

ORDER SHEET

AP/558/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

EAST INDIA MINERALS LIMITED
VS.
THE ORISSA MINERALS DEVELOPMENT COMPANY LIMITED AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 1st September, 2023.

Appearance:

Mr. Jishnu Chowdhury, Adv.

Mr. Souradeep Banerjee, Adv.

Ms. S. Sinha, Adv.

...for the petitioner

Mr. Swarup Banerjee, Adv.

Mr. H. C. Yadav, Adv.

...for the respondent no.1

The Court:-This is an application under Section 15 of the 1996 Act for appointment of the respondents' nominee Arbitrator in terms of an Agreement dated 4th October, 1993.

The undisputed case is that there is already an Arbitral Tribunal in place consisting of two nominee Arbitrators and one presiding Arbitrator. The Tribunal was constituted on 11th June, 2023 pursuant to an order passed by a co-ordinate Bench on 19th May, 2023. The respondents' nominee Arbitrator, however, expressed his inability to continue with the matter on the ground of ill

health and communicated his decision to retire from the arbitration by way of a letter dated 19th June, 2023.

Learned counsel appearing for the petitioner submits that the petitioner wrote to the respondents to nominate their Arbitrator after the letter of the erstwhile Arbitrator of 19th June, 2023 but the respondents failed to do so and only took steps to nominate their Arbitrator after filing of the present application. The respondents' nominated their Arbitrator on 29th August, 2023 whereas the present application was filed on 18th August, 2023.

The only question before the Court is whether the respondents' nomination stands relinquished in favour of the Court's nomination after filing of the application.

In *Datar Swithchgears Ltd. vs. Tata Finance Ltd.* 2000 (8) SCC 151 the Supreme Court held that the right to appoint an Arbitrator within thirty days from the letter of demand under Sections 11(5) and (6), the right is not forfeited but continues until the other party files an application for appointment of an Arbitrator under Section 11 of the 1996 Act.

Although the present application is under Section 15 of the 1996 Act, viz. termination of mandate and substitution of Arbitrator, sub-section (2) of Section 15 assumes importance. Section 15(2) provides that 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. It is arguable whether the parties will be relegated to the Section 11 position on the respondents failing to appoint their nominee Arbitrator before filing of the present application: hence, *Srei Equipment*

Finance Limited vs. Seirra Infraventure Private Limited 2023 SCC OnLine Cal 2030. The decision in *Srei Equipment* was based on a different fact-scenario where the Arbitrators appointed by a co-ordinate Bench were rendered *de jure/de facto* ineligible to perform their functions and the Court steps in to nominate Arbitrators in place and stead of the erstwhile Arbitrators.

However, if the principle laid down by the Supreme Court in *Datar Swithchgears* is followed together with the statutory framework of the 1996 Act, it would be clear that party autonomy continues until the parties come to Court for appointment of an Arbitrator. Once an application is made, the Court steps in to take over the right of appointment.

Learned counsel appearing for the respondents does not oppose to the appointment of their nominee Arbitrator by the Court but argues that the decisions relied on by counsel appearing for the petitioner may not be applicable to the present case.

AP/558/2023 is, accordingly, allowed and disposed of by appointing Mr. Samir Talukdar, Counsel to act as the nominee Arbitrator of the respondents on the same terms and conditions as the erstwhile Arbitrator. There shall be no interruption in the proceedings as mandated under Section 15 of the 1996 Act.

(MOUSHUMI BHATTACHARYA, J.)