

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Arbitration Application No.75 of 2016

J.B. Construction Company Through Its Partner Jaspal Sethi, Son of Late Shri G.S. Sethi, Aged About 60 Years, Office at Hotel Jay Bee Inn, Telephone Exchange Road, Police Station Taarbahar, Tehsil and District Bilaspur, Chhattisgarh.

---Applicant(s)

Versus

1. The South Eastern Central Railway Through General Manager, 5th Floor, C-Block, Bilaspur, District Bilaspur, Chhattisgarh.
2. The Deputy Chief Engineer, South Eastern Central Railway, Chindwara M.P.

---Respondents

For Applicant	:	Ms. Soumya Sharma, Advocate.
For Respondents	:	Shri H.S. Ahluwalia, Advocate.

Hon'ble Shri Justice P. Sam Koshy

ORDER

Reserved on 06.02.2020

Delivered on 12.02.2020

1. The present is an Arbitration Application under Sections 14 and 15 read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, the Act, 1996).
2. The applicant, who is basically a contractor, was awarded with a contract for supply and stacking of machine crushed, stone, ballast in Cess and in depot between CWA and KLOD. Based upon the contract which was awarded, an agreement was executed between the applicant and the respondents on 29.10.2010. The contract value was Rs.5,09,87,359.50/-and the stipulated period of work was 18 months inclusive of rainy season.
3. During the course of execution of contract, some dispute arose between the parties. It is said that initially the applicant invoking

Section 53 of the Indian Contract Act terminated the contract with a request to the respondents to release the security deposit and bank guarantees and also for release of the payment for the supply made to the respondents. Subsequently, it is said that the respondents issued a 7 days notice on 19.11.2013 for completion of work order and again 48 hours notice on 05.12.2013 and finally terminated the contract on 11.12.2013 forfeiting the security deposit and performance guarantee.

4. That, subsequently the respondents management-SECR constituted an Arbitral Tribunal on 28.03.2014 and the arbitration proceeding also commenced. The applicant herein submitted their statement of claim on 20.05.2014. Thereafter, because of some reasons or the other, the arbitral proceeding could not hold effective hearing and the matter kept on getting postponed. In between many of the Presiding arbitrator or the members of the arbitration Tribunal got retired or transferred and subsequently fresh Presiding arbitrator and the members to the Arbitration Tribunal were being appointed. Since considerable delay took place for the arbitration proceeding to effectively proceed and conclude, the applicant has filed this present application under Sections 14 and 15 read with Section 11(6) of the Act, 1996 for appointment of Arbitrator by the High Court.
5. The ground for making said request was purely on the ground that the arbitral Tribunal appointed by the respondents have not been able to give effective results within the reasonable period and in due course of time substantial period has lapsed. The second ground is

that, the Presiding Arbitrator and the members to the Arbitration Tribunal being all officers of the respondent-establishment, there is a great element of bias and therefore an Arbitrator be appointed now by the High Court.

6. The respondents have raised a legal objection to the maintainability of the application before this High Court so far as the prayer for termination of mandate is concerned.
7. Before dealing further on the merits of the case, this court thought it fit to first answer the objection that the respondents have raised as to, “whether the High Court of Chhattisgarh has the power to terminate the mandate of the Arbitrator and thereafter appoint a fresh Arbitrator”.
8. The objection of the applicant primarily is on the ground that the High Court of Chhattisgarh under Sections 14 and 15 of the Act, 1996 does not have the power to terminate the mandate and substitute by appointment of a fresh arbitrator.
9. The counsel for the applicant referred to recent decision of the Bombay High Court in case of ITD Cementation India Ltd. Vs. Konkan Railway Corporation Ltd., 2019 SCC Online Bom 5349, in Aerocomfort Anushka JV Vs. Northern Railway & Another, 2017SCC Online Del, 12737, so also Proddatur Cable TV Digi Servies Vs. Siti Cable Network Limited, 2020 SCC Online Del 350, connecting the objection of maintainability and submitted that it is well within the power of the High Court to terminate the mandate and substitute them by appointment of a fresh Arbitrator.

10.It would be relevant at this juncture to refer to the provisions of Sections 14 and 15 of the Act, 1996, which for ready reference is being reproduced hereinunder:

“14. Failure or impossibility to act (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

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(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.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of Mandate and Substitution of arbitrator- (1) 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 agreement of the parties.

(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.

(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.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

11. A Court under the Act, 1996 stands defined under Section 2(1)(e)

which again for ready reference is being reproduced hereinunder:

“2(1)(e). "Court" means—(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;

(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.”

12. A plain reading of the aforesaid definition of Court clearly reflects that for all practical purposes for the proceeding under the Act, 1996, the word “Court” means the Principal Civil Court of original jurisdiction in a district. Ofcourse, the definition also includes the High Courts in certain cases. The High Courts which would have the power to exercise the power of Court as defined under the Act, 1996, would be all those High Courts which exercise ordinary original civil

jurisdiction to decide the dispute between the parties, if the same had been subject matter of a suit.

- 13.** The expression used in the said definition of “High Courts having original civil jurisdiction” clearly excludes all those High Courts which does not have original civil jurisdiction. As regards the High Court of Chhattisgarh, the same has been established as per Section 21 of the Madhya Pradesh Reorganization Act, 2000. Admittedly, the High Court of Chhattisgarh does not have the jurisdiction of “Ordinary Civil Court”.
- 14.** In view of the fact that this Court does not have ordinary original civil jurisdiction, this High Court automatically gets excluded from the definition of Court as defined under Section 2(1)(e) of the Act, 1996.
- 15.** The Supreme Court in case of Lalitkumar Ve. Sanghvi (dead) through LRS Neeta Lalit Kumar Sanghvi and Another, 2014(7)SCC255, on a similar issue in paragraphs 11 to 17 has held as under :

“11. Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court - “to decide on the termination of the mandate.”

14. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal

also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court “as provided under Section 14(2)”.

15. The expression “Court” is a defined expression under Section 2(1)(e) which reads as follows

“Section 2(1)(e) “Court” means 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.”

16. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law.

17. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order dated 29th October, 2007 by which the arbitral proceedings were terminated.”

16. Similar view was also taken by the Supreme Court on an earlier occasion in case of Nimet Resources INC and Another Vs. Essar Steels Ltd., 2007(8)SCALE, wherein again on an issue arising out of Section 14 of the Act, 1996, in paragraphs 7 to 11 it has been held as under:

“7.Sub-Section (2) of Section 14 of the 1996 Act reads as under :-

“Section 14(2) If a controversy remains concerning any of the grounds referred to in clause (a) of subsection (1), a party may, unless otherwise agreed by the

parties, apply to the court to decide on the termination of the mandate.”

8. Application in terms of sub-Section (2) of Section 14, thus, lies before a 'Court' within the meaning of the 1996 Act.

9. It is only thus the 'Court' , within the meaning of the provisions of the said Act which can entertain such an application raised by the parties herein and determine the dispute therein on merit.

10. Unlike the 1940 Act, "Court" has been defined in Section 2(1) (e) to mean;

“2(1)(e) Court means 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”

11. As a “Court” has been defined in 1996 Act itself, an application under Section 14(2) would be maintainable only before the Principal Civil Court which may include a High Court having jurisdiction but not this Court.”

17. Relying upon the aforesaid two judgments of the Supreme Court, this High Court also on a similar issue in Arbitration Appeal No.80 of 2016 in case of Rahul Somani & Others Vs. Ramgopal Somani & Others, wherein this court in its judgment dated 06.01.2017 has reached to the conclusion that so far as the termination of mandate is concerned, it would lie only before the Principal Civil Court of original jurisdiction and with only those High Courts which exercise ordinary original civil jurisdiction. In the said case, in paragraphs 12 and 17 to 20 held as under :

“12. A conjoint reading of the provisions contained in Section 14(2) and Section 2(1) (e) (i) of the Act, 1996, would manifest

that a prayer for termination of mandate would lie before the Principal Civil Court of original jurisdiction or with the High Court where the High Court is exercising ordinary original civil jurisdiction.”

XXX

XXX

XXX

17. In the present case, learned counsel for the applicant has raised another ground to press his application before this Court on submission that the present is a joint application for termination of mandate as well as for appointment of new Arbitrator, therefore, for the remaining part of the prayer, the application is maintainable.

18. I am not impressed with the arguments advanced by learned counsel for the applicant, because, as long as an Arbitrator is functioning under the deed of joint consent for appointment of Arbitrator and is seized of the matter, a second application for appointment of fresh Arbitrator is not maintainable unless the mandate of the earlier appointed Arbitrator is terminated in accordance with Section 14 of the Act, 1996.

19. I am not commenting on the jurisdiction of this Court under Section 11(6) of the Act, 1996, once the mandate is terminated, but for the present, this Court has no jurisdiction to entertain an application for appointment of fresh Arbitrator.

20. For the foregoing, the application is dismissed, as not maintainable. However, the applicant would be at liberty to approach the principal Civil Court of original jurisdiction seeking prayer to terminate the mandate of the Arbitrator.”

18. So far as judgments which have been relied upon by the applicant is concerned, those are judgments rendered by the High Courts of Bombay as well as Delhi and both these High Courts do exercise the ordinary original civil jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of a suit. The judgments passed by the aforesaid two High Courts

therefore cannot be relied upon or would not be applicable so far as High Court of Chhattisgarh is concerned since it does not have the ordinary original civil jurisdiction. Thus, the aforesaid judgments relied upon by the applicant is distinguishable on its facts alone.

19. In view of all the aforesaid reasons mentioned in the preceding paragraphs, the present application deserves to be and is accordingly rejected reserving the right and opportunity of the applicant to approach the concerned Principal Civil Court having original jurisdiction for the relief of termination of the mandate of the Arbitrator and thereafter to approach this High Court under Section 11(6) of the Act, 1996 for appointment of a fresh Arbitrator.

Sd/-
(P. Sam Koshy)
Judge

inder