

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

WRIT PETITION NO. 9199 OF 2024

M/s. Microvision Technologies Pvt Ltd

Through its representative/Director

Shri Atul Nemichand Dhadiwal

Age : 48 years, Occ: Business,

Residing at 2, Suraj Enclave, Near ABB

Circle, Mahatma Nagar, Nashik – 422 007. Petitioner

Versus

Union of India

Through the General Manager,

Central Railway, G.M. Building,

Mumbai CST – 400 001. ... Respondent

WITH

WRIT PETITION NO. 9202 OF 2024

M/s. Microvision Technologies Pvt Ltd

Through its representative/Director

Shri Atul Nemichand Dhadiwal

Age : 48 years, Occ: Business,

Residing at 2, Suraj Enclave, Near ABB

Circle, Mahatma Nagar, Nashik – 422 007. Petitioner

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Versus

Union of India

Through the General Manager,
Central Railway, G.M. Building,
Mumbai CST – 400 001.

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... Respondent

WITH

WRIT PETITION NO. 9201 OF 2024

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M/s. Microvision Technologies Pvt Ltd

Through its representative/Director

Shri Atul Nemichand Dhadiwal

Age : 48 years, Occ: Business,

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Residing at 2, Suraj Enclave, Near ABB

Circle, Mahatma Nagar, Nashik – 422 007. Petitioner

Versus

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Union of India

Through the General Manager,
Central Railway, G.M. Building,
Mumbai CST – 400 001.

... Respondent

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WITH

WRIT PETITION NO. 9200 OF 2024

M/s. Microvision Technologies Pvt Ltd

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Through its representative/Director

Shri Atul Nemichand Dhadiwal

Age : 48 years, Occ: Business,

Residing at 2, Suraj Enclave, Near ABB

Circle, Mahatma Nagar, Nashik – 422 007. Petitioner 65

Versus

Union of India

Through the General Manager, 70

Central Railway, G.M. Building,

Mumbai CST – 400 001. ... Respondent

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Mr. Mayur Khandeparkar, with Mr. Vivek V. Salunkhe, for the
Petitioner in all Petitions.

Mr. T. J. Pandian, with Ms. Tanisha Raikwar & Mr. Gautam
Modanwal, for the Respondent in all Petitions.

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CORAM : AVINASH G. GHAROTE, J. 75

JUDGMENT RESERVED ON : 12th JULY 2024

JUDGMENT PRONOUNCED ON : 19th JULY, 2024

JUDGMENT:

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1. These petitions question the order dated 10.06.2024 (page
173) passed by the learned Arbitrator, to the extent it holds that

the order of deletion of issue nos.1 and 2, by the earlier substitute arbitrator Shri R. B. Agrawal, Retired District Judge, was non-est 85 on account of the fact that his appointment was without jurisdiction, he having been appointed by the Principal District Judge, Nashik, by an order dated 02.08.2019, in Civil Miscellaneous Application Nos. 86 of 2019 and connected matters, when in fact the substitution was to be made by this 90 Court, which had appointed the original arbitrator Shri Justice R Y Ganoo, which was by an order dated 16.12.2016, (page 33) passed in proceedings under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('A & C Act' for short hereinafter), in Arbitration Petition No.43 of 2016 and connected matters, which 95 Court had also appointed the present Arbitrator in Writ Petition Nos. 10428 of 2019 and connected matters vide order dated 14.09.2023 (page 74).

2. Mr. Khandeparkar learned Counsel for the petitioner, 100 submits that the impugned order dated 10.06.2024 (page 173) by which the issue nos.1 & 2 have been revived by the learned Arbitrator, suffered from a legal perversity, of such a nature, so as

to warrant interference by this Court under Article 226 of the
Constitution of India. 105

3. Issue nos.1 & 2, which were originally framed and which
consequent to their deletion by the order dated 05.11.2019 by the
learned Arbitrator Mr. Agrawal, and have now been revived by
the impugned order, are as under : 110

1. Does the claimant prove that it was registered as
“Small Enterprises” under the provisions of Micro, Small
and Medium Enterprises Development Act, 2006 on the
date of the award of the contract by this proceeding ?

2. Is the claimant entitled to the benefits under Micro, 115
Small and Medium Enterprises Development Act, 2006,
while performing its part of the contract with the
Respondent ?.

4. Framing of an issue as to whether the petitioner was an 120
MSME, under the Micro, Small and Medium Enterprise
Development Act, 2006, (‘MSME Act’ for short hereinafter) at the
time of the transaction, in question and permitting evidence to be
led in upon it, cannot be said to be perverse, as that is something
which goes to the very root of the matter, and in case established 125

or not, would entitle or dis-entitle the claimant to an award.

5. Though a claim made in this regard, that the petitioner was a company to which the MSME Act applied, at the time of an application under section 9 or 11 of the A & C Act may have been upheld, however, that is a finding rendered only on the basis of a prima facie plea being raised and considered and does not dis-entitle the opponent in disproving it, during the conduct of the arbitration proceedings by leading evidence in that regard. Based upon the evidence which would come on record it would be permissible for the party to claim that such a plea has been proved or disproved. However to even shut off such a plea would be depriving the respondent of a defence which it would be in law entitled to raise and prove.

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6. Any admission which the respondents may have given during the proceedings under Section 9 or 11 of the A & C Act, or otherwise would be permissible to be used by the claimant to raise a contention that such a plea is spurious or otherwise stands established. The Evidence Act though not applicable *stricto sensu*,

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however it's principles to a substantial extent apply, which would indicate that the respondent would have an opportunity to even explain an admission given. However outright denial of an opportunity to even frame an issue, would amount to denial of a right of a reasonable defence and would not be permissible. 150

7. Even otherwise, if the arbitrator again finds that certain issues arise for consideration, for an effective decision of the matter before him, nothing prevents him from framing them again for consideration, as the only purpose of framing an issue is to put the parties to notice as to what burden they have been 155 called upon to discharge, on which count also reviving the issues cannot be faulted with. Therefore nothing would turn upon the fact as to who has made the appointment or who has framed or revived the issues.

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8. However, since an argument has been raised vociferously that the revival of the issues was not permissible on the ground that the order deleting them was non-est, the same requires to be dealt with. The deletion of the issues which were initially framed in this regard, was by Mr Agrawal, who was appointed as an 165

Arbitrator in place of Hon'ble Shri Justice R Y Ganoo. This was in exercise of the power under Section 29(4) & (6) of the A & C Act, by the learned Principal District Judge who at that time was supposed to be having the power to exercise jurisdiction under it.

In ***K.I.PL. Vistacore Infra Projects J.V Vs Municipal Corporation of the city of Ichalkarnji, 2024 SCC OnLine Bom 327***, it has been held that such exercise of power by the learned Principal District Judge under Section 29(2) of the A & C Act was not permissible, which would render any exercise of jurisdiction by him under Section 29(4) & (6) of the A & C Act, as non-est and ineffective.

This is also the view taken in ***Sheela Chowgule Vs Vijay Chowgule, 2024 SCC OnLine Bom 1069***, wherein it has been held that the, power to substitute or re-constitute the Arbitral Tribunal as provided under sub-Section 6 of Section 29-A will have to be read with Section 11 which deals with appointment of Arbitrators.

There cannot be any difference with regard to appointment of Arbitrator with that of substitution of one of the Arbitrator or reconstituting the Arbitral Tribunal. The words used in sub-section 7 of the Section 29-A specifically provide the word "appointed under this section". Thus, substitution is in fact a fresh

appointment as contemplated under Section 11 of the said Act. Thus, while extending the period of Arbitration, the Court is also empowered either to substitute one or all the Arbitrators and reconstitute the Arbitral Tribunal. It practically deals with appointment of fresh Arbitrators, which is the power given to the High Court in case of domestic arbitration as found in Section 11, which view is in agreement with the view taken in *K.I.PL. Vistacore Infra Projects J.V Vs Municipal Corporation of the city of Ichalkarnji* (supra). However as this view is found to be contrary to what has been held in *Mormugao Port Trust Vs Ganesh Benzoplast Ltd, Writ Petition No. 3 of 2020 decided on 15.01.2020*, after framing the following question :

1. In the event an Arbitral Tribunal constituted by the High Court under Section 11(6), fails to complete the proceedings within the stipulated period/extended period, where an application under Section 29-A(4) would lie i.e. the High Court or the Civil Court having original jurisdiction in case of a domestic arbitration?
2. In the event an Arbitral Tribunal consisting of three Arbitrators is constituted as per Section 11(2) i.e. with agreement and consent of the parties, fails to complete the proceedings within the stipulated period/extended period, where an application under Section 29-A(4) would lie i.e.

before the High Court or the Civil Court having original jurisdiction in the case of domestic arbitration?

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The Registry has been directed to place the matter before the Hon'ble the Chief Justice for constitution of Larger Bench.

9. It would however, be material to note that in ***Chief Engineer (NH) PWD (Roads), Govt. of Meghalaya Vs M/s BSC & C and C JV, CRP No. 2 of 2024, decided on 22.04.2024***, the learned Single Judge, while considering this issue has held as under :

19. In the backdrop of the discussions herein above, coming to the case in hand, the decision rendered in ***Magnum Opus IT consulting Private Limited Vs. Artcad Systems, Through its Proprietor Vinay Digambar Shende (2022) SCC OnLine Bom 2861: (2023) 1 Arb LR 441***, which has been relied upon by the respondents, however comes to their aid, as the arbitrators in the present case were not appointed under Section 11 by the High Court. As such, by applying this judgment, a distinction can be drawn to hold that, if the appointment of the arbitrator is not by the High Court under Section 11, the Principal Civil Court of original jurisdiction in this case, the Commercial Court at Shillong, East Khasi Hills will have the power to entertain an application under Section 29A for extension of the term, as no anomalous situation would arise therefrom. As such, by

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making use of the expression of Section 2 of the Act “*unless the context otherwise requires*” the textual interpretation 235
will be in tune with the contextual one.

10. This was carried to the Hon’ble Apex Court in *Chief Engineer (NH) PWD (Roads) Vs M/s BSC & C and C JV in Special Leave Petition (C) No. 10544 of 2024*, in which this is 240
what has been said, while dismissing the Special Leave Petition on
13.05.2024 :

“The power under sub-Section (4) of Section 29A of the Arbitration Act vests in the Court as defined in Section 2(1) (e) of the Arbitration Act. It is the principal Civil court of original jurisdiction in a district which includes a High Court provided the High Court has ordinary original civil jurisdiction. 245

In this case, the High Court does not have the ordinary original civil jurisdiction. The power under sub-Section (6) of Section 29A is only a consequential power vesting in the Court which is empowered to extend the time. If the Court finds that the cause of delay is one or all of the arbitrators, while extending the time, the Court has power to replace and substitute the Arbitrator(s). The said power has to be exercised by the Court which is empowered to extend the time as provided in sub-Section (4) of Section 29A of the Arbitration Act. 250
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Hence, there is no merit in the Special Leave Petition.
The same is, accordingly, dismissed.”

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11. In the instant case, there is no dispute that the appointment of Hon’ble Shri Justice R Y Ganoo, was by this Court in exercise of the powers under Section 11(6) of the A & C Act. It is also not dispute that the substitution of the present arbitrator was also by this Court, in exercise of the power under Section 11(6) of the A & C Act. Even if it is accepted that the substitution of Mr. Agrawal, as the arbitrator was in exercise of the jurisdiction by the learned Principal District Judge, Nashik, under Section 29 (4) & (6) of the A & C Act, considering what has been discussed above, regarding the power and authority of the arbitrator, in my considered opinion, nothing would turn on it.

12. In *Tata Capital Limited Vs Geeta Passi and Ors., 2024 SCC OnLine Bom 1897*, while considering a plea regarding interference with the orders passed in Arbitration proceedings, and the scope of interference under Article 226 of the Constitution, after considering *Bhaven Construction Vs. Sardar Sarovar Narmada Nigam Ltd. (2022) 1 SCC 75* ; *Suncity Dhoot*

Colonizers Pvt Ltd Vs. Ram Chandra Patidar (2024) SCC OnLine 280

MP 1203 and State Power Corpn. Ltd. Vs. Emta Coal Ltd., (2020)

17 SCC 93 this is what has been held :

“6.4. The legal position is therefore well settled that the jurisdiction of this Court under Article 226 of the Constitution, in respect of orders passed in arbitral proceedings, can only be invoked, where the Arbitral Tribunal, has acted perversely or had committed a patent illegality, which is apparent on the face of record and not otherwise, the settled norm being that orders passed therein can be made the subject matter of an application under sec.34 or an appeal under sec.37 of the A & C Act, 1996, the intention being to get the arbitration proceedings decided as expeditiously as possible with minimum judicial intervention.” 285 290

The perversity or patent illegality, thus ought to be on the face of record and not otherwise. As discussed above, the mere reviving of an issue, would not amount to perversity, as the proceedings have to be decided on the basis of the controversy, between the parties and when the plea of the petitioner being a MSME on the date of the contract, is germane, I, do not see any perversity or patent illegality, in the impugned order. 295 300

13. The reliance placed by Mr Mayur Khandeparkar learned Counsel for the petitioner on Section 15(4) of the A & C Act regarding protection of orders passed by Arbitrators, is misplaced, 305 as it will have to be held that an order deleting an issue, cannot be construed to be an order, which cannot be reconsidered, if the authority or tribunal, considers the decision on the issue, to be necessary, for the purpose of deciding the matter before it. Even otherwise, presuming that the order deleting issue nos. 1 & 2 was 310 correct, nothing would prevent the learned Arbitrator, to again frame the issues, if in his considered opinion, they go to the very root of the matter, which require determination of the controversy in the proceedings.

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14. That apart if the petitioner claims that this has resulted in any perversity, the same plea can be raised by it under section.34 of the A & C Act and thus would not come within the category of perversity as envisaged by *State Power Corpn. Ltd. Vs. Emta Coal Ltd.* (supra), and other judgments as quoted above, laying down 320 the parameters of interference, so as to enable this Court to interfere under Article 226 of the Constitution.

15. The learned Arbitral Tribunal, in reviving the issue nos.1 & 2, in my considered opinion, has not done anything which can be termed as perverse, or would fall within the expression 'patent 325 illegality', so that the jurisdiction of this Court under Article 226 of the Constitution can be invoked

16. I, therefore do not see any ground made out for interference under Article 226 of the Constitution. The petitions are 330 dismissed. In the circumstances no costs.

(AVINASH G. GHAROTE, J.)