
(2018) 07 MP CK 0276
In the Madhya Pradesh High Court
Case No : AC No.38, 41 of 2018

G.S. Developers & Contractors Pvt. Ltd	APPELLANT
Vs	
Divya Dev Developers Pvt. Ltd. & Anr	RESPONDENT

Date of Decision : 30-07-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 14, 21, 29A, 29A(4), 32(2)(c), 34
Arbitration and Conciliation (Amendment) Act, 2015 — Section 11(8), 12(1), 26, 29A

Citation : (2018) 07 MP CK 0276

Hon'ble Judges : Prakash Shrivastava, J

Bench : Single Bench

Advocate : Kunal Sachdeva, Murtza Bohra, Arjun Pathak

Final Decision : Disposed Off

Judgement

1/ This order will govern the disposal of AC No.41/18 and AC No.38/18.

2/ AC No.41/2018 has been filed by M/s G.S. Developers & Contractors under Section 29A(4) of the Arbitration and Conciliation Act, 1996 (for short

the Act) seeking extension of time for concluding the arbitral proceedings by the arbitrator, whereas AC No.38/2018 has been filed by M/s

Divya Dev Developers under Section 14 of the Arbitration and Conciliation Act for appointment of the substitute arbitrator on the ground that the

mandate of the arbitrator has been terminated because the tribunal on expiry of the statutory period under Section 29A of the Act had become functus

officio.

3/ The brief facts are that the applicant in AC No.41/2018 was awarded a contract for construction of multistorey building for housing project at

Indore and the agreement executed between the parties was containing the arbitration clause. Since the dispute had arisen between the parties in

respect of the payment of bills, therefore, the applicant had filed AC No.21/2016 for appointment of arbitrator for resolving the dispute.

4/ This Court vide order dated 10.1.2017 had proposed the name of Honâ??ble Shri Justice Deepak Verma, Retd. Judge of the Supreme Court as

arbitrator and sought his declaration in terms of Section 11(8) and 12(1) of the amended Arbitration Act in the prescribed form as contained in 6th

Schedule of the Act and after obtaining the requisite declaration the proposed arbitrator was appointed as Arbitrator for resolving the dispute.

5/ The learned Arbitrator had commenced the proceedings but since one year period after commencement of the arbitration proceedings had expired

on 10.1.2018, therefore, the learned Arbitrator on 13.3.2018 taking note of Section 29A of the Act gave opportunity to the parties to mutually agree for

extension of time by 6 months but when no response was received, learned arbitrator vide order dated 27.3.2018 held that after expiry of one year

period the tribunal has become functus officio and it was not possible under the law to hold further sitting and has accordingly cancelled the future

dates which were fixed for the purpose of recording the evidence.Â

6/ Learned counsel appearing for the applicant submits that since the delay is not attributable to the learned Arbitrator and there is also no objection to

the parties in holding the arbitral proceedings before the learned Arbitrator, who has been appointed by this Court and only because of non submitting

the response for extension of time, the learned arbitrator has refused to proceed further in the matter, therefore, the time be extended to complete the

arbitral proceedings.

7/ Learned counsel for the respondent has raised an objection that the amended Section 29A of the Act is not applicable because in terms of Section

21 of the Act the arbitral proceedings had commenced when the notice dated 29.1.2015 was served by the applicant upon the respondent for

appointment of arbitrator and Section 29A has been incorporated much after that by way of amendment.Â He has further raised an objection that the

learned arbitrator has terminated the proceedings by declaring himself functus officio, therefore, the order of the learned arbitrator is covered by

Section 32(2)(c) of the Act.Â Hence the said order can only be challenged under Section 34 of the Act.

8/ I have heard the learned counsel for the parties and perused the record.

9/ In terms of Section 21 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), the arbitration proceedings commenced on the date

on which the request for the dispute to be referred to the arbitrator is received by the respondent, which in the present case is 29.1.2015.

10/ By the Arbitration and Conciliation (Amendment) Act, 2015 (for short "Amending Act of 2015") published in the Gazette on 1.1.2016, Section

29A has been incorporated providing time limit for passing arbitral award. In terms of subsection(1) thereof the award is to be made by the arbitral

tribunal within a period of 12 months from entering upon the reference and subsection (3) provides for extension of time by consent and sub-

section(4) provides for extension of time by the court and termination of mandate of the arbitrator in not passing the award within the stipulated

period. The relevant extract of Section 29A is as under:-

"29A. Time limit for arbitral award.-

(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled

to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section(1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the

arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period."

11/ Section 26 of the Amending Act of 2015 relates to non applicability of the amendment to pending arbitral proceedings and reads as under:-

"26. Act not to apply to pending arbitral proceedings.- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in

accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this

Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

12/ A perusal of the aforesaid provision reveals that the amended provision do not apply to the arbitral proceedings which had already commenced in

terms of Section 21 of the Act of 1996 but the amended provisions apply to the court proceedings in relation to arbitral proceedings commenced after the amendment.

13/ The Supreme Court in a recent judgment in the matter of Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd. reported in 2018 SCC

OnLine SC 232 has examined the scope of Section 26 of the Amendment Act of 2015 and has held that Section 26 is in two parts and the first part

relates to only the arbitral proceedings before the arbitral tribunal and the second part relates to the court proceedings in relation to arbitration

proceedings. In this regard it has been held that:-

33. The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also

important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to"

making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings

commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is

these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely

procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the

Amendment Act came into force. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable

"in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its

absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral

tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings

that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by

the application of Section 21 of the 1996 Act. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity,

into two sets of proceedings "arbitral proceedings themselves, and Court

proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."

14/ Since in the present case the arbitral proceedings in terms of Section 21 of the Act of 1996 had commenced on 29.1.2015 when the notice with the request to refer the dispute to arbitration was received by the respondent prior to the coming into force of the Amendment Act of 2015, therefore, the provisions of Section 29A of the Amendment Act of 2015 are not applicable to the arbitration proceedings which are pending before the learned arbitrator appointed by the order of this Court.

15/ Since the judgment in the matter of Board of Control for Cricket in India (supra) has been delivered by the Hon'ble Supreme Court on

15.3.2018, therefore, the aforesaid interpretation of Section 26 was not before the learned arbitrator, who on 13.3.2018 had taken the view that

Section 29A of the Act applies to the proceedings pending before him and accordingly granted time to mutually extend the period in terms of Section

29A(3) of the Act and for that reason the learned arbitrator in the subsequent proceedings dated 27.3.2018 has treated the tribunal as functus officio

but in terms of the judgment of the Supreme Court in the case of BCCI (Supra) the tribunal had not become functus officio on account of non

applicability of Section 29A to the pending proceedings before the tribunal.

16/ In the aforesaid circumstances no case is made out for passing any order for extending the time under Section 29A(4) of the Act for completing

the arbitration proceedings before the learned arbitrator.Â The AC No.41/2018 is accordingly disposed off by giving liberty to the parties to bring the

aforesaid legal position as also the judgment of the Supreme Court in the case of BCCI (supra) to the notice of the learned arbitrator, who will be at

liberty to recall his orders dated 13.3.2018 and 27.3.2018 and to take an appropriate decision to proceed with the arbitration in accordance with law.

17/ The Arbitration Case No.41/2018 is accordingly disposed off.Â In view of above AC No.38/2018 is dismissed with liberty to approach this court

again if the need so arises.

18/ Signed order be kept in the file of AC No.41/2018 and a copy whereof be placed in the file of AC No.38/2018.