IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice SHEKHAR B. SARAF

A.P. No. 785 of 2022

M/S. GAMMON ENGINEERS AND CONTRACTORS PVT. LTD.

VS

THE STATE OF WEST BENGAL

For the Petitioner : Mr. Swatarup Banerjee, Adv.
Mr. Satyaki Mitra, Adv.

For the Respondent : Mr. Dhrubo Ghosh, Sr. Adv.
Mr. Paritosh Sinha, Adv.
Mr. Altamash Alim, Adv.
Mr. Shourya Samanta, Adv.

Last heard on: **July 28, 2023**

Judgement on: August 11, 2023

Shekhar B. Saraf, J:

1. The instant application [being A.P. No. 785 of 2022] under Sections 14, 15 and 11(6) of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the 'Act'] has been filed by M/S Gammon Engineers and Contractors Private Limited [hereinafter referred to as the 'Petitioner'], a company having its registered office at Gammon House, Veer Savarkar

Marg, Prabhadevi, Mumbai City – 400025 and its regional office at 19, Ballygunge Circular Road, 2nd Floor, Kolkata – 700019. The petitioner is engaged in the business of carrying out construction and civil works, which includes public works on behalf of the central and state governments.

2. The respondent is the State of West Bengal [hereinafter referred to as the 'Respondent'] represented through the Executive Engineer, Teesta Irrigation Division, Assam More, Jalpaiguri – 735101.

3. The petitioner has filed the application against the unilateral appointment of an arbitrator by the respondent alleging violation of Clause 25 of the General Conditions of Contract [hereinafter referred to as the 'Contract'].

Relevant Facts

4. In 2011, the respondent offered bids for an e-Tender which included the construction of Dy. 6 of Teesta Jaldhaka Main Canal including its structure of 12 nos. of minors with total length of the Canal spreading approximately 53.181 km.

5. On March 27, 2012, the petitioner tendered its bid, which was accepted by the respondent for an amount of Rs. 1,36,86,88,135.73/- and a final letter of acceptance was issued on May 23, 2012. On the very next day

the respondent issued a work order as per which the construction was to commence from June 1, 2012, and be completed by May 31, 2014.

6. However, towards the end of the term, the construction was not complete. The petitioner listed their concerns via a letter in May 2014 which was met with threats of legal actions and the respondent terminated the contract vide letter dated August 1, 2014.

7. On August 20, 2014, the respondent served a notice of invocation of seven bank guarantees aggregating to a sum of Rs. 6,84,34,407/- which were furnished by the petitioner. The petitioner while submitting their final statement of accounts on September 16, 2014, claimed an amount of Rs. 50,26,89,550/- to be due. The same was refused by the respondent on December 1, 2014. This refusal prompted the initiation of the arbitral proceedings by the petitioner vide a notice dated December 1, 2014 wherein the petitioner proposed names of retired Judges and a suggestion was also made that an Arbitral Tribunal be constituted of three members.

8. The respondent, vide communication dated December 30, 2014, appointed Shri Ajay Kumar Basak, a former employee of Inland and Waterways Directorate, Government of West Bengal, as the sole arbitrator to resolve the dispute between the parties.

9. The said application has been filed by the petitioner in response to the unilateral appointment of the arbitrator by the respondent.

10. It is also pertinent to mention that the respondent filed an application under Section 9 of the Act before the District Judge at Jalpaiguri. The said application was partially allowed and disposed of vide an order dated February 17, 2017.

The Submissions

11. It is apposite now to mention the contentions put forth by counsels of both sides.

12. Mr. Swatarup Banerjee, learned counsel appearing on behalf of the petitioner has put forward the following arguments:

a. Clause 25 specifically authorised the Chief Engineer of the department to operate as the sole arbitrator. There was no mention that the said Chief Engineer had the authority to appoint someone else. In the present dispute, the respondent appointed Shri Ajay Kumar Basak, a former employee of Inland and Waterways Directorate, Government of West Bengal, having served

the respondent as ex-chief engineer, as arbitrator for the petitioner's reference.

b. Clause 25 did not empower the chief engineer to appoint a former employee or a person who was otherwise likely to be inclined in favour of the Government Department. However, the petitioner had no choice but to agree to the appointment of this sole arbitrator as the respondent had superior bargaining power. Shri Ajay Kumar Basak, being a former employee of the respondent, was proscribed under Section 12(5) of the Act to act as an arbitrator. Furthermore, the petitioner had not given a written consent to legitimise the appointment of the said sole arbitrator as per section 12(5) of the Act. The petitioner has relied on ***TRF Ltd. v. Energo Engg. Projects Limited*** reported in ***(2017) 8 SCC 377***, ***Bharat Broadband Network Limited v. United Telecoms Limited*** reported in ***(2019) 5 SCC 755***, ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited*** reported in ***2019 SCC OnLine SC 1517***, ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors. v. Ajay Sales and Suppliers*** reported in ***2021 SCC OnLine SC 730***, ***Board of Control for Cricket in India v. Kochi Cricket Private Limited & Ors.*** reported in ***(2018) 6 SCC 287***, ***Cholamandalam Investment and Financial Company Limited v. Amrapali Enterprises & Anr***. reported in ***2023 SCC OnLine Calcutta 605*** and distinguished ***West Bengal Housing Board v.***

Abhishek Construction reported in ***2023 SCC OnLine Calcutta 827***, to bolster the said argument.

c. The petitioner filed their statement of claims within the time limit prescribed by the arbitrator, but the respondent delayed for 6 months to file their statement of defence. However, no order was made against the respondent for such delay.

d. Overall, the arbitral proceedings continued for 8 years from the date of issuance of notice on December 1, 2014, as per the wordings of Section 21 of the Act. Even then the proceedings were not concluded and thus the arbitrator had not acted in accordance with section 12(2) of the Act. The unreasonable extension has greatly prejudiced the petitioner and the arbitrator, for all practical purposes, denied justice to the petitioner, which is against the principles envisaged by the UNCITRAL model. These indicate a bias of the arbitrator towards the respondent.

e. Lastly, the arbitrator had a duty to disclose possibilities of bias as per section 12(1) of the Act, which he failed to do. The arbitrator was professionally associated and employed with the respondent and held a senior position in the Inland and Waterways Directorate, Government of West Bengal, which he failed to disclose by himself and thereby concealed a material fact relating to his ineligibility.

f. The present application is under Section 14, 15 read with Section 11 of the Act. The application lies before this High Court only as the High Court is the court having superintending power to appoint arbitrators under Section 11 of the Act.

13. Mr. Dhrubo Ghosh, senior advocate, appearing on behalf of the respondent submitted the following contentions:

a. The petitioner, at no point of time, raised any objections to the appointment of the arbitrator or the validity of the arbitration clause.

b. The arbitrator is a former employee who had nothing to do with the subject matter of the dispute and therefore is not ineligible to be appointed as an arbitrator. Reliance was placed on ***Voestalpine Schiene GmbH v. Delhi Metro Rail Corporation Ltd.*** reported in ***(2017) 2 Arb LR 1 (SC)*** and ***State of Haryana v. G.F. Toll Road (P) Ltd.*** reported in ***(2019) 3 SCC 505*** to buttress the submission.

c. Participation in the proceedings by filing its statement of claim, rejoinder, evidence and making full arguments amounts to waiver of the applicability of Section 12(5) of the Amended Act. Reliance was placed on ***McLeod Russel India and Another v. Aditya***

Birla Finance Limited and Others reported in ***2023 SCC OnLine Cal 330*** to lend weightage to this argument.

d. The issue of unilateral appointment and the proscription under Section 12(5) of the Act are inapplicable to arbitrations which commenced prior to the 2015 Amendment. Reliance was placed on ***West Bengal Housing Board v. Abhishek Construction*** reported in ***2023 SCC OnLine Calcutta 827*** for the said argument.

e. The present application is not maintainable considering the fact that an application under Section 9 of the Act was filed before the learned District Judge at Jalpaiguri. Correspondingly, Section 14 and 15 are applications under Part I of the Act and therefore the bar under Section 42 of the Act applies which requires the instant application to be made before the District Judge at Jalpaiguri.

f. An application under Section 11(6) of the Act is not maintainable, since the earlier appointment is continuing. In the event the appointment was bad, the time prescribed for making an application under Section 11(6) has already expired, that is, three years from date of knowledge of such appointment being invalid.

Analysis and Conclusion

14. The respondent has raised the issue of maintainability and challenged the jurisdiction of this court to entertain the instant application under Section 14, 15 read with Section 11 of the Act. Therefore, before alluding to other aspects of the dispute, it is imperative that I first decide upon the maintainability of the application.

15. Owing to a prior Section 9 application being filed before the learned District Judge at Jalpaiguri, the respondent contends that the instant application must be made before the same 'court', as per the mandate of Section 42 of the Act. The said Section is reproduced hereinbelow :-

> *'42. Jurisdiction — Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.'*

16. In ***State of West Bengal v. Associated Contractors*** reported in ***(2015) 1 SCC 32,*** the Supreme Court laid down the law vis-a-vis Section 9 and 42 of the Act. The relevant paragraph is delineated below :-

'12. Part I of the Arbitration Act, 1996, contemplates various applications being made with respect to arbitration agreements. For example, an application under Section 8 can be made before a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement. It is obvious that applications made under Section 8 need not be to courts, and for that reason alone, such applications would be outside the scope of Section 42. It was held in P. Anand Gajapathi Raju v. P.V.G. Raju [(2000) 4 SCC 539] , SCC at pp. 542-43, para 8 that applications under Section 8 would be outside the ken of Section 42. We respectfully agree, but for the reason that such applications are made before "judicial authorities" and not "courts" as defined. Also, a party who applies under Section 8 does not apply as dominus litis, but has to go wherever the 'action' may have been filed. Thus, an application under Section 8 is parasitical in nature—it has to be filed only before the judicial authority before whom a proceeding is filed by someone else. Further, the "judicial authority" may or may not be a court. And a court before which an action may be brought may not be a Principal Civil Court of Original Jurisdiction or a High Court exercising original jurisdiction. This brings us then to the definition of "court" under Section 2(1)(e) of the Act.

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16. Similar is the position with regard to applications made under Section 11 of the Arbitration Act. In Rodemadan India Ltd. v. International Trade Expo Centre Ltd. [(2006) 11 SCC 651] , a Designated Judge of this Hon'ble Court following the seven-Judge Bench in SBP and Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618] , held that instead of the court, the power to appoint arbitrators contained in Section 11 is conferred on the Chief Justice or his delegate. In fact, the seven-Judge Bench held: (SBP and Co. case [(2005) 8 SCC 618] , SCC pp. 644-45 & 648, paras 13 & 18)

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It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e). The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar [(2007) 1 SCC 467] , SCC at pp. 470 & 473, Paras 9 & 23-26.

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18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "court" as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part I to any court except the court to which an application has been made under Section 9 of the Act.

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25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.'

17. The understanding of 'court' under Section 42 is indisputably in terms of Section 2(1)(e) of the Act. The application under Section 9 is also made to a 'court' as understood under Section 2(1)(e) of the Act. Once such an application to a 'court' as understood under Section 2(1)(e) of the Act is made, all further applications under Part I to a 'court' must be to the 'court' to which the prior application has been made. This is the mandate of Section 42 of the Act. For the purpose of convenience, Section 2(1)(e) is replicated below :-

> *'2. Definitions.—(1) In this Part, unless the context otherwise requires,—*
>
> *[(e) "Court" means—*
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> *(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;*
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> *(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;]*

18. In ***Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal and Others*** reported in ***(2022) 10 SCC 235***, the Supreme Court delineated the law

with respect to the court to which an application for termination of an arbitrator's mandate would lie. The appropriate portions are extracted below :-

> *'21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(e) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.*
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> *32.3. In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under Section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under Sections 11(6)(a) to (c) of the Act.*
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> *32.4. Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the*

arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time.

32.5. <u>In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section 14(1)(a), such a dispute has to be raised before the "court", defined under Section 2(1)(e) of the 1996 Act and such a dispute cannot be decided on an application filed under Section 11(6) of the 1996 Act.</u>'

<u>Emphasis Added</u>

Therefore, it is palpably clear that the 'court' to be approached under Section 14(1)(a) for termination of an arbitrator's mandate, for de jure or de facto reasons, is the 'court' under Section 2(1)(e). Correspondingly, the bar of Section 42 is applicable in the instant case. Additionally, termination cannot be made in an application filed under Section 11(6) of the Act, contrary to what was contended by the petitioner during oral pleadings.

19. In the present factual matrix, the respondent made an appointment as per the agreement between the parties. The arbitration proceeding commenced and statement of claim and statement of defence were filed. The arbitration has proceeded for almost 8 years and is at the last stage of argument. It is to be noted that the petitioner never raised any objection to the appointment made by the respondent and participated in the arbitration proceedings. Presently, the petitioner has filed this application under Section 14 read with Section 15 and Section 11(6) for termination of the arbitrator on the grounds provided in Section 14(1)(a) of the Act that allows for termination and substitution of an

arbitrator who is de jure or de facto unable to act as an arbitrator. It is clear from the records that the Section 21 notice and the appointment of the arbitrator took place prior to the amendment of the 2015 Amendment Act. This court has already pronounced a judgement in ***West Bengal Housing Board (supra)*** dealing with the issues that the grounds of holding an arbitrator to be de jure or de facto ineligible to act as an arbitration vis-a-vis unilateral appointment cannot be taken in instances where the proceeding commenced prior to the Amendment Act of 2015. Additionally, in the present case it appears that the present petition is not maintainable before this Court.

20. The ratio of the judgement in ***Swadesh Kumar Agarwal (supra)*** must be kept in mind, wherein the court has categorically held in paragraph 32 that once an appointment is made under Section 11, the arbitration agreement cannot be invoked for the second time under Section 11. The procedure prescribed in the Act for termination of an arbitral tribunal's mandate is as per Sections 14 and 15 of the Act. The argument raised by the petitioner that a petition can be filed under Section 14 read with Section 15 and Section 11(6) is an argument in sophistry and is superfluous. This is quite evident from the ratio of the judgement in ***Swadesh Kumar Agarwal (supra),*** which has been specifically delineated in paragraph 32 of the said judgement and pointed out by me in the preceding paragraphs. In the present case, a Section 9 application was already made to the District Judge at Jalpaiguri, which is, for all purposes, the 'court' under Section 2(1)(e) of the Act.

Therefore, the bar under Section 42 would lie and all applications to be made to a 'court' must be made to the District Judge at Jalpaiguri. An application under Section 14(1)(a) for termination of an arbitrator's mandate, being required to be made before a 'court' as under Section 2(1)(e) and 42 of the Act, has to presented before the District Judge at Jalpaiguri. In light of the above, A.P. 785 of 2022 is disposed of for not being maintainable before the High Court at this stage. I make it clear that the findings with regard to merits of the case in the preceding paragraphs are tentative in nature and the appropriate court shall decide the Section 14 application in accordance with law.

An Afterword on Sections 14 and 15 of the Act

21. Before parting ways with the facts and law, I deem it appropriate to discuss the law with respect to Section 14 and 15 of the Act. Section 14 specifically avers that 'the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator…'. This raises the question, which though not before me in the instant case, deserves to be discussed for academic purposes and might be later addressed and resolved by courts. The question is that while the 'court' under Section 2(1)(e) and 14 of the Act may be clothed with the power to terminate the arbitrator's mandate, is it empowered to substitute by re-appointment of another arbitrator? The question seems to be answerable in a simple manner if the 'court' is a High Court, which is anyway granted with the power to appoint an arbitrator under Section 11 of the Act. But the

issue becomes difficult to answer if such a 'court' is inferior to the High Court.

22. While Section 14 begins with the prelude that the mandate of the arbitrator shall be terminated and shall be substituted, it simply states the obvious that the vacuum created by termination has to be filled up by substitution. This does not lead to the automatic inference that the 'court' to which an application under Section 14 of the Act lies, has the power to substitute. Reference may be made to Section 14(2) and Section 15(2) in this regard. Both are reproduced below :-

> *'14(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.*
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> *15(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.'*

Firstly, Section 14(2) indicates that the application being made to the 'court' is only for the purposes of termination. Secondly, Section 15(2) suggests that after termination of the mandate, the procedure to be followed is the one applicable to the appointment of the arbitrator being replaced (normally agreed upon by the parties), which if not followed, in the normal scheme of things, is followed by an application under

Section 11(6) of the Act. This leads us to the inference that the 'court', if inferior to that of a High Court, under Section 14 of the Act, has the power to terminate. However, after the termination happens, the parties can either (i) mutually agree to appoint another arbitrator or (ii) file an application under Section 11(6) of the Act before the relevant High Court. While ***Swadesh Kumar Agarwal (supra)*** observes that the arbitration agreement cannot be invoked for the second time, exercise of either of these options will not be 'invocation' of the arbitration agreement, but would merely be means to substitute the mandate of the arbitrator. I must hasten to re-emphasise that this issue is not before this court. The hypothetical predicament necessitated me to record my chords on the same, so that the vibrations created by it are picked up by another court when such an issue is actually placed before it for final and binding observations. My ruminations are preliminary at best and must be treated as such.

23. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)