IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
(Commercial Division)

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No. 677 of 2022

East Indian Minerals Limited

Versus

The Orissa Minerals Development Company Limited and Anr.

For the Petitioner: Mr. Jishnu Chowdhury, Adv.
Mr. Souradeep Banerjee, Adv.
Ms. Sanjana Sinha, Adv.

For the Respondents: Mr. Swarup Banerjee, Adv.
Mr. H.C. Yadav, Adv.

Last heard on: May 04, 2023

Judgment on: May 19, 2023

Shekhar B. Saraf, J:

1. The petitioner, East Indian Minerals Limited, has filed the instant application [being A.P. No. 677 of 2022] praying for appointment of a presiding arbitrator in the position of the erstwhile arbitrator, Late Justice R.N. Ray, who expired during the subsistence of the ongoing

arbitration proceedings. Consequent to the failure of the arbitrators of the arbitral tribunal to appoint a presiding arbitrator, the petitioner prays for termination of the mandate of the expired arbitrator and appointment of a presiding arbitrator under Section 14 and 15 read with Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'].

2. The relevant facts of the matter are as follows:

a) The respondent no. 1 and 2 executed an MOU for formation of Special Purpose Vehicle to carry out mining operations at Thakurani and Roida mines, Barbil and other freehold areas of Orissa. Thereafter, the petitioner being a Joint-Venture Company and the respondent no. 1, being a company holding iron mines under lease from the Government of Orissa, entered into an agreement on October 4, 1993 for a period of 20 years for setting up crushing and processing plant and for sale of iron ore.

b) However, the respondent no. 1 was allegedly unable to materialize the object of the Joint-Venture Agreement. As a resultant of the disputes having arisen, the petitioner invoked the arbitration clause by letter dated December 15, 2006 wherein the petitioner nominated Mr. Ahin Choudhury, Senior Advocate as its nominee arbitrator. The respondent nominated Mr. R.N. Das, Senior Advocate as arbitrator and both the arbitrators appointed Dr.

Tapan Banerjee as the presiding arbitrator. The proceedings commenced but could not be completed on the death of the presiding arbitrator and a reconstituted arbitral tribunal was appointed with Mr. R.N. Ray being the presiding arbitrator who also expired after the 32nd sitting was concluded.

c) During the pendency of Sec. 16 application before the arbitral tribunal, criminal proceedings were commenced against the petitioner which got completed on December 18, 2021. The last arbitration sitting was conducted on February 4, 2016 after which there have been no developments in the arbitration proceeding.

d) By a letter dated May 23, 2022, the petitioner requested the two arbitrators to appoint a presiding arbitrator, which the arbitrators could not comply with. Hence this application has been filed before the Hon'ble Court for termination of the mandate of the late presiding arbitrator and a fit and proper person to be appointed in his position.

Rival Submissions:

3. Mr. Jishnu Chowdhury, counsel appearing on behalf of the petitioner made the following averments:

a) The respondent no. 1 was holding 26% shareholding in the petitioner company. The iron ore mining business had become

profitable and therefore the respondent no. 1 attempted to bring the business to a standstill by not supplying transit passes which affected the employees of the petitioner.

b) The Learned Counsel in his submitted document enclosing brief sequence of events claimed that an Equity Agreement was executed in June 1, 1998. It is further averred that the business activities commenced from March, 1999 and therefore the agreement is to remain valid and continue till 2019.

c) After the commencement of the arbitral proceedings, the petitioner being the claimant had prayed for an award of Rs. 3,02,12,893/- amongst the other claims in its statement of claim. Unfortunately, the presiding arbitrator died, subsequent to which, Justice R.N. Ray was appointed as the presiding arbitrator.

d) During the pendency of the first application under Sec. 16 of the Act before the reconstituted tribunal, an affidavit was filed by respondent no. 1 contending that criminal proceedings had been commenced against the petitioner for which there must not be any progress in the arbitration and thereafter the petitioner waited until its name was finally excluded under Sec. 239 of the Code of Criminal Procedure at the stage of framing charges wherein the petitioner's director was exonerated by order dated December 18, 2021. After the completion of such criminal proceedings, the

petitioner came to know that the presiding arbitrator also expired and thereafter accordingly took action.

e) The delay/lapse of more than 7 years in resuming the arbitral proceedings would not render arbitration infructuous and placed reliance on this Court's judgment in ***Subrata Mitra v. Shyamali Basu and Anr. (AP 67 of 2020 dated November 17, 2020)*** where the last arbitration sitting was held on July 4, 2012 after which the Sec. 14 and 15 petition was filed in February 9, 2020 for termination of the mandate of the recused arbitrator and appointment of a substitute arbitrator. The relevant portion of the judgment has been cited below:

> *"Adjudication on whether a claim is live is a matter that could have been gone into on pre amended provision in section 11. In any event, once the reference has commenced, it cannot be extinguished by Court on objection or contention of abandonment of claims before it. Such must be had from the Tribunal on adjudication of such contention on merit. The Court, not adjudicating the disputes referred to arbitration, will not do anything to extinguish the reference on a contention touching the claim."*

Accordingly, the Court appointed an arbitrator. In due course, a Special Leave Petition, ***Shyamali Basu and Anr. v. Subrata Mitra SLP (C) No. 7501/2021*** that was filed in the Supreme Court against the abovementioned judgement of this Court, wherein this

Court's judgement was upheld and liberty was granted to put forth further issues including the question of limitation period before the incumbent learned tribunal.

f) In the instant circumstances, the two learned arbitrators have failed to appoint the third Arbitrator as the presiding arbitrator and therefore the petitioner has filed the present application for expediting the final adjudication of the dispute.

4. Mr. Swarup Banerjee, appearing on behalf of the respondents has made the following averments-

a. The ultimate object for setting up the Joint Venture Company was to screen and crush 2 million tonnes iron ore per year for actual use in their Sponge Iron Units which was not fulfilled as the petitioner failed to set up even 1 million tonne capacity crushing and screening plant despite having contractual liabilities, thereby frustrating the basic purpose of the agreement. Moreover, its workers also caused serious disruptions by creating a blockade from September 1, 2006 to September 27, 2006 which generated significant losses to the respondent no. 1. After commencement of the arbitral proceedings, the respondent no. 1 claimed, in the statement of defence, an award directing the claimant/petitioner to pay a sum of Rs.22,22,06,787.40/- towards loss suffered by the respondent for less production and consequential loss of

establishment charges. It has been further stated that the pretext/ground of pendency of a criminal case is no bar in arbitral proceedings and therefore the instant petition is non-maintainable.

b. The petitioner had been unduly trying to enforce the contract beyond the tenure which is not permissible in law.

c. Since 2007, 32 sittings have been conducted and the arbitration proceedings have remained idle ever since February 4, 2016, as per the whims of the petitioner. There is no explanation for the delay of more than 7 years, since the arbitral sitting was last held on February 4, 2016 and thereafter the present application is not maintainable. It is further stated that the sole ground of death of the erstwhile presiding arbitrator cannot be a reason to revive arbitration as there were undue delays and several latches which has made the subject-matter of the dispute redundant.

d. The excuse of criminal proceedings pending against the petitioner for its inability to continue with arbitration is not valid. Reliance has been placed on ***Swiss Timing Ltd. v. Organising Committee Commonwealth Game***, ***2010 ([2014] 6 SCC 677)*** to substantiate the proposition that pending criminal proceedings are no bar for existing arbitral proceedings.

e. Section 29A of the Act mandates the award to be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings. Since the time has expired, the award cannot be made nor can any extensions be granted as per the provision. The said provision is applicable prospectively with effect from October 23, 2015 when the Amendment Act came into effect. In the arbitration agreement, it was mentioned that the arbitration would be held as per the provision of the Indian Arbitration Act, 1940 or any statutory modification to the same thereof at the prevailing time. Therefore, the parties agreed to statutory modification and Section 29A applies. Reliance was placed on ***BCCI v. Kochi Cricket Pvt. Ltd. ([2018] 6 SCC 287)*** for the said proposition.

f. Procedural law, where no substantive right of the parties is affected otherwise, it will be held that such procedural law is retrospective in its effect. The judgements in ***Thirumalai Chemicals v. Union of India & Ors. ([2011] 6 SCC 739)*** and ***The Workmen of Firestone Tyre & Rubber Co. Ltd. v. The Management & Ors. ([1973] 1 SCC 813)*** were cited in support of the said contention.

Observation & Analysis:

5. I have heard the counsels appearing for the respective parties and perused the materials on record.

6. At the very outset, it is pertinent to mention that the issue pertaining to limitation period for filing a Sec. 14 and Sec. 15 Application after a span of 7 years since the last sitting of arbitration on February 16, 2013 has to be decided by the arbitral tribunal. The Apex Court in ***Swiss Timing (supra)*** had allowed an application for reference to arbitration under Section 11 of the Act during the pendency of the criminal proceedings. The relevant extracts are reproduced below:

> *'**24.** Keeping in view the aforesaid observations made by this Court in Today Homes case [Today Homes & Infrastructure (P) Ltd. v. Ludhiana Improvement Trust, (2014) 5 SCC 68] , I see no reason to accept the submission made by the learned counsel for the respondents that since a criminal case has been registered against the Chairman of the Organising Committee and some other officials of the petitioner, this Court would have no jurisdiction to make a reference to arbitration.*
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> ***28.** To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void*

on a meaningful reading of the contract document itself without the requirement of any further proof.'

However, the facts are different herein and what has to be determined in the instant case are the consequences that flow once the parties have entered into arbitration and thereafter there have been delays in the proceedings. Is the arbitration proceeding extinguished?

7. In consonance with the observation of this Court in ***Subrata Mitra v. Shyamali Basu and Anr. (AP 67 of 2020 dated November 17, 2020),*** it is to be held that once the reference has been made before the arbitral tribunal and the proceedings have been commenced, the delay in the resumption of such arbitral proceedings would not wipe out the arbitral reference. Moreover, the contention, that the delay in conducting arbitral proceedings is clear evidence to the abandonment of claims and renders the subject-matter of the dispute redundant and the application infructuous, cannot be determined by this Court. It has to be adjudicated upon by the arbitral tribunal. Not foregoing the above, the arbitral proceedings cannot be rendered inoperative by dismissal of this application as the reference of the issue of limitation must also be raised before the arbitral tribunal and adjudicated by the same.

8. The arbitration clause in the instant case was invoked on December 15, 2006. Therefore, the other issue before this court is whether the arbitration cannot proceed owing to applicability of Section 29A of the

Act. It is no longer res integra that purely procedural provisions are to be applicable retrospectively. But, it is also settled law that such applicability can be ousted if specified in any statute. It is also to be seen if Section 29A of the Act is purely procedural in nature. The Supreme Court in ***BCCI v. Kochi (supra)*** had decided on the applicability of 'The Arbitration and Conciliation (Amendment) Act, 2015' (hereinafter referred to as 'the Amendment Act'). The relevant portions are extracted below:

*'**37.** What will be noticed, so far as the first part is concerned, which states—*

> ***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...."*

is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

***38.** That the expression "the arbitral proceedings" refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*

"Conduct of arbitral proceedings"

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. [Section 29-A of the Amend (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 602 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) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new 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****.] 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.'*

Emphasis Added

The import of this judgement is that Section 29-A of the Amendment Act applies prospectively to arbitration proceedings commenced in

accordance with Section 21 of the Act after the Amendment Act, unless the parties otherwise agreed.

9. The respondent contends that the arbitration agreement provided for import of statutory modification, as it was mentioned in the arbitration agreement that arbitration would be held as per the provision of the Indian Arbitration Act, 1940 or any statutory modification of the time being in force. Therefore, as per the respondent, this amounts to agreement between the parties to apply the Amendment Act retrospectively. This argument cannot be sustained. Under identical circumstances, the Apex Court in ***S.P. Singla Constructions (P) Ltd. v. State of Himachal Pradesh, (2019) 2 SCC 488*** had held contrary to the respondents contention herein. The relevant paragraph is produced below:

> '**15.** ***Drawing our attention to the wordings in Clause (65) 'that the agreement is subject to any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause' the learned Senior Counsel contended that these words would certainly attract Section 12(5) of the Act as amended with effect from 23-10-2015.*** In this regard, the learned Senior Counsel placed reliance upon the Delhi High Court judgment in *Ratna Infrastructure Projects (P) Ltd.* v. *Meja Urja Nigam (P) Ltd.* [*Ratna Infrastructure Projects (P) Ltd.* v. *Meja Urja Nigam (P) Ltd.*, 2017 SCC OnLine Del 7808] wherein interpreting the similar words in a contract, the Delhi High Court held that those words satisfy the requirement of Section 26 (amended Act of 2015) of there being an agreement between the parties that the Act as amended with effect from 23-10-2015 will apply and held as under : (SCC OnLine Del paras 22-23)
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> > "*22*. … The words 'any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration…' satisfies the requirement of Section 26 of there being an agreement between the parties that the Act as amended with effect from 23-10-2015 will apply. The Court is not prepared to draw the fine distinction between 'agree' and 'agreed'. Once the amendment to the clause clearly stated that all statutory modifications and re-enactments would apply, then there is no need

> for further agreement in that respect after 23-10-2015. The plea of the respondent in this regard is rejected.
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> *23*. The net result is that Section 12(5) as amended with effect from 23-10-2015 would apply. Section 12(5) clearly prohibits the employee of one of the parties from being an arbitrator. This would straightway disqualify Mr Kher who happens to be a serving GM of the respondent. Therefore, it is to no avail that the respondent has by its letter dated 21-8-2016 appointed Mr Kher as an arbitrator to adjudicate Arbitration Cases Nos. 1 of 2013 and 1 of 2014. His mandate stands terminated.

16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in *Ratna Infrastructure Projects case* [*Ratna Infrastructure Projects (P) Ltd.* v. *Meja Urja Nigam (P) Ltd.*, 2017 SCC OnLine Del 7808] ; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. ***In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23-10-2015).*** In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked.

Emphasis Added

10. Accordingly, I terminate the mandate of the erstwhile Late Arbitrator, Justice R.N. Ray and appoint Justice Asok Kumar Ganguly, Former Judge, Supreme Court of India, as the substitute/presiding arbitrator to resolve the dispute between the parties. The appointment is subject to submission of declaration by the arbitration in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.

11. Let this order be conveyed to the arbitrator by the Registrar, Original Side forthwith.

12. In light of the above, the petition (A.P. 677 of 2022) is disposed of.

13. An urgent Photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)