

RESOLVING THE DISPUTE OF RETROSPECTIVE OR PROSPECTIVE EFFECT OF SECTION 29A OF THE ARBITRATION ACT

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Introduction

One of the pertinent purposes of arbitration is to resolve disputes in a timely manner. However, due to various scenarios of arbitration proceedings not being completed quickly, the Indian legislature introduced the 2015 Amendment section 29A to the Arbitration and Conciliation Act, 1996 ("**the Act**"). This new provision provided a time limit of 12 months for the completion of arbitration proceedings initiated under the Act from the date on which the tribunal enters reference. This provision underwent further amendment in 2019, by way of which the time period of 12 months has to be calculated from the date on which the pleadings are completed, as provided under section 23(4) of the Act. The issue arose as to whether this amendment is supposed to be applied retrospectively or prospectively. The Delhi High Court addressed this issue in the matter of *ONGC Perm Additions Limited v Ferns Construction Co. Inc.*¹

In this case, conflicts emerged as a result of the agreement made between Ferns Construction Co. Inc., a corporation formed under Turkish law, and ONGC Petro Additions Limited, an Indian firm. FERNAS India Private Ltd is the Turkish company's Indian affiliate.

The arbitration provision was then used, and an arbitration tribunal was established to decide the case.

The petitioner sought to extend the deadline and went to the High Court of Delhi through Section 29A of the Act for the said purpose. As per the Act, the single judge in the High Court of Delhi issued an order. The said order gave a period of 18 months to settle the dispute by the tribunal and issue an award. However, during the course of the arbitral proceedings, the Act was amended in 2019. The amendment altered section 29A. In light of this amendment, the parties approached the Court for a clarification on its earlier order as to the wrapping up of the arbitration process and its applicability in the past and the future.

Case put forth by the parties

¹ *ONGC Perm Additions Limited. Ferns Construction Co. Inc.*, OMP (MISC) (COMM) 256/2019.

The petitioner's sought to distinguish between international commercial arbitrations seated in India and arbitrations in India with reference to the changes made to Section 29A of the Act in 2019. The attorney argued that prior to this amendment, all arbitrations that commenced after October 23 2015, would be treated the same, i.e., according to the deadlines given in Section 29A. The deadlines are calculated on the date of completion of pleadings. However, after the amendment, these statutory limitations would not apply only to international commercial arbitrations with a seat in India

The petitioner further argued on the grounds of categorising Section 29A as a procedural statute, that it was a provision that didn't give the parties to the arbitration any rights in its original form. Therefore, the said provision only offered the option to the parties to extend the arbitration for six months if they consented to it. They might approach the Court for an extension if an award was not rendered after this period.

The SC did not give due regard to the procedural law and retrospective application of the Section 29A argument. This was based on the landmark judgement of *BCCI v. Kochi Cricket (P) Ltd.*² The said judgement stated that Section 29A is to be applied subsequently, i.e., prospectively based on Section 26 of the Amendment Act of 2015. The cases of *Rajendra Kumar v. Kalyan (D) by Lrs*³ and *Thirumalai Chemicals Ltd. v. Union of India*⁴ were also cited to distinguish between substantive and procedural legislation

On the other side, the respondent's attorney argued, citing the case of *State of Assam v. Ripa Sharma*⁵, where it was determined that as a matter of law, a challenge to the dismissal of a review petition in a special leave petition filed without challenging the judgement against which review was sought should be maintainable considering previous decisions. It was made clear that the decision that was made subsequently and the judgement relied on by the petitioner was *per incuriam*.

Decision of the Delhi High Court

The Court considered the instances of *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited*⁶ and *MBL Infrastructure Ltd. v. Rites Ltd.*⁷ in order to reach a decision. The Court pointed

² *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.

³ *Rajendra Kumar v. Kalyan (D) by Lrs.* (2000) 8 SCC 99.

⁴ *Thirumalai Chemicals Ltd. v. Union of India* (2011) 6 SCC 739.

⁵ *State of Assam v. Ripa Sharma* (2013) 3 SCC 63.

⁶ *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited* MANU/DE/0399/2020.

⁷ *MBL Infrastructure Ltd. v. Rites Ltd* OMP (MISC) (COMMD 57/2020).

out that the two rulings were at odds with one another and that the verdict in MBL Infrastructure was an order in *per incuriam* since it did not take into account its prior ruling in Shapoorji Pallonji.

The Court also looked at the BCCI case⁸, where it clarified that Section 26 of the 2015 Amendment to the Legislation applied to arbitration procedures and distinguished them from court proceedings.

Regardless of whether such Court proceedings result from arbitrations that were started before October 23, 2015, the apex Court held in the BCCI Judgment that the modification in 2015 shall be applicable to all continuing procedures and Court proceedings that began after that date.

Considering the aforementioned case, Section 87 of the Act, which was added via the 2019 amendment, tried to ignore the BCCI Judgment and limited the potential application of the 2015 Amendment to court and arbitration processes that had started after October 23, 2015. However, Section 87 was disregarded in *Hindustan Construction Company Ltd. v. Union of India & Ors*⁹, which restored Section 26's application in accordance with the ruling in the BCCI case.

For the following reasons, the Court decided that Section 29A would apply to all ongoing arbitration procedures with India as the seat as on the date of August 30 2019, and as long as it was initiated after October 23, 2015:

1. The Court ruled on the lines that any change to the substantive law that deals with the liabilities and rights of any person/entity must be applied prospectively, and any change to the provision on procedural lines must be retrospective in nature, citing the apex Court's decision in the BCCI case on the ground that Section 29A is a procedural law.
2. The judgement of Shapoorji Pallonji is the precedent that is binding, but the judgement of MBL Infrastructure is not binding as it is *per incuriam*.

The amendment being procedural in nature, the Court came to the conclusion that it should be applied to existing arbitrations as of the amendment date, including the current arbitration procedures.

Analysis

⁸ *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.

⁹ *Hindustan Construction Company Ltd. v. Union of India & Ors* WP (Civil) No. 1074 of 2019.

Section 29A provided that the arbitral award should be made within 12 months from the date the arbitrators are appointed and if both parties agree, it can be extended by another 6 months. Even after these 18 months if the arbitral tribunal has not decided the matter, the mandate of the tribunal shall be terminated. The Court can extend the time limit if the parties show sufficient cause for the same. After the expiry of the given time limit, the arbitrators' mandate was terminated and the arbitration proceedings couldn't go any further.

The Act, was amended again in 2019 and two provisions affected the timeline for arbitral proceedings;

Time limit: The 2019 amendment to Section 29A provides that the arbitral award must be given within 12 months from the completion of pleadings; As per the 2019 amendment to Section 23(4), the arbitrator now has a deadline that extends to 6 months to complete the pleadings. This time begins from the date he/she receives the appointment as the arbitrator.

Effectively, the 2019 amendment provides an additional 6 months for the arbitral award to be delivered, the award must be given within 18 months from the date of appointment of the arbitrator, with an option to extend it further by 6 months, if both the parties are in agreement. Thereby, the arbitration must conclude within 2 years from the date of appointment of the arbitrator, or else, the mandate of the tribunal shall be terminated. If the parties require the arbitration to go beyond the 2-year mark, then they must show sufficient cause to the Court for the same.

The mandate of the Arbitrator Pending Application for Extension in Court: The 2019 amendment also added a proviso to Section 29A, it provided that when an application is made to the Court for an extension of the arbitration beyond 2 years, the mandate of the arbitrator shall prevail until the application is disposed of

The retrospective/prospective application of the 2019 amendment to the Act with reference to, Section 29A quickly became a point of litigation with courts holding contrasting views:

In *G.N. Pandian. v. S. Vasudevan and Others*.¹⁰ Madras High Court, the arbitration proceedings began in March 2018 and continued till September 7 2019, with an extension of 6 months. The parties now want a further extension of 6 months to be provided by the Court and have filed an application under Sub-section (5) read with sub-section (4) of Section 29-A of the Arbitration Act.

¹⁰ *G.N. Pandian. v. S. Vasudevan and Others*. 2019 SCC OnLine Mad 9789.

Further while deciding on the issue of whether the new provision should be applied retrospectively, the Court accepted that the amendment to Sub-section (1) of Section 29A by the 2019 amendment was to be applied prospectively. In this light, the Court held that the 2019 amendment Act would not apply to the present case and decided the matter on the position of law prior to 30.08.2019 i.e., the date the 2019 amendment came into force.

The Court further held, with regard to the sub-section (4) of Section 29-A (prior to the 2019 amendment) that

"the language in which sub-section (4) of Section 29-A is couched makes it clear that if the award is not made within the period specified in sub-section (1) and the extended period, the mandate of the arbitrator will terminate and extension of time of said AT under sub-section (4) and (5) of Section 29-A can be made either before or after expiry of the extended period of six months post original 12 months. In the instant case, as this application bar been filed post extended period of 6 months, the termination stands saved by this extension order."

In *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited*¹¹, the Delhi High Court was approached because the time period to deliver the award under the Arbitration Act as per the 2015 amendment had expired; they sought further time to resolve the dispute. The Court held that Sections 23(4) and 29A (1) of the Arbitration and Conciliation Act were procedural laws and would apply retrospectively and hence, would apply to pending arbitrations as of the date of the amendment. The Court ruled in the present case that the time limit had not expired and hence, the arbitration proceedings could continue with the new timeline as per the 2019 amendment.

In *MBL Infrastructure Limited v. Rites Limited*¹², the arbitral tribunal entered upon reference on March 14 2018, and the statutory time limit of twelve months expired on March 13, 2019. Thereafter, the parties mutually agreed to extend the time to six months, which expired on September 13, 2019. After the expiry of said period, parties invoked Section 29A of the Arbitration Act seeking further extension of the period to conclusion of arbitration proceedings, and the Court, vide its order dated September 6, 2019, extended the time limit for twelve months from September 13 2019, till September 12, 2020. On February 10, 2020, a petition was filed under Section 29A (5) of the Act on the ground that the Amendment Act of 2019 would apply to the existing arbitration proceedings. The Court ruled that from a base perusal, it is clear that Section 29A of the Act does not have to be applied retrospectively and, therefore, the amendment to Section 29A of the Arbitration Act would not apply to the proceedings existing as on the date of the amendment.

¹¹ *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited* MANU/DE/0399/2020.

¹² *MBL Infrastructure Limited v. Rites Limited* OMP (MISC) (COMMD 57/2020).

Conclusion

In light of the abovementioned contrasting opinions laid down by various High Courts on the issue of the retrospective/prospective application of Section 29A, *ONGC Petro Additions Limited v. Ferns Construction Co. Inc.*¹³ observed the decision in MBL Infrastructure did not consider its earlier order in Shapoorji Pallonji and thus was an order in *per incuriam*.

On examination of the decision of *BCCI v. Kochi Cricket Pvt. Ltd.*¹⁴, the Court held that Section 29A is a procedural law and as a result of which any changes to it that affect the liabilities and rights of a party must be prospective in nature and any amendment to the provisions dealing with the matter of procedure must be retrospective. The Court concluded that as the amendment in question is a matter of procedure the same should apply to all arbitrations that are currently running as of the date of amendment including the present arbitration proceedings.

This above-mentioned conclusion comes as a welcome relief to the parties who are grappling with the issue of the amended provisions' application. It goes without saying that the conclusion is consistent with the jurisprudence and court precedents that have been established through time that procedural law is retrospective in nature unless the legislation expressly states otherwise.

Furthermore, the modification and judgement of the High Court in the ONGC Case contribute to the reduction of judicial involvement, which is the driving force behind the Arbitration Act and its changes.

This ruling not only answered a crucial question about the application of the revised Section 29 A (1), it also clarified the vagueness of the altered provisions in the Act to a large degree. Nonetheless, assurance can only be attained through jurisprudence, as and when the judicial system is confronted with unusual situations, which are likely to happen in the future.

We think the Court correctly understood the BCCI's retrospectivity test by upholding Shapoorji Pallonji's conclusions over the MBL Infrastructures case. That However, it's worth noting that, aside from the BCCI case, the Supreme Court has made no substantive comment on the matter, so it's unclear how the Court would address the problem.

¹³ *ONGC Petro Additions Limited v. Ferns Construction Co. Inc.* OMP (MISC) (COMM) 256/2019.

¹⁴ *BCCI v. Kochi Cricket Pvt. Ltd* (2018) 6 SCC 287.