

simultaneously. Both the parties are at liberty to file compilation of pleadings, documents and evidence forming part of the arbitral record within eight weeks from today with a copy to be served upon other side.

3. Insofar as the stay of the impugned award is concerned, Mr.Dhakephalkar, learned senior counsel appearing for the petitioner invited my attention to clause 26 of the arbitration agreement which is extracted as under :-

“26. ARBITRATION :

In case of any dispute, the same shall be referred to the Commissioner of the Corporation and his decision shall be final and binding on the Agent.

If the agent is not satisfied with this decision the agent shall within a period of 30 days from receipt of the decision, shall indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be conclusive and the same shall not be questioned subsequently.

Within 30 days of receipt of notice from the agent or his intention to refer the dispute to arbitration, the Municipal Commissioner, shall send to the Agent a list of three officers of the rank of not less than

Deputy Secretary to the Government of Maharashtra and who have not been connected with the work under the contract. The Agent shall within 15 days of the receipt of this list, select one of them and who shall then be appointed as sole Arbitrator by the Municipal Commissioner, Kolhapur.

The Arbitration shall be conducted in accordance with the provisions of Arbitration Act, 1940 or any statutory modification thereof.”

4. It is submitted by the learned senior counsel that in this case the agreement between the parties was executed on 14th November, 1995. Though the arbitral proceedings were commenced after the Arbitration & Conciliation Act, 1996 came into force, since there was no reference to the Arbitration & Conciliation Act, 1996, statutory modification introduced in the year 2015 by the the Arbitration & Conciliation (Amendment) Act, 2015 and more particularly to section 36 would not apply to the present proceedings. He submits that the petitioner is thus entitled to an unconditional stay of the impugned award.

5. Mr.Joshi, learned senior counsel appearing for the respondent on the other hand would submit that it is not disputed by the petitioner that though there is reference to the Arbitration Act, 1940 in the arbitration clause recorded in clause 26 thereof, the fact

remains that the arbitral proceedings were commenced only after the Arbitration & Conciliation Act, 1996 came into force. He submits that the petitioner has also invoked the provisions of section 34 of the the Arbitration & Conciliation Act, 1996 while impugning the arbitral award rendered by the learned arbitrator in this petition. He further submits that it is also not disputed that in the application under section 11(6) of the the Arbitration & Conciliation Act, 1996, the learned arbitrator came to be appointed by this Court. He also pressed in service section 8 of the General Clause Act and would submit that in view of the Arbitration Act, 1940 having been repealed by the Arbitration & Conciliation Act, 1996, the reference to the Arbitration Act, 1940 made in the agreement shall be read as the Arbitration & Conciliation Act, 1996. He strongly placed reliance on the judgment of the Supreme Court in case of **Pam Developments Private Limited vs. State of West Bengal** in Civil Appeal No.5432 of 2019, delivered on 12th July, 2019 in support of his submission that there is no question of any automatic stay in view of the agreement between the parties that arbitration shall be in accordance with Arbitration Act, 1940 which shall be read as Arbitration & Conciliation Act, 1996 with statutory modification thereof.

6. Learned senior counsel also distinguished the order passed by this Court on 13th September, 2019 in Commercial Arbitration Petition No.1021 of 2019 on the ground that there being an agreement between the parties that the parties would be governed by the Arbitration Act, 1940 which shall be read as the

Arbitration & Conciliation Act, 1996 or any statutory modification thereof and thus there is no question of any automatic stay of the impugned award. He submits that in view of section 87 of the Arbitration & Conciliation Act, 1996 inserted by the the Arbitration & Conciliation (Amendment) Act, 2019 also, in view of specific agreement between the parties, the parties would be governed by the amended section 36 of the Arbitration & Conciliation Act, 1996 amended by the Arbitration & Conciliation (Amendment) Act, 2015 and thus the petitioner cannot be entitled to seek unconditional stay of the monetary award rendered by the learned arbitrator.

7. A perusal of the arbitration clause indicates that the parties had agreed that the arbitration shall be conducted in accordance with the provisions of the Arbitration Act, 1940 or any statutory modification thereof. It is not in dispute that the said agreement was entered into between the parties on 14th November, 1995 i.e. before the enactment of the Arbitration & Conciliation Act, 1996. It is not the case of Mr.Dhakephalkar, learned senior counsel for the petitioner that the learned arbitrator was appointed by this Court under the provisions of the Arbitration Act, 1940. It is an undisputed position that the learned arbitrator was appointed in an application filed under section 11(6) of the Arbitration & Conciliation Act, 1996. It is also not in dispute that the arbitration clause was invoked only after the enactment of the Arbitration & Conciliation Act, 1996. In my view the reference to the Arbitration Act, 1940 in the arbitration agreement with a rider that `with any statutory modification

thereof' or would mean that the Arbitration & Conciliation Act, 1996 or any statutory modification thereof since the said Arbitration & Conciliation Act, 1996 was in force when the arbitration notice was issued. In my view, section 8 of the General Clauses Act would also stand attracted in the facts and circumstances of this case.

8. In view of such arbitration agreement entered into between the parties, the parties would be governed by the provisions of the Arbitration & Conciliation Act, 1996 with any statutory modification thereof. Section 87 of the Arbitration Act inserted by the Arbitration & Conciliation (Amendment) Act, 2019 would not assist the case of the petitioner. The parties thus would be governed by section 36 of the Arbitration & Conciliation Act duly amended. In my view, the petitioner thus cannot seek any automatic stay to the impugned award.

9. This Court in case of **Mrs.Padmini Chandran Menon vs. Vijay Menon & Ors., 2018 (1) BCR 743** has construed the provisions of section 11(6A) of the Arbitration & Conciliation Act, 1996 and after adverting to the judgment of the Supreme Court in case of **Thyssen Stahlunion GMBH vs. S.A.I.L. (1999) 9 SCC 334** has held that in view of the agreement entered into between the parties that they would be governed by the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification thereof, the parties also would be governed by the amendment carried out to the provisions of the Arbitration & Conciliation Act even

after invocation of the arbitration notice under section 21 of the Arbitration & Conciliation Act, 1996. The judgment of this Court in case of **Mrs.Padmini Chandran Menon** (supra) thus would assist the case of the respondent and not the petitioner. The judgment of the Supreme in case of **Pam Developments Private Limited** (supra) also would assist the case of the respondent and not the petitioner.

10. Insofar as the amount required to be deposited by the petitioner is concerned, a perusal of the record indicates that the learned arbitrator has considered the amount recovered by the petitioner towards octroi even post the date of the termination of the agreement entered into between the parties though had rendered a finding that the termination effected by the petitioner was valid. In my *prima-facie* view the learned arbitrator thus could not have directed the petitioner to pay the entire amount of octroi recovered post the date of termination.

11. I have heard the learned senior counsel for both the parties and have perused various findings rendered by the learned arbitrator while awarding an amount of Rs.24,06,50,119.03 with further interest thereon in favour of the respondent. After deducting the amount recovered by the respondent post the date of termination, according to the respondent, the petitioner may be directed to deposit Rs.4,51,49,151.90, whereas according to the petitioner a sum of Rs.2,05,92,175/- is collected by the petitioner upto the date of termination excluding the interest awarded by the learned arbitrator

and cost of arbitration. Since this Court is of the view that there is prima-facie substance in the grounds raised by the petitioner in the arbitration petition and in view of the fact that the learned arbitrator had directed the petitioner to pay the entire amount which is inclusive of amount collected by the petitioner post the date of termination, in my view ends of justice would be met with if the petitioner is directed to pay a sum of Rs.3,00,00,000/- in this Court within four weeks from today. It is made clear that no further extension of time would be granted.

12. The respondent would be at liberty to withdraw the said amount upon furnishing an undertaking with the office of the learned Prothonotary & Senior Master within two weeks from the date of communication of such deposit by the petitioner's advocate to the respondent's advocate to the effect that in the event of the petitioner succeeding in the arbitral petition and if the respondent is directed to return any amount, the respondent would return the said amount as may be directed by this Court within such time and with such interest as may be directed.

13. The impugned award dated 1st April, 2019 is stayed on the aforesaid conditions. It is made clear that whatever observations are made by this Court while considering the application for stay of the impugned award are *prima-facie* and are made only for the purpose of deciding the quantum of the amount required to be deposited. It is made clear that if the amount is not deposited within the time

prescribed, the stay to the impugned award shall stand vacated without further reference to the Court.

(R.D. DHANUKA, J.)