



2026:UHC:4365

IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL

First Appeal No.112 of 2014

M/s Sutluz Engineering Pvt. Ltd. Appellant

Versus

M/s Kirby Building System India (Uttaranchal) Pvt. and
another Respondents

Presence:-

Mr. Vinayak Pant, learned counsel for the appellant.

Mr. Nikhil Singhal, learned counsel for the respondents through
V.C.

Hon'ble Siddhartha Sah, J. (Oral)

The present appeal has been preferred against the judgment and decree dated 09.07.2014 passed by District Judge, Haridwar in O.S. No.17 of 2010 'M/s Kirby Building Vs. M/s Sutluz Engineering Pvt. Ltd, whereby the plaintiff's suit was decreed.

2. The present appeal emanates from a suit seeking a declaration in favor of the plaintiff and against the defendants that the alleged appointment of the defendant no.2 as Arbitrator by the defendant no.1 is illegal, void and against the law, and on the basis of which the defendant No.2 does not have any right of arbitral proceedings. The other relief sought was of permanent injunction in favour of the plaintiff and against the defendants that defendant No.2 may not



proceed against the plaintiff on the basis of the alleged appointment as Arbitrator under the agreement in question.

3. It was pleaded in the plaint that the Agreement dated 28.03.2008 (as amended on 29.07.2008) was entered between the parties for supply of 'Prefabricated Steel Building System'. The agreement, inter alia, provided that the dispute between the parties have to be settled through arbitration at Haridwar. It is further averred that the plaintiff made supplies as per the terms of the contract, however, vide notice dated 14.10.2009, issued by the defendant no.1, the agreement dated 28.03.2008 was cancelled. Thereafter, the defendant no.2, Yogesh Anand was appointed as Arbitrator by the defendant no.1 against the conditions of the agreement vide notice dated 23.12.2009. Although, as per law, without the consent of the plaintiff, the defendant was not having any right to unilaterally appoint an Arbitrator. There being no other clause for appointment of Arbitrator as per Section 11(5) read with Section 10 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") an Arbitrator could only be appointed by Hon'ble Chief Justice of High Court. It was further pleaded that a reply notice was sent by the plaintiff/respondent on 05.02.2010. Both the notices were replied to the effect that there was no authority in law to unilaterally appoint an Arbitrator. There was no right to defendant no.1 to arbitrarily appoint Arbitrator, therefore, the prayers were made in the plaint for a declaration that the appointment of the Arbitrator was illegal and void and further seeking a restraint against



the conduct of any proceedings on the basis of such alleged illegal appointment.

4. The said suit was contested by defendant no.1 by filing Written Statement, in which he inter alia contended that Atul Gupta had no right to institute the suit. Atul Gupta and Yogeshwari Devi were necessary parties to the proceedings. The dispute was required to be resolved through arbitration under the provisions of the Act. In spite of notice, the plaintiff did not take action, therefore, the Arbitrator was appointed. It was also contended that the plaintiff had failed to perform his part of the contract, hence, notice was sent for recovery of Rs.1.06 crores. The plaintiff did not turn up in arbitration proceedings. The defendant no.1 cancelled the agreement dated 28.03.2008.

5. After the exchange of the pleadings, the following issues were framed-

- i. Whether the appointment of defendant no.2 by the defendant no.1 is against the provisions of the Act?*
- ii. Whether Akhilesh Kumar Tripathi has the authority to institute the suit on behalf of the plaintiff?*
- iii. Relief?*

6. Thereafter, the parties adduced their evidence. In support of his case, the plaintiff filed both documentary evidence as well as led oral evidence. However, neither any documentary evidence nor any oral evidence was adduced on behalf of the defendant no.1



and suit proceeded ex-parte against the defendant no.2 since as he never appeared before the court. While deciding the issue no.(i), the trial court came to the conclusion that since the defendant did not have any consent for appointment of Arbitrator but it appointed defendant no.2 as Arbitrator, hence it is against law and against the provisions of the Act, therefore, the appointment is illegal, void and against law. Issue no.(ii) was decided to the effect that Akhilesh Kumar Tripathi had the authority to institute the suit and he was authorized by the Company vide Paper No.39-C.

7. Thus, on the aforesaid premise, the suit was decreed by the trial court/District Judge, Haridwar vide judgment and order dated 09.07.2014 and it was declared that the appointment of the defendant no.2 as the alleged Arbitrator by the defendant no.1 was illegal, void and against law. The defendant no.2, Yogesh Anand does not get any authority for arbitral proceedings. The suit was also decreed for permanent injunction, whereby the defendants were restrained from any arbitral proceedings against the plaintiff on the basis of the appointment of defendant no.2 as the alleged Arbitrator.

8. Aggrieved against the judgment and order dated 09.07.2014, the present first appeal has been preferred.

9. In view of the above, the following point for determination arises in this appeal-

1. *Whether the defendant no.2 has been illegally appointed as an arbitrator by the defendant no.1 in pursuance to the*



agreement dated 28.03.2008 as amended on 29.07.2008?

10. Assailing the impugned judgment and order dated 09.07.2014 passed by the District Judge, Haridwar in O.S. No. 17 of 2010, *M/s Kirby Building Vs. M/s Sutluz Engineering Pvt. Ltd.*, learned counsel for the appellant would argue that the Act is silent on the unilateral appointment of an arbitrator. Section 14 of the Act has been invoked by the plaintiff, as the caption of the plaint itself refers to Section 14(2) of the Act. Once the jurisdiction under Section 14 of the Act has been invoked and the mandate of the arbitrator has been sought to be terminated, the Court is called upon to fill the vacancy, which has not been done in the present case. Hence, the order itself is bad.

11. He further submits that when an alternative remedy is available under Sections 12 and 13 of the Act, a civil suit would not be maintainable. Any appointment of an arbitrator can be challenged by resorting to the provisions of Section 16 of the Act, that too during the arbitral proceedings. The learned counsel would further submit that the plaintiff has confined its case to the unilateral appointment of the arbitrator and, thus, referring to paragraph 84(d) of the judgment of the Delhi High Court in *M/s Mahavir Prasad Gupta and Sons Vs. Govt. of NCT of Delhi*, he would submit that the stage for challenging the appointment of an arbitrator would arise only during the arbitral proceedings and not earlier. Paragraph 84(d) of the said judgment is extracted hereinbelow for ready reference.

“84.....



d) Stage of Challenge: An objection to the lack of inherent jurisdiction of an arbitrator can be taken at any stage during or after the arbitration proceedings including by a party who has appointed the sole or presiding arbitrator unilaterally as the act of appointment is not an express waiver of the ineligibility under proviso to Section 12(5) of the Act. Such objection can be taken even at stage of challenge to the award under Section 34 of the Act or during the enforcement proceedings under Section 36 of the Act.”

12. Learned counsel for the appellant would submit that, in the present case, the consent for the appointment of the arbitrator was sought. He would further submit that, in case the appeal is dismissed, it would be hit by the judgment of the Hon’ble Supreme Court in the case of *Swadesh Kumar Agarwal versus Dinesh Kumar Agarwal*, reported in (2022) 10 SCC 235, and would refer to paragraphs 20, 21, and 22 thereof, which are extracted hereunder for ready reference.

“20. Section 15 provides other grounds for termination of the mandate of the arbitrator. It provides that in addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate (a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties. Where the mandate of an arbitrator is terminated on the aforesaid grounds mentioned in Sections 15(1)(a) and (b) in such a situation a substitute arbitrator shall have to be appointed and that too, according to the rules that were applicable to the appointment of the arbitrator being replaced.



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.

22. So far as the termination of the mandate of the arbitrator and/or termination of the proceedings mentioned in other provisions like in Section 15(1)(a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties, the dispute need not be raised before the court concerned. For example, where the sole arbitrator himself withdraws from office for any reason or when both the parties agree to terminate the



mandate of the arbitrator and for substitution of the arbitrator, thereafter, there is no further controversy as either the sole arbitrator himself has withdrawn from office and/or the parties themselves have agreed to terminate the mandate of the arbitrator and to substitute the arbitrator. Thus, there is no question of raising such a dispute before the court. Therefore, the legislation has deliberately provided that the dispute with respect to the termination of the mandate of the arbitrator under Section 14(1)(a) alone will have to be raised before the “court”. Hence, whenever there is a dispute and/or controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/dispute has to be raised before the “court” concerned only and after the decision by the “court” concerned as defined under Section 2(1)(e) of the 1996 Act and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the rules that were applicable to the initial appointment of the arbitrator. Therefore, normally and generally, the same procedure is required to be followed which was followed at the time of appointment of the sole arbitrator whose mandate is terminated and/or who is replaced.”

13. Learned counsel for the appellant, while referring to the said judgment, would submit that in such an eventuality, there has to be a substitution of the arbitrator.

14. Per contra, learned counsel for the respondents, Mr. Nikhil Singhal, would submit that by



virtue of the notice dated 14.10.2009 issued by defendant No. 1, the agreement dated 28.03.2008 was itself terminated. Thereafter, defendant No. 1 proceeded to unilaterally appoint the arbitrator. The learned counsel for the plaintiff/respondent no.1 would submit that the agreement has to be followed in letter and spirit and not according to the whims and fancies of any party. The arbitration clause contained in the agreement dated 28.03.2008 has to be read in accordance with the provisions of the Act. The learned counsel for the respondents drew the attention of the Court to the reply dated 05.02.2010, whereby a response was made to the legal notice dated 14.10.2009. In the said reply dated 05.02.2010, it was specifically contended that -“my client further instructs me to state that they do not agree to the unilateral appointment of Mr. Yogesh Anand as the sole arbitrator and unilateral reference of the alleged disputes to arbitration. In the absence of my clients' concurrence to the appointment of such arbitrator, any such appointment and conducting of further arbitral proceedings shall be deemed to be null and void and not binding upon my client.” Thus, learned counsel for the respondents would further submit that immediately after the reply dated 05.02.2010, the plaintiff instituted the suit. It has further been submitted that, in the written statement, the defendants/appellants have admitted the agreement dated 28.03.2008 and the amended agreement dated 29.07.2008, and that the arbitration clause remains the same in both the said agreements. It is further submitted that defendant No. 1 has not adduced any oral or documentary evidence, and the case proceeded ex parte against defendant No. 2.



15. Learned counsel for the respondents would further submit that, regarding the appointment of defendant No. 2 as an arbitrator, there is nothing on record to show that the plaintiff had consented to the appointment of defendant No. 2 as an arbitrator. Learned counsel for the respondents also drew the attention of the Court to certain paragraphs of the impugned judgment and submitted that even during the arguments before the trial court, defendant No. 1 had admitted that an arbitrator could be appointed only with the consent of the parties, but in the absence of such consent, the appointment of an arbitrator had to be made in accordance with the procedure laid down under the Arbitration and Conciliation Act. Thus, learned counsel for the respondent would submit that the defendants/appellants would be estopped from raising all the arguments that are being advanced in the present appeal. Learned counsel for the respondent would also submit that the suit has been decreed in accordance with law and that there is no scope for interference in the present appeal.

16. In view of the rival submissions advanced by the learned counsel for the parties, the question that falls for determination by this Court is whether the District Judge committed any error in relation to the appointment of the arbitrator and in granting the reliefs sought in the plaint by declaring the appointment of defendant No. 2 as arbitrator by defendant No. 1 to be null and void.

17. For determination of the controversy raised by the respective parties before this Court, reference needs to be made to certain provisions of the Arbitration and



Conciliation Act, 1996. The relevant provisions are Sections 11(2), 11(3), 11(4), 11(5) and 11(6) of the Act. The said provisions are extracted hereinbelow for ready reference.

“11. (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

11. (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or



(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

18. Before examining the mechanism for the appointment of an arbitrator under Sections 11(2), 11(3), 11(4), 11(5), and 11(6) of the Arbitration and Conciliation Act, 1996, it would be apposite to refer to the arbitration clause contained in the agreement dated 28.03.2008, as amended by the agreement dated 29.07.2008. For ready reference, the arbitration clause is extracted hereunder.

“14. GOVERNING LAW:

This Agreement shall be construed and enforced in accordance with and under the laws of the Government of India. Both parties agree that in case of any difference or dispute arising between the SELLER and the BUYER will be resolved by mutual discussions and agreement. However, unresolved issues, if any, will be settled by arbitration as per the India Arbitration and Conciliation Act, and the venue of the arbitration will be Haridwar Uttranchal.”

19. In the present case, it is very clear that the parties had entered into an agreement dated 28.03.2008, which was subsequently amended on 29.07.2008. The agreement was for the supply of a prefabricated steel building system, and by virtue of the arbitration clause, the parties had agreed that their disputes would be settled through arbitration at Haridwar. It is clear from the record that disputes did arise between the parties.



However, defendant No. 1 unilaterally resorted to the appointment of defendant No. 2 as an arbitrator, while relying upon the agreement between the parties. The plaintiff, however, did not agree to the said unilateral appointment of defendant No. 2 as an arbitrator and, in fact, at the very outset, denied and disputed the said appointment. Vide reply dated 05.02.2010, the plaintiff categorically stated that it was not agreeable to the unilateral appointment of Mr. Yogesh Anand as the sole arbitrator and to the unilateral reference of the alleged disputes to arbitration. It was also specifically stated in the said reply dated 05.02.2010 that, in the absence of the plaintiff's concurrence to the appointment of such an arbitrator, such appointment and any further conduct of the arbitration proceedings would be deemed to be null and void.

20. Thereafter, the plaintiff instituted the suit seeking a declaration that the appointment of defendant No. 2 as an arbitrator by defendant No. 1 was null, void, and illegal. The plaintiff also sought a declaration that any further proceedings undertaken by defendant No. 2 pursuant to such appointment would be invalid and further sought a specific relief restraining defendant No. 2 from conducting the arbitration proceedings.

21. The trial court, after the exchange of pleadings, specifically framed an issue regarding the validity of the appointment of the arbitrator by defendant No. 1. After considering the entire record, the evidence, and the rival contentions raised by the parties, the trial court came to the conclusion that the appointment of defendant No. 2



as an arbitrator by defendant No. 1 was illegal, null, and void, and accordingly granted the reliefs sought.

22. Now, this Court is called upon to consider the rival submissions advanced by the learned counsel for the parties with regard to the impugned judgment.

23. On one hand, learned counsel for the appellant has submitted that the Act is silent regarding the unilateral appointment of an arbitrator and, once the plaintiff has invoked the provisions of Section 14 of the Act, there needs to be a substitution of the arbitrator since an arbitrator has already been appointed and the Court needs to fill the vacancy. It is also submitted that the suit would not be maintainable and that there is a challenge procedure provided under the Act itself, which ought to have been resorted to by the plaintiff instead of instituting the suit.

24. On the other hand, it is the case of the plaintiff that there could not have been a unilateral appointment of the arbitrator since there was an arbitration clause, which is admitted by defendant No. 1, and instead of resorting to the provisions of the Act, defendant No. 1 unilaterally appointed defendant No. 2 as the arbitrator, which is absolutely illegal. At no stage did the plaintiff consent to the appointment of the unilateral arbitrator.

25. Now, in the aforesaid background and since of the judgment of the Hon'ble Supreme Court in the case of Swadesh Kumar Agarwal and Dinesh Kumar Agarwal, the judgment of the Delhi High Court in the case of M/s Mahavir Prasad Gupta and Sons vs. Govt. of NCT of Delhi, are not attracted in the case and in view of the



provisions of Section 11(3), (4), (5) and (6) of the act, it is clear that the Arbitration and Conciliation Act does not provide for the unilateral appointment of an arbitrator by any party to the arbitration agreement. In fact, the entire mechanism for the appointment of an arbitrator is provided under Section 11(3), (4), (5) and (6) of the Act. Moreover, as a matter of fact, at the time of hearing before the District Judge, learned counsel for the defendant had admitted that an arbitrator can be appointed only with the consent of the parties and that, in the absence of such consent, one party cannot appoint an arbitrator unilaterally. It was further admitted that where there is a dispute regarding the appointment of an arbitrator, the jurisdiction for such appointment vests with the Hon'ble High Court.

26. Upon consideration of the entire facts and circumstances of the case, the provisions of the Act, and the arbitration clause, it is clear that the trial court has not committed any error in coming to the conclusion that the appointment of defendant No. 2 as arbitrator by defendant No. 1 is illegal and void and that defendant No. 2 does not have any authority to proceed on the basis of such illegal appointment. Thus, the point for determination is answered accordingly to the effect that the appointment of defendant No. 2 as an arbitrator by defendant No. 1 is contrary to the provisions of the Act and is, therefore, null, void and illegal, and defendant No. 2 cannot proceed as an arbitrator.

27. Thus, the judgment and order of the trial court does not suffer from any infirmity, and the present first appeal deserves to be dismissed. However, defendant no.



1/appellant shall be at liberty to seek recourse to such remedies as may be available under law.

28. The appeal is dismissed accordingly.

29. Let the original record be transmitted to the court concerned.

(Siddhartha Sah, J.)
01.06.2026

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