



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 51/2020

1. Vimlesh Bansal Wife Of Prem Prakash Bansal, Resident Of New Sabji Mandi, Station Road, Bayana (Bharatpur).
2. Smt. Shakuntala Wife Of Chandra Prakash Bansal, Resident Of Near SBBJ, Arya Samaj Road, Bayana (Bharatpur)

3. Anand Kumar Singhal Son Of Late Shri Chandra Pal, Resident Of Station Road, Bayana (Bharatpur)

----Petitioners

Versus

Ashok Kumar Son Of Shri Baij Nath, R/o New Colony Warehouse Road, Bayana, District Bharatpur.

----Respondent

For Petitioner(s) : Mr. Jatin Agarwal
For Respondent(s) : Mr. Abhi Goyal

HON'BLE MR. JUSTICE PANKAJ BHANDARI

Order

ORDER RESERVED ON :: 19/05/2022

ORDER PRONOUNCED ON :: 26/05/2022

1. The applicants have filed this arbitration application under Section 11(5) read with Section 11(6) and Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of a sole arbitrator for settlement of differences and disputes between the parties.

2. It is mentioned in the arbitration application that earlier an application under Section 11 of the Act was filed before the High Court, which was registered as S.B. Arbitration Application No.88/2011: Vimlesh Bansal & Ors. Versus Ashok Kumar. The said application was allowed by the High Court vide its order dated



23.09.2016, wherein the High Court was pleased to appoint Mr. Brij Mohan Gupta, Retired District Judge as a sole arbitrator. It is also mentioned in the application that no notice was received from the sole arbitrator and only in 2018, the applicants received a copy of the order-sheet from the arbitrator wherein it was stated that even after the service of the notice, no one turned up in the proceedings and accordingly, the proceedings were closed on 29.11.2016.

3. In reply to the above application, it is contended by the respondent that a second application is not maintainable. It is also mentioned that the applicants have an alternative and efficacious remedy by either filing a regular application for setting aside the award and cannot be allowed to invoke the powers of this Court. It is further mentioned in the reply that the dispute is barred by limitation as the alleged dispute relates back to the year 2009 and the present application has been filed in the year 2020. It is mentioned that after dismissal of the claim on 29.11.2016, the present application has been filed after a lapse of 4 years and since Article 137 of the Limitation Act is applicable, the limitation being 3 years, the said application is barred by limitation.

4. A rejoinder has also been filed by the applicants denying that the application is not maintainable being barred by *res-judicata*. It is stated in the application that the proceedings were terminated since none of the parties appeared before the sole arbitrator and the proceedings were terminated in view of Section 32(2)(c) and sub-clause (3) of Section 32 of the Act. It is contended that on termination of the mandate of an arbitrator, a substituted arbitrator can be appointed. It is also stated in the rejoinder that with the closure and termination of the arbitration proceedings by



the sole arbitrator on 29.11.2016 effectively also terminated the mandate of Arbitral Tribunal in view of Section 32(3) of the Act. Thus, substituted arbitrator in view of the provisions of the Act could only be appointed in terms of the procedure for which the earlier sole arbitrator was appointed as per Section 15(2) of the Act.

5. Counsel for the applicants has placed reliance on *Uttarkhand Pury Sainik Kalyan Nigam Ltd. Versus Northern Coal Field Ltd.:* **(2020) 2 SCC 455** wherein it was held that the High Court erred in dismissing application for appointment of arbitrator on ground that claim was barred by limitation. Such preliminary objection was to be decided by arbitrator, once Court had determined existence of arbitration agreement, after which it was bound to appoint arbitrator once the same was found to exist. Counsel for the non-applicant has placed reliance on *Bharat Sanchar Nigam Limited & Anr. Versus Nortel Networks Indian Private Limited:* **(2021) 5 SCC 738** wherein it was held that Article 137 of the Limitation Act would apply in cases wherein application is filed under Section 11(6) of the Act and that the limitation period would be 3 years.

6. I have considered the contentions and carefully perused the material available on record.

7. Admittedly, the applicants earlier approached the High Court by way of filing an arbitration application and the same was allowed by the High Court vide order dated 23.09.2016 and an arbitrator was appointed. The arbitrator issued notices to the parties and it is evident from the order-sheet of the sole arbitrator that none of the parties appeared before the arbitrator and therefore, the arbitrator terminated the arbitration proceedings.



The applicants did not agitate the termination of the proceedings and have approached the Court again on 06.07.2020 by filing the present arbitration application. The earlier proceedings terminated on 29.11.2016 and the present application has been filed on 06.07.2020 i.e. after a lapse of 3 years and around 7 months. The applicants never approached the arbitrator and proceedings terminated as no claim was filed by them before the arbitrator. As per the rejoinder filed by the applicants themselves, the proceedings were terminated in view of Section 32(2)(c) of the Act.

A bare perusal of Section 32(2)(c) of the Act makes it clear that the arbitral proceedings shall be terminated by an order of the arbitral tribunal under sub-section (2) where the arbitral tribunal finds that continuation of proceedings has for any reason become unnecessary or impossible. The recourse available to the parties in such a case is to apply to the 'Court' as is envisaged under Section 14(2) of the Act. Section 14(1)(a) & (2) are reproduced herein below:-

“(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—

(a) he becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate”.

Further, the term 'Court' as mentioned in Section 14 (2) of the Act is defined in Section 2(e) to mean principal Civil Court of



original jurisdiction in a district or the High Court, in exercise of its ordinary original civil jurisdiction.

9. The legal maxim '*Vigilantibus Non Dormientibus Jura Subveniunt*' literally translates to 'the law assists only those who are vigilant and not those who sleep over their rights'. The said legal maxim applies squarely to the present case where applicants did not take recourse of law available to them when the arbitrator terminated the proceedings on 29.11.2016 and have now preferred a second application under Section 11(5) of the Act, that too with inordinate delay and laches. Thus, this Court is of the considered view that once an application under Section 11(5) of the Act is allowed by the High Court and an arbitrator is appointed, a second application for appointment of the arbitrator does not lie, more particularly when the arbitrator has terminated the proceedings and the proper course available to the applicants was to file an application under Section 14(2) of the Act to challenge the order on the ground that they were not given proper notice.

10. The present application has been filed after 3 years and more than 7 months of the termination of the mandate of the arbitrator, which is clearly barred by limitation in view of the judgment of the Apex Court in *Bharat Sanchar Nigam Limited & Anr.* (supra). The judgment in *Uttarkhand Purv Sainik Kalyan Nigam Ltd.* (supra) has no applicability to the facts of this case as in the present case, there is a second application under Section 11(5) of the Act and the first application was allowed. The proceedings of the arbitrator was terminated and after a lapse of more than 3 years and 7 months, the present application has again been filed for



appointment of an arbitrator. The present arbitration application therefore, deserves to be and the same is accordingly dismissed.

(PANKAJ BHANDARI),J

SUNIL SOLANKI /PS



RAJASTHAN HIGH COURT



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