel appearing for the respondent.

5. The learned counsel for the applicants would submit that the objections raised by the respondent in this Section 29A application, has to be rejected by this Court for the following reasons:-

- a) The respondent was a party to Section 11 application filed by the applicants before this Court and has consented for the name of the Arbitrator to be appointed by this Court.
- b) He has also participated in the arbitration.
- c) He has also filed an application under Section 16 of the Act, challenging the jurisdiction of the Arbitrator but has never raised an issue that has been raised before this Court, namely the



Application No.2388 of 2023

residential status of the applicants, which according to him, will not empower the High Court to appoint an Arbitrator under Section 11 of the Act, as the subject arbitration is an International Commercial Arbitration.

- d) The respondent has already filed his statement of defence before the Arbitrator and having filed the statement of defence in which he has not raised the issue that has been raised in this application, he is estopped from raising the issue in this application filed under Section 29A of the Act.

6. It is also the contention of the learned counsel for the applicants that the respondent has waived his right to object the appointment of an Arbitrator as per Section 4 of the Act.

7. In support of his contention, the learned counsel relies upon a decision of the Hon'ble Supreme Court in the case of '**Quippo Construction Equipment Ltd. Vs. Janardan Nirman (P) Ltd.**' reported in '**(2020) 19 SCC 277**' and in particular, he referred to



Application No.2388 of 2023

paragraphs 20, 21 & 25 of the said judgment. Relying upon the said judgment, the learned counsel would submit that the respondent has waived his right to object with regard to the jurisdiction of the Arbitrator to adjudicate the dispute on account of the arbitration being an International Commercial Arbitration, as he has participated in the arbitration and he has also filed his statement of defence. The learned counsel would also submit that as per the provisions of Section 16 of the Act, the respondent ought to have objected to the jurisdiction of the Arbitrator before filing the statement of defence.

8. Per contra, the learned counsel for the respondent would rely upon the following authorities in support of his contention that even in a collateral proceedings as the present one, the respondent is empowered to raise objections with regard to the jurisdiction of this Court to appoint an Arbitrator under Section 11 of the Act:-

- i. A decision of the Bombay High Court in the case of '**Roptonal Ltd. and another Vs. Anees Bazmee**' reported in '**2016 SCC OnLine Bom 3555**';



Application No.2388 of 2023

WEB COPY

- ii. A decision of the Hon'ble Supreme Court in the case of '**Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited and another Vs. Narmada Equipments Private Limited**' reported in '**(2021) 14 SCC 548**';
- iii. A decision of the Hon'ble Supreme Court in the case of '**Tata Sons Private Limited Vs. Siva Industries and Holdings Limited and others**' reported in '**(2023) 5 SCC 421**' and
- iv. A decision of the Hon'ble Supreme Court in the case of '**Union of India and another Vs. India Fisheries Private Ltd., Bombay**' reported in '**(1965) 3 SCR 679**'.

9. Relying upon the aforesaid decisions, the learned counsel for the respondent would submit that the respondent is empowered to raise objections even in a collateral proceedings like the one that has been filed by the applicants under Section 29A of the Act, seeking for extension of time for the Arbitrator to pronounce the Arbitral Award. In particular, he laid emphasis on the judgment of the Bombay High



Application No.2388 of 2023

WEB COPY

Court in '**Roptonal Ltd's case**' referred to *supra* and would submit that the Bombay High Court had recalled the earlier order passed by the Bombay High Court under Section 11 of the Act on the ground that erroneously, the said order was passed despite the fact that the arbitration is an International Commercial Arbitration.

10. The learned counsel also drew the attention of this Court to the order passed by the Hon'ble Supreme Court dated 10.10.2018 in Civil Appeal No.10395 of 2018, confirming the order of the Bombay High Court in '**Roptonal Ltd's case**'. He referred to various paragraphs in the judgment of the Bombay High Court to support his contention that the respondent is empowered to raise objections that have been raised in the counter-affidavit, even in an application filed under Section 29A of the Act, seeking for extension of time for the Arbitrator to pronounce the Arbitral Award. He would also rely upon the judgment of the Hon'ble Supreme Court in '**Chief General Manager (IPC)'s case**' referred to *supra*, for the purpose of the proposition that an objection as regards the order passed under Section



Application No.2388 of 2023

11 of the Act, can be raised if the said objection goes to the root of the matter. He also relied upon a judgment of the Hon'ble Supreme Court in '*Tata Sons Private Limited's case*' referred to *supra*, for the proposition that Section 29A application is not maintainable in respect of International Commercial Arbitration.

Discussion:-

11. The following are the undisputed facts:-

- (a) The respondent had consented for the name of the Arbitrator before this Court in a petition filed by the applicants under Section 11 of the Act and based on the said consent, the Sole Arbitrator who is adjudicating the dispute between the parties, has acted upon the reference.
- (b) The respondent has participated in the arbitration by filing his statement of defence. The respondents in his statement of defence has also not raised any objection with regard to the jurisdiction of the Arbitrator to adjudicate the dispute between the parties. He has never raised the issue before the Arbitrator



WEB COPY



Application No.2388 of 2023

that the arbitrable dispute is an International Commercial Arbitration.

- (c) The respondent had earlier filed a petition under Section 16 of the Act before the Arbitrator but has never raised the issue of International Commercial Arbitration in the said petition.
- (d) The arbitration is presently at the stage of cross-examination of the respondent's witness, which is admitted by both the counsels.
- (e) The respondent did not file any application before this Court to recall the earlier order passed by this Court under Section 11 of the Act. He also did not file a review application to review the order passed by this Court under Section 11 of the Act appointing the Arbitrator, who is presently adjudicating the dispute between the parties.

12. The learned counsel for the respondent had relied upon various authorities which are referred to *supra*. In the authorities relied upon by the learned counsel for the respondent, none were dealing with cases of similar facts. In the decision rendered by the Bombay High



Application No.2388 of 2023

Court in '*Roptonal Ltd's case*' referred to supra, a review application was filed by a party claiming International Commercial Arbitration and only in the said review application, the Bombay High Court had recalled the order of appointing the Arbitrator under Section 11 of the Act, after coming to know that the arbitration is an International Commercial Arbitration and that only the Hon'ble Supreme Court is having the power to appoint an Arbitrator.

13. In the case on hand, no review application has been filed by the respondent to recall the earlier order passed by this Court, appointing the Sole Arbitrator under Section 11 of the Act. Therefore, the facts of the case on hand are different from the facts of the decision rendered by the Bombay High Court referred to *supra*.

14. The decision rendered by the Hon'ble Supreme Court in '*Chief General Manager (IPC)'s case*' has no applicability to the facts of the instant case. In the instant case, the respondent has chosen to raise objections with regard to the appointment of an Arbitrator by this



Application No.2388 of 2023

WEB COPY

Court at a very belated stage. The respondent has filed his statement of defence before the Arbitrator and in the said statement of defence, he has never raised an objection with regard to the maintainability of the arbitration on the ground that the arbitration is an International Commercial Arbitration. The respondent has also filed an application under Section 16 of the Act and even in the Section 16 application, he has not raised any objection with regard to International Commercial Arbitration, which he has raised only for the first time in this application filed by the applicants under Section 29A of the Act.

15. Section 4 of the Act deals with waiver. The learned counsel for the applicants contended that the respondent has waived his right to object, as he has acquiesced to the jurisdiction of the Arbitrator, which is disputed by the learned counsel for the respondent, who would submit that even at this stage, the respondent is entitled to object since this Court, without jurisdiction, had appointed an Arbitrator under Section 11 of the Act.



Application No.2388 of 2023

16. Since it is a disputed question of fact, it is for the Arbitrator to decide with regard to the respective contentions as to whether the respondent has acquiesced or whether on account of arbitration being an International Commercial Arbitration, the Arbitrator does not have the jurisdiction to pass an Arbitral Award. Being a triable issue, this Court in this application filed under Section 29A of the Act, which only seeks for the relief of extension of time for the Arbitrator to pronounce the Arbitral Award, cannot adjudicate the said issue. Therefore, the decision of the Hon'ble Supreme Court in '*Chief General Manager (IPC)'s case*' referred to *supra*, has no applicability for the facts of the instant case.

17. Insofar as the decision rendered by the Hon'ble Supreme Court in '*Tata Sons Private Limited's case*' referred to *supra*, relied upon by the learned counsel for the respondent is concerned, the said decision has also got no bearing for the facts of the instant case. In the said decision, no order was passed by any High Court under Section 11 of the Act, appointing an Arbitrator. The Hon'ble Supreme Court in the



Application No.2388 of 2023

said decision was dealing with an application under Section 29A of the Act. Being an International Commercial Arbitration, the Hon'ble Supreme Court held that the said provision is not applicable for an International Commercial Arbitration. There was no occasion for the Hon'ble Supreme Court in the said decision, to consider the issue of a similar nature where the respondent had acquiesced to the jurisdiction of the Arbitrator and had given consent for the name of the Arbitrator before the Court which had appointed an Arbitrator under Section 11 of the Act. The facts of the decision of the Hon'ble Supreme Court in '*Tata Sons Private Limited's case*' referred to *supra*, are totally different from the facts of the instant case.

18. In view of the reasons given by this Court for rejecting the contentions of the respondent, this Court is of the considered view that the other decision relied upon by the learned counsel for the respondent in '*Union of India's case*' referred to *supra*, which was dealing with the Arbitration and Conciliation Act, has no bearing for the facts of the instant case.



Application No.2388 of 2023

WEB COPY

19. The decision relied upon by the learned counsel for the applicants in '*Quippo Construction Equipment Ltd's case*' referred to *supra*, dealing with Section 4 of the Act namely, waiver of right to object under Section 16 of the Act, namely, competence of Arbitral Tribunal to rule on its jurisdiction, will have to be examined by the Arbitrator while dealing with the merits of the respective contentions.

20. Being an issue raised by the respondent at a belated stage and being a disputed question of fact, this Court while deciding an application under Section 29A of the Act, cannot adjudicate the issues raised by the respondent in this application. Being an application merely seeking extension of time for the Arbitral Tribunal to pronounce the Arbitral Award, the contentions of the respondent is left open for the Arbitrator to decide and the said contentions cannot be adjudicated by this Court in this application filed under Section 29-A of the Act.

21. As seen from the affidavit filed in support of this application,



Application No.2388 of 2023

there has been progress in the arbitration and it is an admitted fact that the arbitration is at the stage of cross-examination of the respondent's witness.

22. No prejudice will be caused, if the extension of time is granted for the Arbitral Tribunal to pronounce the Arbitral Award.

23. After rejecting the contentions of the respondent, this Court is allowing this Application, by granting time for the Arbitral Tribunal to pronounce the Arbitral Award, within a period of four (4) months from the date of receipt of a copy of this order. All the defences of the applicants with regard to the contentions of the respondent is also left open. The Arbitrator is directed to pass an Arbitral Award uninfluenced by any of the observations made by this Court.

20.09.2023

Sni



WEB COPY



Application No.2388 of 2023

ABDUL QUDDHOSE, J.

Sni

Application No.2388 of 2023

20.09.2023