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# RIGHTS OF PARTY TO CHOOSE ARBITRATOR RELINQUISHED ONCE IT FOREFITS ITS RIGHT U/S 11

The Hon'ble Calcutta High Court has held that when the parties move to the Court under section 11(6) of the Arbitration & Conciliation Act, 1996 for a stay of the appointment proceedings, then they cannot trace it back. Once the arbitral proceedings have begun under section 21 of the Arbitration & Conciliation Act,1996 and the appointment dispute between the parties regarding the appointment of arbitrator is settled by the Hon'ble Court under section 11(6), the parties cannot go back for a new date of commencement of arbitral proceedings under the guise of substitution.

**IN THE HIGH COURT AT CALCUTTA**
**Ordinary Original Civil Jurisdiction**
**Original Side**
**(Commercial Division)**

**Present :-**
**The Hon'ble Justice Moushumi Bhattacharya**

AP 281 of 2023
with
AP 283 of 2023
Srei Equipment Finance Limited
Vs.
Seirra Infraventure Private Limited

| | | |
|---|---|---|
| For the petitioner | : | Mr. Swatarup Banerjee, Adv.<br>Mr. Sariful Haque, Adv.<br>Mr. Rajib Mullick, Adv.<br>Ms. Sonia Mukherjee, Adv.<br>Mr. Biswaroop Ghosh, Adv. |
| For the respondent | : | Mr. Rohit Das, Adv.<br>Mr. Indradip Das, Adv.<br>Ms. Kishwar Rahman, Adv.<br>Mr. Preetam Majumder, Adv. |
| Last Heard on | : | 27.06.2023 |
| Delivered on | : | 18.07.2023 |

**Moushumi Bhattacharya, J.**

1. The petitioner seeks appointment of arbitrators in place and stead of the arbitrators who were appointed by an order of Court dated 22.2.2022. The arbitrators were later elevated to the Bench/relocated outside India and communicated their inability to perform their duties. The petitioner has filed the present applications for appointment of arbitral tribunals under sections 14 and 15 of The Arbitration and Conciliation Act, 1996.

2. The question which falls for adjudication is the governing provisions of the 1996 Act with regard to the appointment of the Tribunal. In other words, whether the procedure for appointment of a new arbitral tribunal should revert to

i) section 14 of the Act which contemplates an arbitrator's failure or impossibility to act or

ii) to section 11 where the Court intervenes in the matter of appointment of arbitrators subject to circumstances existing under the situations envisaged in section 11 of the Act.

3. The petitioner urges that the appointment should be governed by section 14 while the respondent stresses on the need to start afresh from the stage of section 11(5) of the Act. The submissions made on behalf of the parties should be presented in a little more detail.

4. Learned counsel appearing for the petitioner submits that the arbitrator was *de facto* unable to perform her functions under section 14(i)(a) by reason of

the elevation and relocation. Counsel relies on section 15(2) which provides for appointment of a substitute arbitrator when the mandate of an arbitrator terminates under section 14 or by reason of the additional circumstances referred to in section 15(1). Counsel submits that the procedure for substitution of an arbitrator under section 15 must be the same as the initial appointment of the arbitrator whose mandate came to an end by reason of the inability. Counsel submits that the respondent had forfeited the right of appointment of an arbitrator under section 11 in the earlier proceedings and hence cannot seek to revive that right. Counsel urges that the Court now has the jurisdiction to appoint an arbitrator in the same manner as the previous appointment on 22.2.2022.

5. Learned counsel appearing for the respondent places emphasis on the concept of party autonomy to urge that the Court can only appoint an arbitrator under section 11(5) and (6) of the Act and that sections 14 and 15 do not confer any power on the Court to make such appointment. It is submitted that the petitioner had unilaterally appointed a sole arbitrator which prompted the respondent to make a written request to the unilaterally-appointed sole arbitrator to withdraw as he was ineligible to act as an arbitrator. The controversy between the parties arose after the arbitrator refused to withdraw resulting in the respondent filing an application under section 14 before the Court. Counsel submits that unlike the earlier circumstances, there is no controversy between the parties in the present proceeding as the arbitrators were unable to continue with their functions. It is also submitted that the

"rules" mentioned in section 15(2) would be the rules as contained in section 11(5) of the Act which would mean that the procedure for appointment should revert to the stage of section 11(5) for appointment of a new Arbitral Tribunal. Counsel submits that section 11(5) must be complied with before the Court intervenes to appoint an arbitrator as sought for in the present application.

The issue for decision :

6. The dilemma confronting the parties – and the Court - is the stage to which the appointment of the arbitrator should revert on the erstwhile arbitrators becoming *de jure / de facto* unable to perform their functions. The application for appointment has accordingly been made under sections 14 and 15 of The Arbitration and Conciliation Act, 1996 on the termination of the mandate of the arbitrators.

7. The question which is to be answered is whether the Court steps in to appoint an arbitrator (as the petitioner says) or the parties should be sent back to the sequential steps under section 11, which requires a party in receipt of a request by the other party to agree to the appointment made by the second party within 30 days from receiving the request – section 11(5). The respondent proposes the second option.

The facts which led to the dilemma :

8. The petitioner had appointed a sole arbitrator. The respondent made a written request to the appointed arbitrator to withdraw on the ground of unilateral appointment but was denied the same which led to the respondent

filing an application under section 14 of the Act for termination of the arbitrator's mandate. The Co-ordinate Bench passed an order on 22.2.2022 noting that disputes and differences had arisen between the parties and appointed the arbitrator on consent. The arbitrators thereafter communicated their inability to perform the functions on the ground of elevation to the Bench and relocation outside India. There is no doubt that the arbitrators have become *de jure* and *de facto* unable to perform their functions under section 14(1)(a) of the Act. The inability to continue with the mandate is also under one or more of the grounds under section 15(1) of the Act.

The contesting provisions of the 1996 Act

9. The termination of the mandate of an arbitrator and substitution of the arbitrator are found in sections 14 and 15 of the Act.

10. Section 14 deals with situations where the arbitrator either fails to act or finds it impossible to perform his/her functions for the reasons provided for in section 14(1)(a) and (b). The *de jure* and *de facto* inability to perform the functions or undue delay in performing those functions is found under section 14(1)(a). Section 14(1)(b) comes in where the arbitrator withdraws from office or the parties agree to the termination of the mandate.

11. Section 15 provides for certain additional circumstances apart from those referred to in sections 13 and 14 and reiterates termination of mandate upon the arbitrator withdrawing from office including pursuant to an agreement between the parties.

12. Section 15(2) contemplates substitution of the arbitrator whose mandate has terminated under the circumstances provided for in sections 13,14 and 15 and the consequent appointment of a "substitute arbitrator" *"according to the rules that are applicable to the appointment of the arbitrator being replaced"* (the relevant part of section 15(2) has been reproduced).

The provision relevant to the dispute

13. The crux of the competing contentions made on behalf of the parties is centered on the construction of section 15(2) which is reproduced below for completeness.

> *"Section 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."*

14. Section 15(2) does not define "rules" which is referred to and made applicable to the appointment of the replaced arbitrator. On a plain reading of the provision, the rules would mean the rules of the agreement between the parties with regard to the appointment of the arbitrator or the procedure of appointment by the Court of the erstwhile arbitrator. The operative words are ".... of the arbitrator being replaced."

15. The rules must therefore stop at the stage of the replacement of the erstwhile arbitrator. In other words, the Court would simply rewind the clock to the date and time when the arbitrator (whose mandate is terminated) was appointed and not to a stage before the replacement. This would accordingly be

the "rules" which would determine the appointment of the substitute arbitrator under section 15(2) of the Act.

16 A little more elaboration on the "Rules" follows.

The "Rules" in section 15(2) of the Act

17. The "rules" relevant to section 15(2) was considered by the Supreme Court in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.; (2006) 6 SCC 204* where it was held that the rules would be those referred to in the procedure for appointment contained in the arbitration agreement or any rules of any institution under which disputes were referred to arbitration.

18. In the present case, the initial appointments of the arbitrators under the arbitration agreement was contested by the respondent on the ground of unilateral appointment and the respondent filed an application for termination of the arbitrators mandate under section 14 of the Act. However, the controversy on the appointment was laid to rest when the respondent consented to the appointments made by the Co-ordinate Bench on 22nd February, 2022. The respondent hence cannot say that the appointments which are now proposed to be made of the substitute arbitrators must be consigned to the drill of section 11(5) where the parties have to agree on the appointment within 30 days and thereafter approach the Court if they are unable to do so.

19. The reason for the above view is the continuity envisaged in sections 15(2) and (3) in the performance of the arbitrator's duties. While section 15(2)

provides for an appointment of a substitute arbitrator in accordance with the rules that were applicable to the appointment of the arbitrator being replaced, section 15(3) ensures that the arbitration remains uninterrupted by giving the option to the substitute arbitrator to either repeat the hearings already held by the arbitrator or commence the proceedings anew. Section 15(3) is reproduced below.

> *"Section 15(3). – Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal."*

The flow of proceedings continues till section 15(4) where the validity of orders passed by the arbitral tribunal, pre-replacement, are deemed to remain undisturbed regardless of a change in the composition of the arbitral tribunal.

20. The interpretation of the statutory position agrees with the facts. The records show that the arbitrator/s held a few sittings before becoming unable to perform her functions. This fact also leans towards continuity of the arbitration already initiated rather than relegating the parties to a stage which is prior even to the first appointment. The second appointment, as stated above, was done by the Court with the consent of parties. The decision of the Delhi High Court in *Tricolor Hotels Limited v. Dinesh Jain; 2022 SCC OnLine Del 3717* was on similar facts and the Court held in favour of the arguments made by the petitioner before this Court.

Party autonomy takes a back-seat once the Court makes the appointment

21. The argument of Counsel appearing for the respondent, though attractively-framed, is diluted by the admitted facts of the present case. According to counsel, the parties should be sent to the section 11(5) stage and be given the option of concurring/disputing each other's choice of arbitrator and thereafter come to the Court in a 11(6) proceeding for appointment of the arbitrator if the need so arises.

22. The argument is based on the refrain of party autonomy in the 1996 Act where the Court's intervention in the matter of choice in the arbitral process is specifically curtailed under section 5 of the Act. Section 5 declares that a judicial authority shall not intervene in matter governed by Part-I of the 1996 Act except where the Act permits intervention and regardless of any other law for the time being in force. The argument is also based on the difference between sections 14 and 15 and 11 of the Act where the power of appointment of an arbitrator by the High Court is reserved only in section 11(6) for arbitrations which are not international commercial arbitrations.

23. There is little doubt that party autonomy is one of the fundamental underpinnings of the 1996 Act where all decisions, from the appointment of arbitrators to venue and procedure, are made subject to the choice exercised by the parties to an arbitration agreement. The right to choose an arbitrator in accordance with an agreed procedure for appointment however stops at the doorway of 11(6) when the parties surrender that right to the High Court or the

Supreme Court, as the case may be. The Court then steps in to make that choice in the matter of appointment of an arbitrator.

24. Once the Court intervenes in the matter of appointment and the arbitration is set in motion, the parties must revert to the Court in all subsequent interruptions in that process. There is no provision in the 1996 Act to support the contention that the parties be relegated to the 11(5) stage every time the mandate of the arbitrator comes to an end and a substitute arbitrator is required to be appointed. The scheme of the Act also does not support re-winding the clock every time the arbitration comes to a halt - or is stalled - for any of the reasons contemplated under sections 13,14 and 15 (termination and substitution) or even 29-A which provides for a time limit for making of the award in domestic arbitrations.

25. After all, the intent of the 1996 Act, with all the amendments up to 2019, is to speed up the process of arbitration. The intent cannot be to retrace the steps from sections 15 to section 11 whenever an arbitrator is required to be substituted.

26. Further, section 21 of the Act contemplates commencement of the arbitral proceedings on the date on which a request for the dispute to be referred to arbitration is received by the respondent / other party. The receipt of a request also forms the basis of section 11(5) of the Act with the receiving - party being put on a window of 30 days to agree to the appointment made by the first party. The commencement of arbitral proceedings starts from the

exchange of a notice and a reply – or a failure to receive a reply. Therefore, the clock has already started to tick when the parties come to the Court under section 11(6) for quietus to the appointment procedure. Once the arbitral proceedings have commenced under section 21 and the appointment / dispute between the parties with regard to the appointment of arbitrator is put to rest by the Court under section 11(6), the parties cannot be permitted to re-set the clock to a fresh date of commencement of arbitral proceedings on the pretext of substitution.

27. The decisions shown on behalf of the respondent, including *West Bengal Power Development Corporation Limited vs. Sical Mining Limited*, were concerned with the initial appointment being made under section 11 and the Courts hence held that the parties must be sent to the stage of 11(6). In *Sical Mining*, a Division Bench found that the requirement of section 21 has not been complied with. In *The Chairman Indian Oil Corporation Ltd. vs. Laltu Filling Station,* another Division Bench of this Court dismissed an appeal filed by the appellant who was the respondent in a writ petition by holding that the appellant / applicant had not taken recourse to section 15(2) of the Act for appointment of a new arbitrator. In *Gunjan Sinha Jain vs. Registrar General, High Court of Delhi; 188 (2012) DLT 627*; a Division Bench of the Delhi High Court considered the answers given in the Delhi Judicial Service preliminary examination and considered the effect of the answer to question no. 175 where the Court was of the view that the arbitration proceedings should start *de novo* at the time of appointment of another arbitrator. *Hemant B Prasad vs. Perfect*

*Solutions* of the High Court of Judicature at Hyderabad for the State of Telengana, and *Deepak Galvanising & Engineering Industries Pvt. Ltd. vs. Government of India* of the High Court of Andhra Pradesh dealt with appointments made under section 11(6) of the Act. In *Niranjan Lal Todi vs. Nandlal Todi; (2014) 4 CHN Cal 489* a learned Single Judge of this Court noted the conduct of one of the parties to scuttle the arbitration between the parties. *Municipal Corporation of Delhi vs. Gurnam Kaur; (1989) 1 SCC 101* is on the broader and well-recognised proposition that the Court does not adjudicate upon the rights of the parties when passing an order on consent. This however does not assist the respondent since the rights of the parties in the present case to agree to / dispute the appointment of an arbitrator was exhausted when the respondent filed an application for termination of the mandate under section 14 before this Court. In other words, the right to choose an arbitrator was relinquished in favour of the Court appointing an arbitrator which the Court did on 22.2.2022. The respondent cannot revive that right once the arbitrator became *de jure / de facto* unable to act under section 14.

28. The above discussion must and invariably tilt towards the Court appointing new arbitrators in the same manner as was done on the previous occasion on 22.2.2022 when the parties approached the Court under Section 14 of the Act. There is no statutory basis to send the parties back to the section 11(5) position.

29. A.P. 281 of 2023 and A.P. 283 of 2023 are accordingly disposed of by appointing Mr. Shounak Mukhopadhyay and Mr. Jayanta Sengupta, Advocates, as arbitrators in accordance with the statutory mandate of section 15 of the Act. The learned arbitrators shall communicate their consent in the prescribed format and subject to section 12 read with the Schedules to the Act to the Registrar Original Side of this Court within 3 weeks from date. The arbitrators shall also be at liberty to continue with the hearings which were previously held subject to the parties agreeing to such resumption. The petitioner shall communicate this order along with details of the contact person to the arbitrators without delay.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)