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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.1104 OF 2018

Jay Builders	...	Petitioner
V/s.		
Union of India	...	Respondent

Mr. Arthav Singhvi i/by Fraxis legal, for the Petitioner.
Dr. Sharma a/w Mr Gaurav Sharma, Mr. Sarang Pathak,
for respondent

CORAM : G. S. KULKARNI, J.

DATE : 20th MARCH, 2019.

P.C. :

1] Heard Mr. Arthav Singhvi learned counsel for the petitioner and Dr. Sharma, learned counsel for the respondents.

2] This petition is filed under Section 14 of the Arbitration and Conciliation Act, 1996 (for short, "ACA"), whereby the petitioner has prayed for the following reliefs :-

"a] that this Hon'ble Court may be pleased to confirm the termination of the mandate of the Arbitral Tribunal and appoint a sole arbitrator in the matter, not connected with either party and conversant with construction contracts, to decide the disputes

between the petitioner and the respondent due to non settlement and non payment of the petitioner's claims, more specifically listed in 20(f) (i) to (v) of this petition.

b] for such further and other reliefs as the facts and circumstances of the case may require

c] for costs of this petition"

3] The case of the petitioner is that a contract came to be awarded by the respondent to the petitioner for work of special repairs to watch towers, certain minor works and widening of PCC Paths at its Mahul site. The petitioner states that as per agreement, the stipulated date of completion of the work was 20.09.2005. However, the contract work was completed on or about 30th May, 2006. After a year from the date of completion of work that is in the year 2007, the petitioner addressed a letter to the respondent demanding various amounts which according to petitioner, became payable by the respondent under the said contract. The petitioner says that the respondent neglected to make the payments. The petitioner accordingly on 24th October, 2007, invoked the arbitration agreement and requested the respondent to appoint an arbitrator to adjudicate the disputes. Pursuant to this invocation of the arbitration agreement, an arbitral tribunal was constituted by the respondent on 10.12.2017, as per arbitration clause being clause No.70 of the General Terms and conditions. Clause No.70 reads as under:-

"70 The Arbitration:- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding), shall after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an (Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub Division II of Institution of Surveyor (India) recognized by the Government of India), to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the contract under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos.52, 53 or 54 hereof, such reference shall not take place until alternative arrangement have been finalised by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always, that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues, notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and published the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his

findings, along with sums awarded, separately on each individual, item of dispute. The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims.

(emphasis supplied)

4] Initially respondent appointed Mr. Col. H.S. Mann, as the sole arbitrator. Subsequently respondent, some time in the year 2009, replaced Mr. Mann, by appointing a substitute arbitrator Mr. R.D. Gupta. The case of the petitioner is that thereafter Mr. Sanjay Ekbote came to be appointed on 3rd October, 2009, as Mr. Ekbote resigned and Mr. K. N. Adholekar, was appointed as sole Arbitrator on 25.04.2011. Thereafter on 4.10.2011, Mr. K.L. Adholekar also resigned and accordingly on 26.10.2011, Mr. R.D. Kurdiya was appointed as a substitute arbitrator. Further Mr. Kurdiya resigned on 28th August, 2013 and Mr. S.C. Goyal was appointed as substitute arbitrator on 28.8.2013. Thereafter Mr. S.C. Goyal, by a communication dated 27.3.2018, resigned and now Mr. Gyanendra Singh, a sitting Officer of respondent was appointed as substitute arbitrator on 03.04.2018. The petitioner says that Mr. Gyanendra Singh also has refused to proceed with the arbitral proceedings. Accordingly, in May, 2018 this petition came to be filed.

5] On this backdrop, learned counsel for the petitioner submits that the whole efficacy of the arbitral proceeding stand completely

obliterated considering the manner in which the arbitrators resigned and the substituted arbitrators were appointed. It is submitted that the respondent also arbitrarily proceeded utilizing their contractual position to appoint arbitrators under the arbitration agreement. In this situation, the petitioner wants this Court to exercise jurisdiction under Section 14 of ACA and appoint an independent arbitrator, who would effectively and expeditiously adjudicate the disputes as per the Arbitration and Conciliation Act and complete the arbitral proceedings. Learned counsel for the petitioner would submit that the provisions of the Amending Act would be applicable. It is submitted that the respondent would not have any right to appoint its officer. It is submitted that the arbitration clause has become unworkable by virtue of the Arbitration Amendment Act. It is, thus, submitted that the Court, therefore, should appoint an independent arbitrator.

6] On the other hand learned counsel for the respondent has drawn the attention of this Court to the arbitration agreement. It is submitted that the arbitration agreement authorises the respondent to appoint an arbitrator and the petitioner cannot have any grievance on such successive resignations of the arbitrators and the substituted appointments so made by the respondent. It is submitted that the petitioner participated in the arbitral proceedings. Learned counsel for the respondent submits that

the respondent has acted as per the arbitration agreement and the procedure. It is submitted that as on date, the stage of the arbitral proceeding is that oral arguments are remaining and Shri.Gyanendra Singh, learned sole arbitrator so appointed will hear oral arguments and complete the proceedings within a period of three months from today. It is submitted that the petitioner all these years, was not averse for appointment of the substitute arbitrators.

7] Having heard learned counsel for the parties and having perused the record. It is quite true that the arbitration which the parties agreed was to conclude within six months as agreed in the last paragraph of the arbitration agreement stands obliterated by the successive arbitrators not completing the arbitration proceeding. Several arbitrators came to be appointed and substituted for some reason or the other which would not normally happen. Definitely the efficacy of the arbitral proceedings as contended by learned counsel for the petitioner was adversely affected.

8] However, the Court cannot be oblivious to the arbitral agreement between the parties wherein the respondent is authorized to appoint as arbitrator and/or a substitute arbitrator. Moreover, when several such substitute arbitrators came to be appointed, the petitioner

nevertheless participated in the arbitral proceedings. Now the stage of arbitral proceeding is that oral arguments remain to be advanced on behalf of the parties. Substitute arbitrator Mr. Gyanendra Singh has already been appointed on 3rd April, 2018 and thereafter the petitioners have moved this Court and the partitioner is remained pending.

9] The facts of the case clearly indicate that the commencement of the arbitral proceeding is much prior to the Arbitration Amending Act (Act No.3 of 2015 w.e.f. 23rd October, 2015, was brought into force. Thus, the provisions of the amending act would not be applicable to the arbitral proceedings which were pending on the date of Amending Act, was brought into force. In this regard the law is no more res-integra. In **SP Singla Constructions Pvt. Ltd.-vs- State of Himachal Pradesh and ors**¹ the Supreme Court, considering the arbitration amendment Act, has held that the amendment act shall not apply to arbitral proceedings which had commenced prior to the amendment act, as the provisions of Section 21 of the Principal Act, and section 26 of the Amending Act would provide. In the said case, court was concerned with an arbitration agreement which authorises the respondent therein to appoint serving Officer Superintending Engineer as an arbitrator to adjudicate the dispute between the parties. The

1 (2019) 2 SCC 488

invocation of the arbitral agreement in the said case was dated 30.2.2013, which was prior to the commencement of the Amendment Act. The Supreme Court, in paragraph Nos. 15 and 16 observed thus :-

"15. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the Appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the Amended Act cannot be invoked.

16. In Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors. M (2018) 6 SCC 287, this Court has held that the provisions of Amendment Act, 2015 (with effect from 23.10.2015) cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree and held as under:

37. What will be noticed, so far as the first part is concerned, which states--

26. Act not to apply to pending arbitral proceedings.-- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree....

is that: (1) "the arbitral proceedings" and their

commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

10] In a recent judgment of the Supreme Court, in **Rajasthan Small Industries Corporation Limited -vs- M/s Ganesh Containers Movers Syndicate²**, the facts of which are quite similar to the facts in hand. The appellant therein was aggrieved by the order passed by the High Court appointing a substitute arbitrator in view of the delay in the appointment as caused by the appellant therein. The Court considering that the arbitral proceedings had commenced prior to the Amendment Act, in paragraph Nos. 29, 30, 31, 33 and 34 held that :-

"29. In support of his contention, the learned Counsel for the Respondent relied upon the decision in *Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited* (2015) 2 SCC 52. Learned Counsel for the Respondent contended that the arbitrator failed to conclude the proceedings even after four years and the High Court rightly appointed the substitute arbitrator departing from the arbitration Clause in the agreement between the parties. In the said case, since the Arbitral Tribunal did not pass award in spite of expiry of four years, the Respondent thereon filed Request Case No. 10/2010 and the High Court passed order dated 09.03.2011 giving the last chance to the Arbitral Tribunal to complete the arbitral proceedings within a period of three months. In para (6) of

the judgment, this Court pointed out that the High Court took note of the various dates and hearings that are fixed by the Tribunal between 25.03.2011 and 25.06.2011 and came to the conclusion that the delay caused in the arbitral proceedings was intentional. After referring to *Union of India v. Singh Builders Syndicate* (2009) 4 SCC 523 and other judgments, this Court observed that the delays and frequent changes in the Arbitral Tribunal defeat the process of arbitration and therefore, the appointment of the arbitrator by the court of its own choice departing from the arbitration Clause has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Having regard to the facts of the said case, observing that the delay in arbitral proceedings was intentional, in para (6) of *Uttar Pradesh State Bridge Corporation Limited*, it was held as under:

6. The High Court took note of the various dates of hearings that are fixed by the Tribunal between 25-3-2011 and 25-6-2011 and came to the conclusion that delay caused in the arbitral proceedings was intentional. So much so, the members of the Arbitral Tribunal were continuing their dilatory tactics in deciding the matter before it since 2007 and four years had passed in the process. The Tribunal had faltered even after giving specific directions to conclude the matter within three months and long adjournments were granted thereby violating the specific directions of the High Court. Terming this attitude of the members of the Tribunal as negligent on their part towards their duties with no sanctity for any law or for the orders of the High Court, the High Court allowed the petition of the Respondent herein and set aside the mandate of the Tribunal with the appointment of sole arbitrator by the Court itself.

30. Having regard to the factual matrix of the present case, in our considered view, the ratio of the said decision cannot be applied to the case in hand. Per contra, in the present case, the proceedings of the arbitral tribunal continued till 17.08.2011. From the proceeding of the arbitral tribunal dated 17.08.2011, it is seen that the "*arbitrator observed that the file regarding arbitration appears tampered/missing papers are incomplete and therefore, the chronological events need to be ascertained and reconstitution will be required.*" It is in this background, the award was not passed till

2013. It is true that there was some delay in passing the award. However, between 2011 and 2013, the Respondent has not filed any application to expedite the proceedings and for passing of the award. The Respondent has neither filed the Request Case for passing of the award at an early date nor filed the petition Under Section 14 of the Act for termination of the mandate of the arbitrator that the arbitrator has 'failed to act without undue delay'.

31. Mere neglect of an arbitrator to act or delay in passing the award by itself cannot be the ground to appoint another arbitrator in deviation from the terms agreed to by the parties. We may usefully refer to RUSSELL ON ARBITRATION, 20th Edition which reads as under:

"Mere neglect of an arbitrator to act, as distinct from refusal or incapacity, does not of itself give the court power to appoint another arbitrator in his place. It does, however, give the court power to remove him, whereupon there is a power to replace him.*

*[RUSSELL ON ARBITRATION, 20th Edition, Pg. 136 quoted in Law relating to Arbitration and Conciliation, 9th Edition, by Dr. P.C. Markanda at Pg. 620]

33. After analysis of the scheme of Sections 11, 14 and 15, in *S.B.P. and Company v. Patel Engineering Limited and Anr.* (2009) 10 SCC 293, this Court held that the legislature has repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of appointment of arbitrators and procedure to be followed for such appointment. In para (31), it was held as under:-

"31. ...Even Section 15(2), which regulates appointment of a substitute arbitrator, requires that such an appointment shall be made according to the Rules which were applicable to the appointment of an original arbitrator. The term "rules" used in this Sub-section is not confined to statutory Rules or the Rules framed by the competent authority in exercise of the power of delegated legislation but also includes the terms of agreement entered into between the parties".

34. In *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Anr.* (2006) 6 SCC 204, the Supreme Court was called upon to examine the scope of Section 15 of the Act in the backdrop of the fact that after resignation of the arbitrator appointed by the Managing Director of the Respondent company, another arbitrator was appointed by him in accordance with the arbitration agreement. At that stage, the Petitioner thereon filed an application Under Section 11(5) read with Section 15(2) of the Act praying for appointment of a substitute arbitrator to resolve the disputes between the parties. The said application was dismissed by the Chief Justice holding that Section 15(2) refers not only to the statutory Rules framed for regulating the appointment of arbitrators but also to contractual provisions for such appointment upholding the view taken by the Chief Justice. In para (4), it was held as under:

"4. ...The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1) (a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the Rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the Rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any Rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice Under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the Rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory Rule or Rule framed under the Act or under the scheme. It only means that

the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage...." [Underlining added]

As held in Yashwith Constructions, Section 11(6) of the Act would come into play only when there was failure on the part of the party concerned to appoint an arbitrator in terms of the arbitration agreement. In the case in hand, the High Court, in our view, was not right in appointing an independent arbitrator without keeping in view the terms of the agreement between the parties and therefore, the impugned order appointing an independent arbitrator/retired District Judge is not sustainable. (emphasis supplied)

11] In view of above clear position of law, the present petition cannot be entertained. It is accordingly rejected. No costs.

12] Learned counsel for respondent at this stage makes a statement that the substitute sole arbitrator as appointed shall hear the parties as expeditiously as possible and publish an award within a period of three months from today. The statement is accepted.

13] The parties shall co-operate with each other to enable the learned sole arbitrator to conclude the proceedings.

[G. S. KULKARNI, J]