$~18

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 9th January, 2019

\+ **CS(COMM) 9/2019**

REPUBLIC OF INDIA THROUGH: MINISTRY OF DEFENCE ..... Plaintiff

Through: Ms. Pinky Anand, ASG with Mr. Rajesh Ranjan, Mr. Sumit Teterwal, Mr. Joel, Ms. Kritika Sachdeva, Advocates (M-9810003146)

versus

M/S AGUSTA WESTLAND INTERNATIONAL LTD. ..... Defendant

Through: Mr. Arun Kathpalia, Senior Advocate with Mr. Anand Prasad, Mr. Ashok Bhan, Mr. Mohit Rohatgi & Ms. Swati Narnulia, Advocates (M-9971997784)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

I.A. 230/2019 (for exemption)

1. This is an application seeking exemption from filing original/certified copies of documents. Recording the Plaintiff's undertaking that the inspection of original documents shall be given, if demanded, or that the original documents/certified copies shall be filed prior to the stage of admission/denial, the exemption is allowed. I.A. is disposed of.

I.A. 231/2019 (for exemption)

2. This is an application seeking extension of time to file the requisite Court fee. The time for deposit of court fees is extended by two weeks. I.A. is disposed of.

CS(COMM) 9/2019

3. Let the plaint be registered as a suit.

4. Mr. Anand Prasad accepts summons on behalf of the Defendant.

5. List before Court on 28th February 2019.

I.A. 229/2019 (u/O XXXIX Rule 1 and 2 CPC)

6. The present suit has been filed seeking declaration and permanent injunction in the following terms:

> *"A. Pass a decree of declaration that the mandate of the Arbitral Tribunal has been terminated in terms of Section 29A of the Arbitration and Conciliation Act, 1996.*
> *And/or*
> *B. Pass a decree of Permanent Injunction restraining the Defendant from continuing with the Arbitration Proceedings being Claim no. 1 of 2017 as the mandate of the Arbitral Tribunal has been terminated.*
> *C. Pass a decree of Permanent Injunction restraining the Defendant from continuing with the Arbitration Proceedings being Claim no. 1 of 2017 pending before the Ld. Tribunal consisting of Professor William W Park, Hon'ble Justice B.N Srikrishna and Hon'ble Justice BP.P Jeevan Reddy on the basis of pendency of serious criminal cases before Special Court for CBI alleging criminal offences of corruption and fraud under Prevention of Corruption Act and Indian Penal Code and Special Courts for Enforcement Directorate alleging serious offences under Prevention of Money Laundering Act 2002.*
> *D. Award costs in favor of the Plaintiff and against the Defendant."*

7. The suit was listed upon urgent mentioning on 8th January, 2019 at 3.50pm. The matter was directed to be listed today i.e., on 9th January, 2019

in the supplementary list. It was also directed that an advance copy of the suit and documents be served on the Defendant via electronic e-mail. Since the hearing before the Arbitral Tribunal was today, detailed submissions have been heard on behalf of both parties.

8. The urgency expressed by the Plaintiff is that the Arbitral Tribunal constituted under Article 21 of the agreement dated 8th February, 2010 between the Government of Republic of India, Ministry of Defence, and Augusta Westland International Ltd., is scheduled to hold its hearing this afternoon.

9. There are various issues which have been raised in the present suit. The Ld. ASG appearing for the Plaintiff submits that the arbitral proceedings deserve to be stayed as the mandate of the Arbitral Tribunal stands terminated in terms of Section 29A of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*).

10. She further submits that the various allegations raised in respect of the entire transaction as also the allegations of corruption, fraud, and bribery cannot be gone into by the Arbitral Tribunal, and hence the disputes, not being arbitrable, the arbitral proceedings deserve to be stayed.

11. Mr. Arun Kathpalia, Ld. Senior Counsel appearing for the Defendant submits that the present case is not governed by the provisions of Section 29A of the Act, inasmuch as the arbitral proceedings had commenced much prior to the Amendment Act of 2015 coming into force. He places on record some of the correspondence as also the communications by the International Court of Arbitration to argue that both parties had nominated their respective Arbitrators, and the third Arbitrator, Prof. William W. Park, was nominated as far back as on 2nd August, 2014/7th August, 2014, when the Plaintiff had

given its no objection to the appointment of Prof. Park and the Arbitral Tribunal stood constituted by the ICC. He submits that as on 7th August, 2014, the ICC, in fact, closed the file relating to these proceedings and hence the proceedings had commenced prior to the Amendment Act of 2015 coming into force.

12. Mr. Kathpalia further submits that the Plaintiff has already taken its preliminary objections as to the jurisdiction of the Arbitral Tribunal on 28th October, 2014, before the Tribunal itself. Thus, it is for the Tribunal to rule on its jurisdiction on the basis of the objections raised by the Plaintiff.

13. The Ld. ASG submits that in the present case, the Terms of the Appointment of the Arbitrators was fixed on only 16th March, 2017 and hence, the Arbitral Proceedings are governed by the provisions of the Act, as amended in 2015.

14. Both counsels have referred to various authorities in support of their respective cases.

15. The first observation of the court is that the Arbitral record, including the orders passed by the Tribunal till date have not been placed before the court. The court has not seen the claims raised, nature of objections raised as also the material placed before the Arbitral Tribunal. Insofar as the allegations of fraud, corruption, and bribery are concerned, which have been raised in the present case, the Defendant has also not been heard.

16. At present, the short issue to be considered is as to whether the Amendment Act of 2015 applies to the Arbitral proceedings. The Arbitration and Conciliation (Amendment Act) of 2015 (*hereinafter, 'Amendment Act'*) came into force on 23rd October, 2015. Section 26 of the Amendment Act reads as under:

> ***"26. Act not to apply to pending arbitral proceedings.*** *– Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

17. The above provision refers to Section 21 of the principal act which reads as under:

> ***"21. Commencement of arbitral proceedings.–*** *Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

18. The question is - whether the time limits prescribed under Section 29A of the Act would apply to pending proceedings where arbitral proceedings have already commenced. The question of whether arbitral proceedings have been commenced is now settled i.e., the commencement takes place on the date on which a request for the disputes to be referred to arbitration, is received. Admittedly, in the present case, the notice invoking arbitration was issued on 4th October, 2013, when the Defendant invoked the Arbitration clause in the contract.

19. On 21st October, 2013, the Plaintiff raised various issues in respect of the arbitrability of the disputes and made reference to the inquiry, which had been ordered by the CBI on 12th February, 2013. In this communication, the Plaintiff also made reference to the Pre-Contract Integrity Pact (*hereinafter, 'PCIP'*) dated 3rd October, 2008, which does not contemplate arbitration.

20. Subsequently, however, on 1st January, 2014, the Plaintiff appointed Hon'ble Justice Jeevan Reddy (Retd. Judge of the Supreme Court) as its Arbitrator in the following terms:

> *"Sir,*
> *With reference to your letters dated November 25, 2013 and December 4, 2013 calling upon the Government of India to nominate an arbitrator, the Government of India hereby appoints Hon'ble Mr. Justice B.P. Jeevan Reddy, former Judge of the Supreme Court of India, as one of the arbitrators, without prejudice to all its contentions, including without limitation, with regard to arbitrability of the claims made by AWIL and the jurisdiction of the arbitrators.*
> *2. Again, and without prejudice, in terms of Clause 21.4 of the Agreement, we request you to propose the names of three persons for the purpose of selecting the third arbitrator by agreement of the parties."*

21. Since there was no consent between the two Arbitrators for appointment of the third Arbitrator, the International Court of Arbitration appointed Prof. William W.Park as the third Arbitrator. On 2nd August, 2014, the Plaintiff gave its consent to the appointment of Prof. Park as the third Arbitrator. The said email addressed by the solicitors of the Plaintiff dated 2nd August, 2014 is set out below:

> *"Dear Colleagues,*
>
> *Further to our email of earlier today (below), we write to confirm that the Respondent, having now considered Professor Park's disclosure, has no objection to his appointment as the third arbitrator.*
>
> *The Respondent, however, reserves all its rights and contentions with regard to arbitrability of the*

Claimant's claims, the jurisdiction of the tribunal, and its right to object to any enlargement of the scope of reference of arbitration.

Best regards,
Sd/-
Partner
White & Case."

22. On 7th August, 2014, the ICC confirmed as under:

"Dear Madam and Sirs,

The Secretariat is pleased to inform you that, at its session of 7 August 2014, the Special Committee of the Court appointed Professor William W. Park as third arbitrator in the above-referenced case.

For good order, a copy of the Declaration of Acceptance and Statement of Independence as well as the curriculum vitae of Professor Park are enclosed for the parties.

From now on, the parties should correspond directly with the arbitral tribunal and send copies of their correspondence to the other side.

The Secretariat hereby administratively closes the file."

Thus, the Arbitral Tribunal stood constituted as on 7th August, 2014 i.e., prior to the Amendment Act coming into force.

23. At this stage, the document described as Terms of Appointment dated 16th March, 2017, and the purport of the said document relied upon by the Ld. ASG, needs to be considered. The said document is a procedural order passed by the Arbitral Tribunal which records the following:

1. Parties
2. Appointment of Arbitral Tribunal
3. Remuneration and expenses of the Arbitrators
4. Advance on costs
5. Confidentiality
6. Immunity from suit
7. Notices

This document is signed by all the three arbitrators.

24. In the section on appointment of the Arbitral Tribunal, this document records in para 3 as under:

> *"...*
> *3. The Parties confirm their acceptance of an Arbitral Tribunal comprising Justice B.N. Srikrishna (Ret.), appointed by Claimant, Justice B.P. Jeevan Reddy (Ret.), appointed by Respondent, and Professor William W. Park, appointed as Presiding Arbitrator by the International Chamber of Commerce on consultation with the Parties."*

25. The submission of the Ld. ASG is that the date when the `Terms of appointment' were drawn, ought to be construed as the date when the commencement of arbitral proceedings takes place. She relies upon the Explanation in Section 29A(1) which reads as under:

> *"**29-A. Time-limit for arbitral award.***
> *(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*
> *Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all*

the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(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.

(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 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.

(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."*

26. The language of Section 26 of the Amendment Act is very clear. It clearly specifies that the Amendment Act of 2015 does not apply *"to the arbitral proceedings commenced in accordance with provisions of Section 21 of the principal act"*. Thus, if Arbitral proceedings have commenced under Section 21 of the Act, prior to coming into force of the 2015 Amendment Act, then Section 29A of the Act would not be applicable.

27. In ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Ors. (2018) 6 SCC 287*** (*hereinafter 'BCCI'*), the Supreme Court has held as under:

> *"39. … The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."*

28. Ld. ASG relies upon the observations of the Supreme Court in para 64 and 65 of ***BCCI (supra)*** to submit that the time period prescribed is procedural in nature and should therefore operate retrospectively, just as in

the case of Section 36. A reading of ***BCCI (supra)***, especially para 75, is clear that the Supreme Court was dealing with the question as to whether Section 36 of the Amendment Act would be applicable to court proceedings which commenced after the Amendment Act came into force. In ***BCCI (supra)*** the execution applications were filed on 26th November 2015. Section 36 is clearly a proceeding before the court and not before the Tribunal.

29. The Explanation in Section 29A(1) uses the terminology *"deemed to have entered upon reference"*. This language is clearly distinct and different from commencement of Arbitral proceedings used in Section 21 of the Act. While the time period prescribed in Section 29A Act would apply from the date when the Tribunal enters upon reference, the commencement of arbitral proceedings does not take place when the Tribunal enters reference.

30. Arbitral Proceedings are deemed to have commenced as per the provisions of Section 21 of the Act and not as per the Explanation to Section 29A(1) of the Act.

31. The legislative intent was obviously not to make the provisions of Section 29A of the Act retrospective in nature. Section 26 of the Amendment Act is clear that the amendments apply prospectively, insofar as arbitral proceedings are concerned.

32. Mr. Kathpalia has referred to a view of the single judge of the Madhya Pradesh High Court in ***M/s G.S. Developers and Contractors Pvt. Ltd. v. M/s Divya Dev Developers Pvt. Ltd [AC NO.41/2018 dated 30th July, 2018]***, wherein the court has held as under:

> *"12. A perusal of the aforesaid provision reveals that the provision do not apply to the arbitral proceedings*

> *which had already commenced in terms of Section 21 of the Act of 1996 but the amended provisions apply to the court proceedings "in relation to arbitral proceedings" commenced after the amendment."*

33. On a specific query, counsels for both the parties confirm that they were unable to find any judgement where a view has been taken by this Court, on this aspect.

34. The purpose of the Explanation in Section 29A is to ensure that the timelines prescribed for making of the award commence from the date when the Tribunal enters reference. In arbitral proceedings, there is a time gap between the commencement of arbitral proceedings and the Tribunal entering reference. Once a notice invoking arbitration is issued by one party, the constitution of the Tribunal takes some time and on several occasions requires the intervention of Courts and Arbitral institutions. If a time period is prescribed for making of the award, to begin from the commencement of arbitral proceedings, the same would be impractical. Hence the need for the Explanation to Section 29A. However, what is clear from a reading of Section 21 and the Explanation to Section 29A is that there is a clear distinction between `commencement' of arbitral proceedings and `entering upon the reference'. They are not synonymous, as is sought to be urged. For deciding whether the amendments of 2015 apply or not, to a particular Arbitral proceeding, the provisions of Section 21 have to be considered and not the Explanation to Section 29A. Under Section 21 parties can agree as to when arbitral proceedings would commence. In the absence of any agreement between the parties, the commencement is from the issuance of notice invoking arbitration. There is no agreement to the contrary, that either

party has pointed out, in the present case, on the issue of `commencement' of arbitral proceedings. The document `Terms of Appointment' dated 16th March 2017, is not an agreement to the contrary between the parties, as contemplated under Section 21 of the Act. Thus, the mandate of the Arbitral Tribunal does not stand terminated under Section 29A of the Act. This court agrees with the view of the Madhya Pradesh High Court that Section 29A of the Act does not apply to arbitral proceedings commenced prior to the coming into force of the Amendment Act of 2015.

35. Thus, the mandate of the Arbitral Tribunal, constituted under the Agreement dated 8th February, 2010, in the present case, does not stand terminated.

36. The question then arises as to whether the Arbitral proceedings in the present case ought to be terminated, owing to the nature of allegations raised.

37. The objections raised by the Plaintiff, challenging the jurisdiction of the Arbitral Tribunal were filed way back in October, 2014. From the documents placed on record, and the list of dates, it is submitted that subsequent to the filing of the said objections, the Charge-sheet has also been filed by the CBI, and the Special Judge CBI has taken cognizance of the offences alleged. These are subsequent developments which have taken place after the objections under Section 16 of the Act were filed before the Tribunal.

38. In ***Mcdonald's India Pvt. Ltd. v. Vikram Bakshi & Ors. (2016) 232 DLT 394***, a Ld. Division Bench of this Court, has held as under:

> "*63. Courts need to remind themselves that the trend is to minimize interference with arbitration process as*

that is the forum of choice. That is also the policy discernible from the 1996 Act. Courts must be extremely circumspect and, indeed, reluctant to thwart arbitration proceedings. Thus, while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act. We have already indicated that the circumstances of invalidity of the arbitration agreement or it being inoperative or incapable of being performed do not exist in this case."

39. Thus, a suit seeking an injunction against Arbitral proceedings is maintainable, though the said power is to be exercised sparingly.

40. In ***A. Ayyaswamy v. A. Paramasivam & Ors. (2016) 10 SCC 386***, the Supreme Court, while dealing with the issue as to which disputes ought to be considered as being non-arbitrable disputes, has observed as under:

"14. ..... The courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration.
The following categories of disputes are generally treated as non-arbitrable:-
(i) patent, trade marks and copyright,
(ii)anti-trust/competition laws;
(iii)insolvency/winding up;
(iv)bribery/corruption;
(v)fraud;
(vi)criminal matters.
Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter

may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations if fraud touching upon the internal affairs of the party inter se and it has no fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes

> *which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis hat party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."*

41. Insofar as the question as to whether the contract which includes the arbitration agreement is vitiated by fraud, as also the allegations of bribery and corruption, are concerned, in order for this Court to decide the said question, the nature of the claims raised by the Defendant and the nature of objections and allegations raised by the Plaintiff need to be considered. The arbitral record is not before the court and the Defendant has also not yet been given an opportunity to respond to the case set out by the Plaintiff. Whether the arbitration agreement has been nullified would require to be determined after calling for a Reply from the Defendant. Clearly, the Arbitral Tribunal has not taken a view on the objections raised by the Plaintiff in October 2014, as to arbitrability of the disputes. There have also been subsequent developments which are pleaded in the Plaint. The question

as to the arbitrability of the disputes, in the context of the claims raised and the allegations of the Plaintiff, as also whether they can be raised at this stage when the Tribunal stands constituted, owing to subsequent developments including the filing of the charge sheet/framing of charges by the CBI court, deserve to be considered by this Court.

42. The question as to whether the arbitration agreement stands nullified in the present case, owing to the allegations that there are allegations of corruption and fraud, cannot be rejected at this stage. However, for the said purpose, the Court would require the parties to complete their pleadings in the application seeking interim injunction. The Court would also like the Arbitral record to be placed before it. Accordingly, at the time of consideration of the application under Order XXXIX Rules 1&2, the submission that the question of arbitrability has already been raised before the Ld. Tribunal, and whether the parties deserve to be relegated to the Tribunal, would also be considered. The Plaintiff would also address submissions on the maintainability of a civil suit, in these circumstances, on the next date of hearing

43. Reply to the application be filed, as requested, within three weeks. Rejoinder, if any, within two weeks, thereafter. List on 28th February 2019.

44. Copy of this order may be placed before the Ld. Arbitral Tribunal.

45. A copy of this order be given *dasti* under signature of the Court Master.

PRATHIBA M. SINGH
JUDGE

JANUARY 09, 2019
Rahul