IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: July 21, 2020

\+ OMP(MISC) (COMM) 256/2019, I.A. 4989/2020

ONGC PETRO ADDITIONS LIMITED

..... Petitioner

Through: Mr. Nakul Dewan, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Somiran Sharma, Mr. Robin V.S., Mr. Nooren Sarna, Ms. Anushka Shah and Mr. Sambit Nanda, Advs.

versus

FERNS CONSTRUCTION CO. INC

..... Respondent

Through: Mr. Naresh Thacker, Adv. With Mr. Arpan Behl and Mr. Alok Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J (Oral)

This matter is being heard through video-conferencing.

I.A. 4989/2020

1. The present application has been filed with the following prayers:

> *(a) Clarify / modify the order dated 25.09.2019 passed by this Hon'ble Court in O.M.P (MISC.) (COMM.) 256/2019 to hold that the time limit prescribed under Section 29A of the Arbitration and*

Conciliation Act, 1996 for the Tribunal to pass the award is not applicable in the present arbitration; and/or

(b)Pass such other or further orders as this Hon'ble Court may be pleased in the facts and circumstances of the case.

2. Vide order dated September 25, 2019 ('Order', for short), this Court had disposed off the main petition filed under Section 29A of the Arbitration and Conciliation Act, 1996 (' Act', for short), extending the time period for the Arbitral Tribunal to complete the proceedings and render the Award by 18 months effective from June 24, 2019.

3. Subsequent to the disposal of the petition under Section 29A, it appears an issue arose before the Arbitral Tribunal, whether the time limit to make an award would be applicable. In fact, the Arbitral Tribunal on March 23, 2020 had passed the following order:

"However, it has been rightly pointed out by the Ld. Counsel for the Respondent No. 2 that- 'assuming without admitting that respondent No. 2 is determined as a proper party to the present arbitration, then the arbitration would qualify as an international commercial arbitration, and therefore, the statutory

limit to make the award under Section 29A of the Arbitration and Conciliation Act, 1996 will not be applicable'. The Tribunal expects the Parties to file an appropriate application before the Hon'ble High Court of Delhi seeking clarifications on its Order dated 25- 9-2019 passed in O.M.P (MISC.) (COMM.) 256/2019 titled 'ONGC Petro Additions Limited –vs- Fernas Construction Co. Inc.'."

4. A perusal of the above order also makes it clear that an issue is pending before the Tribunal for determining whether the respondent herein is a proper party to arbitration proceedings or not. Be that as it may, it is the case by the petitioner that initially when the petition under Section 29A of the Act was filed on May 31, 2019 (refiled on June 17, 2019), the said Section was applicable to all arbitration proceedings seated in India. However, Section 29A of the Act was amended vide Arbitration and Conciliation (Amendment) Act, 2019 ('Amendment Act of 2019', for short) (came into effect from August 30, 2019) to the effect that the time limit for the Arbitral Tribunal to pass the Award does not apply to international commercial arbitration as defined under Section 2(1)(f) of the Act.

5. In substance, it is the case of the petitioner that Section

29A of the Act, does not apply to the arbitration proceedings between the parties on the date when the petition under Section 29A was filed, owing to the retrospective applicability of the amendment made to Section 29A.

6. Moreover, attention of this Court is drawn to two orders of the Coordinate Benches of this Court, wherein the orders prior in time in ***Shapoorji Pallonji and Co. Pvt. Ltd v Jindal India Thermal Power Limited O.M.P.(MISC.) (COMM.) 512/2019,*** decided on January 23, 2020 has held, the effect of amendment to Section 29A as per Amendment Act of 2019 to be retrospective in operation while the order latter in time in ***MBL Infrastructures Ltd. v. Rites Ltd. O.M.P.(MISC)(COMM) 56/2020,*** decided on February 10, 2020 held the applicability of amended Section 29A to be prospective in nature.

7. Mr. Nakul Dewan, learned Senior Counsel appearing for the petitioner has drawn the attention of this Court to the distinction brought about in Section 29A of the Act prior to and subsequent to the Amendment Act of 2019 in the following manner:

Section 29A prior to its amendment	**Section 29A as amended by the 2019 Amendment Act**

"*(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.* *Explanation.— For the purpose of this subsection, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment…".*	"*(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of* *completion of pleadings under sub-section* *(4) of section 23:* *Provided that the award in the matter of international commercial arbitration may be* *made as expeditiously as possible and endeavour may be made to dispose of the* *matter within a period of twelve months from the date of completion of pleadings* *under sub-section (4) of section 23.*"

8. Relying upon the aforesaid table, it is submitted by Mr. Dewan that in terms of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act of 2015', for short), Section 29A was introduced with effect from 23 October 2015. As a result, the statutory time limits set out under Section 29A applied to all arbitration proceedings commenced on or after this date, irrespective of whether they were domestic

arbitrations or international commercial arbitrations, seated in India. However, subsequent to the changes brought about in Section 29A by the Amendment Act of 2019, the statutory time limit for making an award has become inapplicable to international commercial arbitrations seated in India and that the statutory time limit for making an award in a domestic arbitration is calculated from the date of completion of pleadings, as opposed to the date on which the arbitral tribunal enters into reference.

9. It is submitted by Mr. Dewan that Section 29A has been classified as a procedural law since its inception *vide* Amendment Act of 2015 and that in its original form, the said Section does not create any vested rights in the parties in the arbitration proceedings. In other words Section 29A allows the parties, in the first instance, to agree to an extension of six months for the arbitral tribunal to render an award and on the failure of such agreement or for a period beyond the extension, for the parties to approach the Court to grant an appropriate extension; for all arbitrations seated in India.

10. Mr. Dewan relied upon the judgment in ***BCCI v. Kochi***

***Cricket (P) Ltd.*, (2018) 6 SCC 287,** to contend that the Apex Court has classified Section 29A of the Act as procedural law and that the retrospective operation of the same was not given effect to due the presence of Section 26 of the Amendment Act of 2015,which made the operation of section 29A prospective.

11. He further relied upon the Supreme Court judgments in ***Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739*** and ***Rajendra Kumar v. Kalyan (D) by Lrs., (2000) 8 SCC 99,*** to differentiate between substantive and procedural laws.

12. It is submitted by Mr. Dewan that the changes brought about in Section 29A will have retrospective effect from October 23, 2015 i.e., the date from which the Section 29A was introduced into the Act, vide Amendment Act of 2015. This, he contends by stating that Amendment Act of 2019 does not contain a provision which is equivalent to that of Section 26 of the 2015 Amendment Act, to indicate any legislative intent in favour of prospective application and since amendment to Section 29A does not create any new rights/liabilities, the exceptions, to the principle that procedural laws are retrospectively applicable, such as (1) procedural law creating

new disabilities/obligations or imposing new duties qua transactions already concluded; or (2) if the law not only changes the procedure but also creates new rights/liabilities (Reference-***Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors., (1994) 4 SCC 602***), are not applicable to this case. In support of this contention he has relied upon the Apex Court judgment in ***Sudhir G. Angur and Ors. v. M. Sanjeev and Ors., (2006) 1 SCC 141,*** wherein it was held that all procedural laws and amendments to procedural laws, are retrospective in nature, unless the statute expressly states to the contrary.

13. He further stated that the Amendment of 2019 was pursuant to recommendations in the Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India ('Report', for short) and it was by adopting the recommendations in the Report that the legislature limited the applicability of Section 29A to domestic arbitrations only and excluded international commercial arbitrations from the purview of the statutory timelines set out in the provision.

14. Mr. Dewan on views taken by Coordinate Benches of this Court with regard to the applicability of Section 29A as amended

by the Amendment Act of 2019, submitted that this Court is well-within its power to hold that the order latter in time not in consonance with prior order on legal principle of *per incuriam*. It is submitted by Mr. Dewan that judgement delivered by ld. Single Judge on January 23, 2020 in ***Shapoorji Pallonji and Co. Pvt. Ltd (supra),*** holding that Section 29A was procedural in nature and applicable retrospectively to all pending arbitrations was binding on the Court while considering the same issue in ***MBL Infrastructures Ltd. (supra)*** and that since the order in ***MBL Infrastructures Ltd (supra)*** on February 10, 2020 was without considering and contrary to the position laid down in ***Shapoorji Pallonji (supra),*** cannot hold the field. He further submitted that the in ***MBL Infrastructures Ltd (supra),*** the ld. Single Judge did not consider the procedural aspect of Section 29A and soley relied upon the Notification dated August 30, 2019 which did not reveal any legislative intension for the Amendment Act of 2019. He, in regard to this submission relied on the Supreme Court judgment in ***National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680,*** wherein it was held that a decision passed in ignorance of another decision of a Coordinate

Bench is *per incuriam*, thereby not being a binding precedent.

15. He relied upon the Supreme Court judgment in ***Sundeep Kumar Bafna v. State of Maharastra and Ors. (2014) 16 SCC 623,*** wherein it was held that even High Courts when faced with conflicting decisions of the Supreme Court, should follow the decision earlier in time since the later decision would be *per incuriam.*

16. Further, he relied upon Supreme Court judgments in ***State of U.P. and Ors. v. Synthetics & Chemicals Ltd. and Ors., (1991) 4 SCC 139*** and ***Narmada Bachao Andolan (III) v. State of Madhya Pradesh, (2011) 7 SCC 639,*** wherein a lower Bench held a decision of the Constitutional Bench *per incuriam* having passed in ignorance of law and a full bench held a decision of a coordinate bench to be *per incuriam* respectively.

17. Mr. Naresh Thacker, learned counsel for the respondent has, without prejudice, while agreeing to the stand taken by the petitioner and submissions made by Mr. Dewan, additionally relied upon the Supreme Court judgment in ***State of Assam v. Ripa Sharma, (2013) 3 SCC 63,*** wherein on the maintainability of a challenge to dismissal of a review petition in a special leave

petition filed without challenge to the judgment against which review was sought, the petitioner relied upon a subsequent judgment of the Supreme Court holding such a challenge to be maintainable as against the position of law settled by prior judgments. It was clarified by the Court that the judgment which was subsequent in time and relied upon by the petitioner in the special leave petition was *per incuriam*.

18. Having heard the learned counsel for the parties, at the outset I may state that the petitioner through this application is seeking a clarification to the extent, *de hors* the Order dated September 25, 2019 on an application filed by the petitioner under Section 29A of the Act whereby this Court had extended the time for Arbitral Tribunal to complete the proceedings and render the Award by a period of eighteen months effective June 24, 2019, that such time limit is not applicable for the Arbitral Tribunal to complete the proceedings and render the Award, being an international commercial arbitration.

19. It is an admitted position that by an amendment brought to Section 29A of the Act by the Amendment Act of 2019 as notified on August 30, 2019, it is specified that an Award, in

matters other than international commercial arbitrations, shall be made by the Arbitral Tribunal within a period of twelve months from the date of completion of pleadings. In fact, as per *proviso* to Section 29A (1), the time limit of twelve months is not rigid in an international commercial arbitration. Relevant portion of Section 29A as amended vide Amendment Act of 2019 is reproduced as under:

> *"29A.Time limit for arbitral award.--(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:*
> *Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.*
> *(2)……"*

20. There is also no dispute that the respondent herein is a foreign party. I have been informed that an issue whether the respondent is a necessary party in the proceedings in pending consideration before the Arbitral Tribunal. In any case, the question before this Court is, if the proceedings before the

Arbitral Tribunal are in nature of an international commercial arbitration then whether the time limit as fixed by this Court *vide* Order dated September 25, 2019 shall be applicable or not. To answer this question, it is necessary to decide whether the arbitration proceedings in the case in hand having started before the amendment to Section 29A (1) of the Act as notified on August 30, 2019 shall be applicable.

21. Before I proceed to answer the question, it is necessary to refer to the view taken by two Coordinate Benches of this Court in this regard. In the case of ***Shapoorji (supra)***, the Court held that the amended Section 29A(1) of the Act being a procedural law would also apply to the pending arbitrations as on the date of the amendment. Whereas, learned Single Judge in ***MBL Infrastructure (supra)***, by referring to the Notification August 30, 2019 held that, from the perusal of the said Notification it does not have a retrospective effect. Apparently both the orders are at variance. I also note in the latter order, ***MBL Infrastructure (supra)***, the attention of the Court was not drawn to the earlier order in ***Shapoorji (supra)***. To that extent the order in ***MBL Infra (supra)*** is *per incuriam.*

22. Mr. Dewan is justified in relying upon the judgement in case of ***National Insurance (supra)***, wherein in paragraph 28 has held as under:

> *"28. In this context, we may also refer to Sundeep Kumar Bafna v. State of Maharashtra [Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in Rajesh case [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] was delivered on a later date, it had not apprised itself of the law stated in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] but had been guided by Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] . We have no hesitation that it is not a binding precedent on the coequal Bench."*

23. He has also rightly relied upon the Supreme Court judgment in ***Sundeep Kumar Bafna (supra)*** and the relevant paragraph reads as under:

> *"19. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

24. Suffice to state the list of judgments on this proposition is endless and it is not necessary for this Court to add / refer any more judgments, other than what have been referred to above.

25. So, it follows that the conclusion of a Coordinate Bench in ***Shapoorji (supra)*** wherein the Court has held that the

amendment being a procedural in nature shall be applicable to all pending arbitrations as on the date of amendment is correct. This I say so, for the following reasons:

a. The Supreme Court in ***BCCI (supra)*** referring to Section 29A of the Act, as incorporated in by way of Amendment of 2015 held it to be a procedural law, as it does not create new rights and liabilities, but held that amendment to be prospective in view of Section 26 of the Amendment of 2015, which clearly stipulated that the said Amendment Act of 2015 shall apply in relation to arbitration proceedings commenced on or after the date of the commencement of the said Act. The relevant portion of ***BCCI (supra)*** (foot note to paragraph 38) reads as under:

> *"Section 29-A of the Amendment (sic Amended) Act provides for time limits within which an arbitral award is to be made. In Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC at p. 633: 1994 SCC (Cri) 1087, this Court stated (SCC p. 633, para 26)*
>
> > *"26. ...(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*
> >
> > *(iv) <u>A procedural statute should not generally speaking be applied retrospectively where the result would be to create new</u>*

disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (sic Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force".

b. There is no such stipulation akin to Section 26 of Amendment Act of 2015 in the Amendment Act of 2019. It is also pertinent to note that the deletion of Section 26 of Amendment Act of 2015 vide Amendment Act of 2019 has been set-aside by the Apex Court in ***Hindustan***

Construction Company Limited and Ors. v. Union of India (UOI) and Ors., AIR 2020 SC 122.

c. It is a trite law that substantive law refers to a body of rules that creates, defines and regulates rights and liabilities whereas procedural law establishes a mechanism for determining those rights and liabilities and machinery for enforcing them. Any change/amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability thereof will be prospective in nature and any change/amendment to the provisions of statute dealing merely with matters of procedure or procedural laws will be retrospective in nature, unless there exist a contrary intention of the legislature. (Reference: ***Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd., (1973) 1 SCC 813; Board of Control for Cricket in India (supra), Sudhir G. Angur (supra) and Thirumalai Chemicals Ltd. (supra)*)*.** Relevant paragraphs of ***Thirumalai Chemicals Ltd. (supra)***) reads as under:

> "14. *Substantive law refers to body of rules that creates, defines and regulates rights and liabilities.*

Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. ....

xxx xxx xxx

16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective."

d. By the Amendment of 2019 to Section 29A (1), the time period for making an Arbitral Award in international commercial arbitration been made inapplicable. The prescription of time limit by Amendment Act of 2015 had not conferred any rights or liabilities on a party rather it was a procedural law establishing a mechanism for the Arbitral Tribunal to render the award, which determine the rights and liabilities of parties in twelve months and

surely the removal thereof also does not confer/affect rights of any party to be given effect prospectively.

26. In view of my above discussion, it must be held that the provisions of Section 29A (1) shall be applicable to all pending arbitrations seated in India as on August 30, 2019 and commenced after October 23, 2015.

27. It is also held that there is no strict time line of 12 months prescribed to the proceedings which are in nature of international commercial arbitration as defined under the Act, seated in India.

28. It is clarified that the Arbitral Tribunal shall not be bound by the time line prescribed *vide* Order dated September 25, 2019, if the proceedings are in the nature of an international commercial arbitration.

29. The application is disposed of.

V. KAMESWAR RAO, J

JULY 21, 2020*/aky*