IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 88 OF 2024

Sheela Chowgule, H. No.34, Lengkok, Gopeng, Age 65 yrs., Tamangolf, Ipoh 31350, West Malaysia Represented By its Poa Holder, Yalamanchili Laxman Rao, Residing At Balaji Nagar, Arilova, Visakhapatnam, Andhra Pradesh 530040.

..... Petitioners

Versus

1. Vijay V. Chowgule, Chowgule House, Baina, Vasco Da Gama, Goa-403 802.

2. Umaji V. Chowgule, Regina Mundi Road, Airport Road, Chicalim, Vasco Da Gama-403711.

3. Ashok V. ChowguleKanchanjunga, 5th Floor, Peddar Road, Kemps Corner, Mumbai-400026.

4. Padma V. Chowgule, 91, Advent 9th Floor, Gen. JagannathraoBhosale Marg, Mumbai-400021.

5. Daulatrao Chowgule, 60/61, Alto Mangor, Vasco da Gama, Goa-403802.

6. Jagdeep Chowgule, "Chowgule House", H. No. 273, Airport Road, Chicalim, Goa - 403 711.

7. Jaywant Chowgule, "Villa Chowgule", Airport Road, Chicalim, Goa- 403 711.

8. Vidya Vernekar, r/o H.No. 424, Ward No. 12, St. Joaquim Road, Borda, Margoa, Goa. Presently c/o Mr. Jaywant Yeshwantrao Chowgule, residing at "Villa Chowgule", Airport Road, Chicalim, Goa- 403711.

9. Chowgule & Company Pvt. Ltd, Registered Office: Chowgule House, Mormugao Harbour, Goa

10. Chowgule & Company (Salt) Pvt. Ltd. Registered Office: Chowgule House, Mormugao Harbour, Goa.

11. Dolphin Extrusions Pvt Ltd, Registered Office: Chowgule House, Mormugao Harbour Goa.

12. Dolphin Ore Extraction Pvt Ltd, Registered Office: Chowgule House, Mormugao Harbour Goa.

13. Dolphin Mining Services Pvt Ltd, Registered Office: Chowgule House, Mormugao Harbour Goa

14. Sarita P. Shirke, Coombe Edge, Sunninghill Road, Windleshem, Surrey Gu 20 6 PP UK

15. Rohini V. Chowgule, Chowgule House, Baina, Vasco Da Gama, Goa-403 802

16. Sulakshana Suresh Chowgule, Flat No. 181, 8th Floor, Jolly Maker Apartments No. 3, Cuffe Parade, Colaba, Mumbai -400 005

17. Nikhilesh Suresh Chowgule, Flat No. 181, 8th Floor, Jolly Maker Apartments No.3, Cuffe Parade, Colaba, Mumbai-400 005

18. Akhilesh Suresh Chowgule, Flat No. 181, 8th Floor, Jolly Maker Apartments No. 3, Cuffe Parade, Colaba, Mumbai - 400 005

19. Ramesh L. Chowgule, 678, La Citadel Colony, Donapaula, Goa-403711

20. Satish L. Chowgule 829, Ambu Sadan, Vaccine Depot Road, Belgaum Tikwadi, Hukari, Belgaum, Karnataka-590 006

21. Bharati Naik, 25/1, Hondwaddo, Betalbatim Goa 403713

22. Mrs. Surekha Dilip Chowgule, "Shefali", S.no 132-B, Plot no. 4, Building No. 1, Flat no. 5 ICS Colony, Pune- 411007

23. Ms. Girija Dilip Chowgule, "Shefali", S.no 132-B, Plot no. 4, Building No. 1, Flat no. 5 ICS Colony, Pune-411007

24. Santosh L. Chowgule, "Embassy Eros", Flat No. 007, No. 7, Ulsoor Road, Bangalore 560 042.

25. JagdishChowgule, "Chowgule House" H. No.273 Airport Road, Chicalim, Goa-403 711.

26. Chowgule Steamship Limited Chowgule House, Mormugao Harbour Goa- 403803.

27. Jaigad Logistics Private Limited Plot No. C-221, MIDC, Mrijole Ratnagiri-415 639.

28. Chowgule Construction Technologies Private Limited 503 Gabmar Apartments, Vasco-Da Gama, Goa 403802.

29. Chowgule Construction Chemical Private Limited, 503 Gabmar Apartments, Vasco-Da Gama, Goa 403802.

30. Kolhapur Oxygen and Acetylene Private Limited 503 Gabmar Apartments, Vasco-Da Gama, Goa 403802.

31. Chowgule Ship Building Private Limited, 503 Gabmar Apartments, Vasco-DaGama, Goa 403802.

32. Angre Port Private Limited, 4th Floor, Bakhtawar, Nariman Point Mumbai-400 021.

33. Fibroplast Marine Private Limited, No. 2 GabmarAppts, Vasco Da Gama, Goa-403 802. ..... Respondents

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Mr. Pawan Jhabakh, Advocate *with Mr. Gajendra Kanekar and Mr. Aniket S. Kunde, Advocate for the Petitioners.*

Mr. Parag Rao, Advocate *with Ms. Sowmya Drago, Mr. Ajay Menon and Mr. Akhil Parrikar, Advocate for Respondent nos. 1, 14 to 16 and 18 to 33.*

Mr. Pulkit Bandodkar, Advocate *with Mr Rahul Mantri and Ms Angali Kumari, Advocate for the Respondent Nos. 2, 3, 4, 5, 7 and 8.*

Mr. Shailesh Redkar, Advocate *for the Respondent No. 9.*

CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ.

RESERVED ON : 1st AUGUST 2024

PRONOUNCED ON : 7th AUGUST 2024

JUDGMENT (*Per M. S. Karnik, J.)*

The Reference :

1. The learned Single Judge was not in agreement with the view taken by another learned Single Judge in **Mormugao Port Trust vs.**

Ganesh Benzoplast Ltd.[1] and as the same was contrary to the decision of this Court in **K.I.P.L. Vistacore Infra Projects J. V. Municipal Corporation of the city of Ichalkaranji**[2] and hence thought it fit to refer the matter to a larger bench. The reference is made on the following questions :

> (i) 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 ?
>
> (ii) 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 ?

2. Shri Parag Rao, learned Counsel for the respondents submitted that it may now not be necessary to answer the reference in view of the decision of the Supreme Court in **Chief Engineer (NH) PWD**

1 Writ Petition No.3/2020 decided on 15.01.2020

2 2024 SCC Online Bom 327

(Roads) vs. M/s. BSC & C and C JV[3]. It is submitted that after the decision in **Chief Engineer (NH) PWD (Roads)** (supra) was brought to the notice of the learned Judge who had made the reference, the learned Judge in **Marcelina Fernandes & Ors. vs. Green Valley Realtors[4]** held that in view of the observations of the Supreme Court, the Principal Civil Court of original jurisdiction in the district is the Court of Principal District Judge, South Goa, Margao. Shri Rao, therefore submitted that the issued is now well settled.

3. On a reading of the decision of the Supreme Court in **Chief Engineer (NH) PWD (Roads)** (supra), we did carry an impression that the reference could be answered in terms of the Supreme Court's order as it seems squarely covered by such decision. We find it apposite to reproduce the order in **Chief Engineer (NH) PWD (Roads)** (supra), which reads thus :

> "Heard the learned senior counsel appearing for the petitioner. Section 29A of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act") reads thus:
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> > "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.

3 2024 SCC OnLine SC 1801

4 2024 SCC Online Bom 2028

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 off the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(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:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in subsection (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

(underlines supplied)

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.

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."

4. Section 29-A of the Arbitration Act is extracted in the aforesaid decision. The Supreme Court in no uncertain terms observed that the power under sub-section (4) of Section 29-A of the Arbitration and Conciliation Act, 1996, vests in the Court as defined in Section 2(1)(e) of the Arbitration Act. Their Lordships held that it is the Principal Civil Court of original jurisdiction in the district which includes a High Court provided the High Court has ordinary original civil jurisdiction. In the case before the Supreme Court, the High Court did not have the ordinary original civil jurisdiction. It is material to note that Their Lordships observed that the power under sub-section (6) of Section 29-A 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). It is thus held that the said power has to be exercised by the Court which is empowered to extend the time as provided under sub-section (4) of Section 29-A of the Arbitration Act. In view of the law laid down by the Supreme Court, we thought our task is now simple and the reference should be answered in terms of what is held by the Supreme Court.

5. Shri Pawan Jhabakh, learned Counsel for the petitioners, insisted that the facts in **Chief Engineer (NH) PWD (Roads)** (supra) be carefully looked into before forming any opinion. Our attention was invited to the order passed by the learned Single Judge of the High Court of Meghalaya at Shillong in **Chief Engineer (NH) PWD (Roads) vs. M/s. BSC & C & C JV**[5] , which decision was challenged before the Supreme Court in **Chief Engineer (NH) PWD (Roads)** (supra). Reference to paragraphs 19 and 20 of the decision of High Court of Meghalaya in **Chief Engineer (NH) PWD (Roads)** (supra) is necessary to understand the facts. In the case before the Meghalaya High Court, the Arbitrators were not appointed under Section 11 by the High Court. In that context, the learned Judge observed that 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, which is the Commercial Court at Shillong, East Khasi Hills, will have the power to entertain an application under Section 29-A for extension of the terms, as no anomalous situation would arise therefrom. The learned Judge held that as such, by making use of the expression of Section 2 of the Act, "*unless the context otherwise requires*" the textual interpretation will be in tune with the contextual one. It was then held by the learned Judge that keeping in mind the fact that the High Court

5 2024 SCC OnLine Megh 284

of Meghalaya does not possess original Civil Jurisdiction, coupled with the fact that Section 11 nor Section 29-A(6) do not come into play in the present case, as the arbitrators were not appointed by the High Court, the Commercial Court, East Khasi Hills, Shillong being the Principal Court or original jurisdiction will have the jurisdiction to extend the mandate as prescribed under Section 29-A of the Act.

6. We thus find that it was in a different factual context than the one arising in the present case that the Meghalaya High Court held that the Principal Civil Court of original jurisdiction will have the jurisdiction to extend the mandate as prescribed under Section 29-A of the Act and not the High Court. The Supreme Court having upheld the judgment and order of the Meghalaya High Court, the question is whether the decision rendered by the Supreme Court will bind us having regard to the fact situation in the present case.

7. Faced with a dilemma, therefore, it became necessary for us to seek guidance from the principles laid down by the Supreme Court as to what is a ratio decidendi emanating from a decision and as to the principles of binding precedent. The Supreme Court in **Secunderabad Club vs. Commissioner of Income-Tax**[6] has elaborately discussed the concept of ratio decidendi. It would be useful to extensively refer to the observations made by the Supreme

6 (2023) 457 ITR 263 (SC)

Court. Dealing with the concept of ratio decidendi, it is held to be settled position of law that only the ratio decidendi of a judgment is binding as a precedent. In **B. Shama Rao vs. Union Territory of Pondicherry**[7], it has been observed that a decision is binding not because of its conclusion but with regard to its ratio and the principle laid down therein. In **Quinn vs. Leathem**[8], wherein it was observed that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. In other words, a case is only an authority for what it actually decides. According to the well settled theory of precedents, every decision contains three basic ingredients -(i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the Judge draws from the direct or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of (i) and (ii) above. For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision, for, it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from

7 AIR 1967 SC 1480

8 1901 AC 495 (HL)

reopening the dispute. However, for the purpose of the doctrine of precedent, ingredient (ii) is the vital element in the decision. This is the ratio decidendi. It is not everything said by a Judge when giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.

8. Their Lordships further observed that in the leading case *Qualcast (Wolverhampton) Ltd. vs. Haynes*[9], it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. A judgment is not binding (except directly on the parties to the lis themselves), nor are the findings of fact. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case. The legal principles guiding the decision in a case is the basis for a binding precedent for a subsequent case, apart from being a decision which binds the parties to the case. Thus, the principle underlying the decision would be binding as a precedent for a subsequent case. Therefore, while applying a decision to a later case, the Court dealing with it has to carefully ascertain the

9 (1959) AC 743

principle laid down in the previous decision. A decision in a case takes its flavour from the facts of the case and the question of law involved and decided.

9. Article 141 of the Constitution states that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. All Courts in India, therefore, are bound to follow the decisions of Supreme Court. This principle is an aspect of judicial discipline. The Supreme Court further observed that the doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to individuals as to the consequences of transactions forming part of daily affairs. Thus, what is binding in terms of Article 141 of the Constitution is the ratio of the judgment and as already noted, the ratio decidendi of a judgment is the reason assigned in support of the conclusion. The reasoning of a judgment can be discerned only upon reading of a judgment in its entirety and the same has to be culled out thereafter. The ratio of the case has to be deduced from the facts involved in the case and the particular provision(s) of law which the court has applied or interpreted and the decision has to be read in the context of the particular statutory provisions involved in the matter. What is binding, therefore, is the principle underlying a decision which must be discerned in the context

of the question(s) involved in that case from which the decision takes its colour. In a subsequent case, a decision cannot be relied upon in support of a proposition that it did not decide. Therefore, the context or the question, while considering which, a judgment has been rendered assumes significance.

10. As against the ratio decidendi judgment, an obiter dictum is an observation by a Court on a legal question which may not be necessary for the decision pronounced by the Court. However, the obiter dictum of the Supreme Court is binding under Article 141 to the extent of the observations on points raised and decided by the Court in a case. Thus, we need to bear in mind that what is of essence in a decision is its ratio and not every observation found therein, nor what logically follows from the various observations made therein.

11. Keeping the aforesaid principles relating to ratio decidendi and law of binding precedents in mind, we are of the considered opinion that though there is a discernible ratio decidendi in **Chief Engineer (NH) PWD (Roads) vs. M/s. BSC & C and C JV** (supra), however, the decision is applicable in the facts of that case and cannot be treated as binding precedent for the present case. While carefully reading the order of the Supreme Court in **Chief Engineer (NH) PWD (Roads) vs. M/s. BSC & C and C JV** (supra), in the light of

the facts that have been narrated in the judgment of the Meghalaya High Court which we have already referred to herein before, we are of the humble view that the decision of the Supreme Court cannot be treated as a binding precedent in the facts of the present case as the Arbitrator was appointed by the High Court under Section 11(6) of the Arbitration Act.

12. Let us now deal with the questions referred that fall for our consideration. First we deal with the second question referred to us. The answer to this question need not detain us much. The Arbitral Tribunal constituted under Section 11(2), i.e. with agreement and consent of parties fails to complete the proceedings within the stipulated period/extended period, the application under Section 29-A(4) would lie before the Principal Civil Court of original jurisdiction in a district which includes a High Court provided the High Court has ordinary original civil jurisdiction. The power under sub-section (6) of Section 29-A is only a consequential power vesting in the Court which is empowered to extend the time under Section 29-A(4). The answer to the second question in this reference is squarely covered by the decision of the Hon'ble Supreme Court in **Chief Engineer (NH) PWD (Roads)** (supra).

13. In answer to the first question posed for our consideration, some basic facts of the present case need to be noticed. Initially, the arbitral tribunal comprising of three Arbitrators came to be constituted. After some time, the Presiding Arbitrator recused from the matter on 23.08.2022 resulting in the two Arbitrators appointing Presiding Arbitrator, who accepted such appointment on 15.09.2022. The extended period for passing of the award would have expired on 28.03.2023. The respondent no.1, therefore, applied for extension of time for making of the award by the Arbitral Tribunal by a period of six months. During the pendency of such application, the Presiding Arbitrator resigned and as the two Arbitrators could not agree upon a Presiding Arbitrator, an application for Appointment of Arbitrator came to be filed before this Court by the respondent no.1. This Court appointed a Presiding Officer vide order dated 31.10.2023. The Arbitral Tribunal was thus reconstituted and arbitral proceedings recommenced. By an order dated 02.07.2024, the Commercial Court extended the period for passing of the award by the Arbitral Tribunal. The order dated 02.07.2024 was challenged by the petitioners in this petition.

14. This Court in **Cabra Instalaciones Y. Servicios, S.A. vs. Maharashtra State Electricity Distribution Company Limited**[10] and more recently on **K.I.P.L. Vistacore Infra Projects**

10 2019 SCC OnLine Bom 1437

J. V. vs. Municipal Corporation of the City of Ichalkarnji (supra) had, *inter alia,* taken the view that once the Arbitrator(s) is appointed by the High Court, the word '*Court*' as mentioned in Section 29-A would have to be read as the High Court.

15. Then in **Mormugao Port Trust** (supra), the learned Single Judge after referring to the scheme of the Arbitration Act and upon a detailed analysis thereof, had taken a view that a "*Court*" for the purpose of Section 29-A would be the very same Court i.e. defined under Section 2(1)(e) i.e. either the District Court or the High Court whenever the High Court exercises ordinary original civil jurisdiction.

16. Learned Counsel for the petitioners submitted that Section 2(1)(e) of the Arbitration Act cannot be read in isolation but only in consonance and in conjunction with Section 2(1) of the Act. It is submitted that an isolated textual interpretation cannot be provided to Section 2(1)(e) of the Arbitration Act. According to him, Section 2(1) of the Act indicates the definition should be understood in accordance with the surrounding context or specific circumstances rather than strictly adhering to a textual interpretation. It is submitted that for the purpose of Section 29-A(4), "*Court*" has to be the High Court as the appointment of the Arbitrator(s) was made under Section 11(6) of the Arbitration Act. Reliance is placed on the decisions in **Chief**

Engineer (NH) PWD (Roads) vs. M/s. BSC & C & C JV (supra) rendered by the Meghalaya High Court, **Chief Engineer (NH) PWD (Roads) vs. M/s. BSC & C & C JV** order dated 16.02.2024 in Commercial Misc. Case no. 1/2024 of Commercial Court, East Khasi Hills, Shillong, **M/s. Linear Enterprises vs. M/s. Maha Active Engineering Pvt. Ltd.** order dated 26.07.2024 in Arbitration Application No. 14/2024, **Shapoorji Pallonji & Co. vs. Lily Realty Private Limited)** Order passed in I.A. Nos. 1 and 2/2023 in CMP No. 357/2018 of Karnataka High Court, **Lots Shipping Company Ltd. vs. Cochin Port Trust**[11], **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel**[12] **DDA vs. Tara Chand Sumit Construction Co.**[13], **Indian Farmers Fertilizers Coop Ltd. vs. Manish Engineering Enterprises**[14] and **Jaypee Infratech Ltd. vs. EHBH Services (P) Ltd.**[15], in support of his submissions.

17. Shri Parag Rao, Learned Counsel for the respondents submitted that this reference has to be answered in terms of the law declared by the Supreme Court in **Chief Engineer (NH) PWD (Roads)** (supra). It is submitted that when the reference was made, this Court did not have the benefit of the Hon'ble Supreme Court's decision which has now settled the controversy. The Hon'ble Supreme Court

11 2020 SCC OnLine Ker 21443
12 2018 SCC OnLine Guj 5017
13 2020 SCC OnLine Del 2501
14 2022 SCC OnLine All 150
15 2024 SCC OnLine All 444

has emphasized and taken note of the fact that the Meghalaya High Court did not have the ordinary original civil jurisdiction which, according to the learned Counsel, is the only determining factor to decide whether a "*Court*" under Section 29-A would be the High Court or the Principal Civil Court of original jurisdiction in a district. The appointment of Arbitrator(s) by the High Court under Section 11(6) is of no consequence while deciding whether the "*Court*" under Section 2(1)(e) would also be the "*Court*" under Section 29-A of the Arbitration Act. It is submitted that merely because the High Court has appointed Arbitrator(s), the expression "*Court*" used in Section 29-A cannot be construed to mean the High Court unless such High Court exercises ordinary original civil jurisdiction.

18. Relying on the decision in **Kunhayammed and Ors. vs. State of Kerala**[16]**,** it is submitted that the declaration of law by the Supreme Court under Article 141 of the Constitution of India, is binding on this Court. To express any opinion in conflict with or in departure from the view taken by the Supreme Court is not proper because permitting to do so would be subversive of judicial discipline and an affront to the order of the Supreme Court. It is submitted that generally the definition clause which defines a term when used elsewhere in the statute, should and would carry the same meaning as given in the definition clause. The object of such definition is to avoid

16 (2000) 6 SCC 359

frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply. It is submitted that the definition "*Court*" under Section 2(1)(e) is an exhaustive definition as it uses the expression "*means and includes*" and it envisages only two Courts i.e. either a principal Civil Court of original jurisdiction in a district or a High Court in exercise of its ordinary original civil jurisdiction. It is further submitted that contextual interpretation is not to be invoked unless it leads to absurdity. It is further submitted that the power of appointment under Section 11(6) is the power given to the High Court only to put the arbitration proceedings in play or in motion whenever the parties fail to agree on appointment of an Arbitrator. It is the submission that the Arbitrator once is appointed, the High Court is not in seisin of the arbitration proceedings or the Arbitrator and does not retain any jurisdiction on the Arbitrator as it becomes *functus officio*. Learned Counsel relied on the decision in **Nimet Resources Inc. & anr. vs. Essar Steels Limited**[17]**,** in support of his submissions. Learned Counsel was at pains to point out that the power of appointment under Section 11 is independent and distinct power of substitution under Section 29-A. It is further submitted that there are other provisions in the Arbitration Act which indicate conceding of powers to parties and Court to terminate mandate of Arbitrator(s) appointed by Supreme

17 (2009) 17 SCC 313

Court/High Court. It is therefore urged that the Commercial Court is the correct Court for exercising powers under Section 29-A.

19. Reliance is placed on the decisions in **Mormugao Port Trust vs. Benzoplast Ltd.,** (supra), **Chief Engineer (NH) PWD (Roads) vs. M/s. BSC & C and C JV** (supra), **Kunhayammed & Ors. vs. State of Kerala & anr.** (supra), **Marcelina Fernandes & Ors. vs. Green Valley Realtors** (supra), **Nahalchand Laloochand Private Ltd. vs. Panchali Cooperative Housing Society Ltd.[18], State of West Bengal & Ors. vs. Associated Contractors[19]** and **Nimet Resources INC & anr. vs. Essar Steels Limited[20]**, by Shri Parag Rao, in support of his submissions.

20. Let us consider some of the provisions of the Arbitration Act. Section 2(1)(a) of the Arbitration Act defines – '*arbitration*' means any arbitration whether or not administered by permanent arbitral institution; Section 2(b) defines '*arbitration agreement*' means an agreement referred to in section 7; Section 2(d) defines '*arbitral tribunal*' means a sole arbitrator or a panel of arbitrators relevant in the context of the present case. Section 2(e)(i) of the Act defines '*Court*' means (i) in the case of an arbitration, the Principal Civil Court of original jurisdiction in a district and includes the High Court in

18 (2010) 9 SCC 536

19 (2015) 1 SCC 32

20 (2009) 17 SCC 313

exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit. We have not referred to that part of the definition which deals with the international commercial arbitration.

21. Chapter III of the Arbitration Act contains provisions relating to composition of Arbitral Tribunal. Section 11 therein provides for appointment of arbitrators. Sub-section (2) of Section 11 of the Arbitration Act provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (3) deals with the situation where failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the Presiding Arbitrator. Sub-section (4) says that if the appointment procedure in sub-section (3) applies and, (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made on an application of the party, by the High Court, in case of arbitrations other than the international commercial arbitration, that is for domestic arbitrations.

Sub-section (5) provides that failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section(4). It is now significant to notice sub-section (6) of Section 11 of the Arbitration Act, which provides that where, under an appointment procedure agreed upon by the parties,- (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the High Court, in case the arbitrations other than international commercial arbitration to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

22. Chapter VI of the Arbitration Act, deals with making of arbitral award and termination of proceedings. Significant in the context of the present case is Section 29-A which provides for time-limit for arbitral award. Sub-section (4) of Section 29-A stipulates that 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. It is also pertinent to note that sub-section (6) of Section 29-A stipulates that while extending the period referred to in sub-section (4) it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

23. If the strictly textual interpretation of Section 2(e)(i) is applied, there would be no difficulty for us to hold that the Court for the purpose of Section 29-A(4) and sub-section (6) of the Arbitration Act, would be the principal Civil Court of original jurisdiction in a district which includes a High Court in exercise of its ordinary original civil jurisdiction even when the Arbitrator is appointed under Section 11(6) of the Act. However, we have to consider whether the "*Court*" means District Court or the High Court which would mean the principal Civil Court of original jurisdiction or the High Court in the context of the appointment of an Arbitrator made by the High Court under Section 11(6) of the Arbitration Act. Section 2(1)(e) of the Arbitration Act

defines "*Court*". However, having regard to the purport of Section 2(1) which provides that in this part, unless the context requires, the same will have to be read in a contextual sense.

24. Let us now examine the basic facts in **Mormugao Port Trust** (supra), which view of the learned Single Judge was a trigger for this reference. The Mormugao Port Trust and the company between whom there was a supplementary agreement signed, jointly appointed a retired learned Judge of the Delhi High Court as the sole Arbitrator. Having entered the arbitration on 19.06.2018, the sole Arbitrator could not complete the arbitral proceedings in one year as stipulated under Section 29-A of the Arbitration Act. With both parties' consent, the period stood extended by six more months. As the extended period was to end on 18.12.2019, two days prior, both parties jointly applied to the Principal District Judge for further extension of time. Both the parties wanted the time extended by one more year. By an Order dated 17.12.2019, the Principal District Judge rejected the parties' joint application. The Principal District Judge held that jurisdiction under Section 29-A of the Arbitration Act to extend the arbitral period lies with the High Court.

25. In our considered opinion, the learned Single Judge in **Mormugao Port Trust** (supra) rightly came to the conclusion that

the power to extend the arbitral period would be with the District Judge who will have jurisdiction to entertain the application under Section 29-A(4) of the Arbitration Act and not the High Court. In **Mormugao Port Trust** (supra) the arbitral proceedings was not commenced under Section 11(6) by the High Court but the same was with the consent of the parties.

26. Thus, the issue in **Mormugao Port Trust** (supra) was not in the context of the appointment of the Arbitrator under Section 11(6) of the Arbitration Act. We may hasten to add that we agree with the conclusion in **Mormugao Port Trust** (supra) as the same is in conformity with what is recently held by the Supreme Court in **Chief Engineer (NH) PWD (Roads)** (supra). In **Mormugao Port Trust** (supra), though the learned Single Judge has referred to Section 11(6) of the Arbitration Act, we find that the issue of Section 11(6) was not arising for consideration. The observations in the context of Section 11(6) of the Arbitration Act, will therefore have to be regarded as passing remarks and not as a binding ratio.

27. The Arbitration Act proceeds on two fundamental principles. One is party autonomy and the other is minimal Court intervention. Section 5, as held by the Hon'ble Supreme Court, brings out clearly the object of the new Act, namely, that of encouraging resolution of

disputes expeditiously and less expensively and when there is an arbitration agreement, the Court's intervention should be minimal. The provisions of the Act reveal that the party autonomy extends to parties being free to determine the appointment procedure, the parties are free to agree on a procedure for challenging an arbitrator; at several places in the Act, consequences are provided only when the parties do not agree on a given issue/procedure. So much for the party autonomy and minimal Court intervention. The parties thus can decide virtually everything as regards the procedure barring some exceptions made by the Act.

28. Section 29-A was inserted in the Act w.e.f. 23.10.2015. Provisions were thereby made prescribing time limit for arbitral award. The object obviously was to ensure that the arbitration proceedings are decided expeditiously and within the time frame prescribed. Sub-section (2) of Section 29A provides for an incentive if the award is made within the time prescribed. The proviso to sub-section (4) of Section 29A says that while extending the period under this sub-section, if the Court finds that the proceedings are delayed for reasons attributed to the arbitral tribunal, then it may order reduction of fees. Sub-section (4) will have to be read together with sub-section (5) and sub-section (6). As per sub-section (5), the extension under Section 29-A(4) can be granted by the Court on an application by one of the

parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

29. In the context of sub-section (6) Their Lordships held that the power under sub-section (6) of Section 29A is only a consequential power vested 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 obviously has to be exercised by the Court which is empowered to extend the time. At this juncture, it is significant to notice Section 11(2) which provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator(s). As a result, under sub-section (6) of Section 11, the appointment shall be made, on an application of the parties, by the High Court, in case of arbitrations other than international commercial arbitrations. Even in sub-section (6) it is significant to note that parties' autonomy is seen, in that the appointment of arbitrator shall be made by the High Court to take necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. We need to bear in mind that the parties are permitted to raise objections/defences before appointment of an arbitrator under Section 11(6) and upon considering all relevant factors, the High Court appoints an Arbitrator(s) under Section 11(6) of the Act. Now in this context if sub-sections (4), (5) & (6) of Section 29A

are read, it would be clear that extension of period is not just an empty formality. Even when application for extension of period is made, several consequences may flow while considering the application as it shall even be open to the Court to substitute one or all of the arbitrators. When the Act provides for a procedure in Section 11(6) as to how appointment of an Arbitrator shall be made and as sub-section (2) of Section 11 provides that parties are free to agree on a procedure for appointing the arbitrator/s, we find it difficult to comprehend as how the power to substitute an arbitrator would lie with any Court other than the one empowered to appoint arbitrator/s under Section11(6). It is for this reason that the definition of 'Court' cannot be taken strictly in the textual sense but as the provisions of Section 2 ordain, the definition of 'Court' will have to be seen in a contextual sense. Thus the Court empowered under Section 11(6) for an appointment of an arbitrator is the High Court, we find it inconceivable that for the purpose of sub-section (4) of Section 29A, when the appointment of the Arbitrator is made by the High Court, the Court would be any other Court than the one empowered under Section 11 (6) of the Arbitration Act.

30. Having put a mechanism in place by providing a timeline for arbitral award in the form of Section 29-A, there are several factors to be considered by the Court before extending the period under sub-section (4) of Section 29A which fall within the realm of discretionary

power of the Court. For one, the extension of the period may be granted only for sufficient cause and second, on such terms and conditions as may be imposed by the Court. Then again it shall be open for the Court to substitute an arbitrator and as the sub-section (6) says that the arbitrator appointed under this Section shall be deemed to have received the said evidence and material for the purpose of continuation of the arbitral proceedings from the stage already reached. The extension of time is therefore not a mere ritual or an empty formality. Considering the nature of application of mind and the extent of the discretionary powers conferred on the Court, we have no hesitation in forming an opinion that it can only be the Court empowered under Section 11(6) which will be the Court for the purpose of sub-section (4) of Section 29-A in the present case.

31. No doubt that once the arbitrator is appointed under Section 11(6), the Court appointing the Arbitrator becomes *functus officio* for the purpose of arbitration proceedings before the arbitrator. However, that can never take away the empowerment of the Court which appointed the Arbitrator under Section 11(6) when the question of extension of period arises in the context of sub-section (4) of Section 29-A.

32. The decision of the Hon'ble Supreme Court in **Nimet Resources Inc. & anr. vs. Essar Steels Limited** (supra), which

was relied upon by learned Counsel for the respondents, was rendered prior to the insertion of Section 29-A in the Arbitration Act. We have carefully gone through the various decisions relied upon by the learned Counsel. We do not propose to multiply the decisions, suffice it to say that we are in respectful agreement with the view taken by the High Court of Gujarat in **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel** (supra). Paragraphs 7, 8 and 9 of the said decision reads thus :

> "7. In order to judge the objections of Shri Mehta to the jurisdiction of this Court to entertain the application, few provisions of the said Act would have to be noted. Section 2(1)(e) of the Act defines the term 'Court' as under:—
>
> "*2. Definitions*
>
> *(1) In this Part, unless the context otherwise requires.*
>
> *... ... ...*
>
> *(e) "Court" means—*
>
> *(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
>
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the*

subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

8. As per this definition thus a Court in case of an arbitration other than international commercial arbitration is the Principal Civil Court of original jurisdiction in a district and where the High Court exercises its ordinary original civil jurisdiction, would include the High Court also. If the reference is to an international commercial arbitration, the Court would mean the High Court, if it exercises ordinary original jurisdiction or the High Court having jurisdiction to hear appeals of Courts subordinate to that High Court. This definition in Section 2, however, like most other definition provisions starts with a caveat when it provides that in this part unless the context otherwise requires. We may note that this definition was substituted by the Act 3 of 2016 with effect from 23.10.2015. The definition contained prior to such amendment did not contain two clauses as in the present case. Clause (i) in the present form was the full definition without presence of Clause (ii). Effectively so far as our case is concerned, this change in the definition is inconsequential.

9. Section 11 of the Act, as is well-known, pertains to appointment of arbitrators and makes detailed provision for appointment of arbitrators by the High Court or the Supreme Court. In terms of sub-sections (4), (5) or (6) of Section 11, the High Court would make an appointment in case of an arbitration other

than international commercial arbitration. In case of international commercial arbitration such appointments would be made by the Supreme Court.

33. Paragraph 10 of **Nilesh Ramanbhai Patel vs. Bhanubhai Ramanbhai Patel** (supra) extracts Section 29-A, which was inserted in the said Act by virtue of the Amending Act 3 w.e.f. 23.10.2015. Then in paragraph 11 to 16, it is observed thus :

> "11. Perusal of this section would show that time limits have been introduced for completion of arbitral proceedings. Sub-section (1) of Section 29A provides that the award shall be made within a period of twelve months from the date the Arbitral Tribunal enters upon the reference. This expression "to have entered upon the reference" is also explained through the explanation below sub-section (1). Sub-section (2) is in the nature of incentive for completing the arbitral proceedings expeditiously. Sub-section (3) of Section 29A provides for extension of such period as specified in sub-section (1) by consent of the parties for a period not exceeding six months. Sub-section (4) of Section 29A provides that if the award is not made within the period specified in subsection (1) or the extended period specified in sub-section (3), the arbitrator's mandate shall terminate, unless the Court has, either prior to or after expiry of the period, extended the period. Sub-section (5) of Section 29A provides that the extension under sub-section (4) would be granted on an application of any of the parties only

for sufficient cause and on such terms and conditions as may be imposed by the Court. Sub-section (6) of Section 29A which is of considerable importance, provides that while extending the period referred under subsection (4), it would be open for the Court to substitute one or all of the arbitrators and if such substitution is made, the arbitral proceedings shall continue from the stage already reached and on the basis of evidence or material already collected. As per sub-section (7) the re-constituted Tribunal shall be deemed to be in continuation of the previously appointed arbitral Tribunal. Under sub-section (8) the Court is given power to impose actual or exemplary cost on any of the parties. This section makes detailed provisions providing time period for completion of arbitration, for extension of time such time, who can extend such time and under what circumstances and subject to what conditions the time may be extended. It also provides that if the award is not passed within the initial period or extended period, the mandate of the arbitrator would terminate. Section 29A of the Act is thus a complete Code by itself.

12. In case of *State of West Bengal* v. *Associated Contractors*, (2015) 1 SCC 32, the Supreme Court interpreted the term 'Court' as defined under Section 2(1)(e) of the Act as to mean only the Principal Civil Court of original jurisdiction in a district or High Court having civil jurisdiction in the State. No other Court, including the Supreme Court, is contemplated under Section 2(1)(e) of the Act. In case of *State of Jharkhand* v. *Hindustan Construction Company Ltd.*, (2018) 2 SCC 602, this was further elaborated

by a Constitutional Bench of the Supreme Court holding that the definition of term 'Court' contained in Section 2(1)((e) of the Act was materially different from its predecessor section contained in Section 2(c) of the Arbitration Act, 1940 and that Supreme Court cannot be considered to be a Court within the meaning of Section 2(1)(a) even if it retains seisin over the arbitral proceedings. The decision in case of **Associated Contractor** was affirmed.

13. Ordinarily therefore I would have accepted the contention of learned advocate Shri Mehta that the term 'Court' defined in Section 2(1)(e) in the context of the power to extend the mandate of the arbitrator under sub-section (4) of Section 29A would be with the principal Civil Court. However, this plain application of the definition of term 'Court' to Section 29A of the Act poses certain challenges. In this context one may recall that the definition clause of subsection (1) of Section 2 begins with the expression "in this part, unless the context otherwise requires". Despite the definition of term 'Court' contained in Section 2(1)(e) as explained by the Supreme Court in above noted judgments, if the context otherwise requires that the said term should be understood differently, so much joint in the play by the statute is not taken away.

14. As is well-known, the arbitration proceedings by appointment of an arbitrator can be triggered in number of ways. It could be an agreed arbitrator appointed by the parties outside the Court, it could be a case of reference to the arbitration by Civil Court in terms of agreement between the parties, it may even be the case of appointment of an arbitrator

by the High Court or the Supreme Court in terms of subsection (4), (5) and (6) of Section 11 of the Act. The provisions of Section 29A and in particular sub-section (1) thereof would apply to arbitral proceedings of all kinds, without any distinction. Thus the mandate of an arbitrator irrespective of the nature of his appointment and the manner in which the arbitral Tribunal is constituted, would come to an end within twelve months from the date of Tribunal enters upon the reference, unless such period is extended by consent of the parties in term of sub-section (3) of Section 29A which could be for a period not exceeding six months. Sub-section (4) of Section 29A, as noted, specifically provides that, if the award is not made within such period, as mentioned in sub-section (1) or within the extended period, if so done, under subsection (3) the mandate of the arbitrator shall terminate. This is however with the caveat that unless such period either before or after the expiry has been extended by the Court. In terms of sub-section (6) while doing so it would be open for the Court to substitute one or all the arbitrators who would carry on the proceedings from the stage they had reached previously.

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-section (4) of Section 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-section (3) of Section 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The Court on the other hand has vast powers for extension of the

period even after such period is over. While doing so the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Section 2(1)(e) does not fit. It is inconceivable that the legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-section (4), (5) and (6) of Section 11 of the Act. If therefore there is a case for extension of the term of an arbitrator who has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-section (6) of Section 29A would be non-operatable. In such a situation sub-section (6) of Section 29A would be rendered otiose. The powers under sub-section (6) of Section 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-section (6)

> of Section 29A the legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Section 11 of the Act. If we therefore accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior Courts to appoint arbitrators under section 11 of the Act and those of the Civil Court to substitute such arbitrators under Section 29A(6). This conflict can be avoided only by understanding the term "court" for the purpose of Section 29A as the Court which appointed the arbitrator in case of Court constituted arbitral Tribunal.
>
> 16. Very similar situation would arise in case of an international commercial arbitration, where the power to make an appointment of an arbitrator in terms of Section 11 vests exclusively with the Supreme Court. In terms of Section 2(1)(e) the Court in such a case would be the High Court either exercising original jurisdiction or appellate jurisdiction. Even in such a case if the High Court were to exercise power of substitution of an arbitrator, it would be transgressing its jurisdiction since the power to appoint an arbitrator in an international commercial arbitrator rests exclusively with the Supreme Court.

34. We, therefore, have no hesitation in holding that the term "*Court*" for the purpose of Section 29-A(4) would be the "*Court*" which appointed the Arbitrator(s) under Section 11(6) of the Arbitration Act

i.e. the High Court in the present case and therefore, answer the reference thus :

> (i) - 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, then an application under Section 29-A(4) would lie to the High Court in case of a domestic arbitration.
>
> (ii) In answer to the second question, we opine that 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, the application under Section 29-A(4) would lie to the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original jurisdiction.

35. In view of the above, the Writ Petition be placed before the learned Single Judge for further consideration.

VALMIKI MENEZES, J. **M. S. KARNIK, J.**