

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISC. CIVIL APPLICATION NO. 342/2022

<u>APPLICANT</u>	M/s. Strongwell Construction Company, a Partnership Firm, having its office at 23, NMV Colony, Byramji Town, Nagpur, Tahsil and District Nagpur, through its Partner Mr. Gopaldutt son of Mangaldutt Sharma, aged 76 years, Occupation Business, R/o. 23, N.M.V. Layout, Byramji Town, Nagpur.
<u>...Versus...</u>	
<u>NON-APPLICANTS</u>	1. Maharashtra State Seeds Corporation Ltd., (State of Maharashtra Undertaking), Plot No.8, Shastri Nagar, Akola-444001 Through its Chairman-cum-Managing Director. 2. Maharashtra State Seeds Corporation Ltd., 'Mahabij' Bhawan, Krushi Nagar, Akola-444104. Through its General Manager (Processing & Engineering) 3. Maharashtra State Seeds Corporation Ltd., 'Mahabij' Bhawan, Krushi Nagar, Akola-444 104, Through its Executive Engineer, 4. The Secretary, Government of Maharashtra, Department of Agriculture, Animal Husbandry, Dairy Development, Mantralaya Annexe, Mumbai 400 032.

Mr. N.G.Moharir, Advocate for applicant
Mr. J.B.Kasat, Advocate for non-applicant no.2
Ms. T.H.Khan, AGP for non-applicant no.4

CORAM : AVINASH G. GHAROTE, J.

Judgment reserved on : 10/03/2023

Judgment pronounced on : 31/03/2023

1] Heard Mr. N.G. Moharir, learned counsel for the applicant, Mr. J.B. Kasat, learned counsel for the non-applicant no.2 and Ms T.H. Khan, learned Assistant Government Pleader for the non-applicant no.4. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties.

2] The application is under Section 11(6) of the Arbitration and Conciliation Act,1996 (for short, “the A & C Act”, hereinafter) for appointment of an Arbitrator. In the instant matter, the following position is material.

Sr.No	Date	Event
1.	30/07/1999	In exercise of the power under Section 11(6) of the A & C Act, in MCA (Arb.) No.10/1999, an Arbitrator was appointed by this Court, who was Shri K.G. Khadse, Architect, Akola.
2.	17/11/1999	The above order dated 30.7.1999 was challenged before the Hon’ble Apex Court in

		Petition for Special Leave to Appeal (Civil) No. 15961-15962/1999 by the present respondents, which was dismissed.
3.	01/08/2001	Writ Petition No.72/2000 filed by the present non-applicants challenging the appointment of Shri K.G.Khadse, was disposed of and Secretary, Department of Agriculture and Dairy Development, State of Maharashtra, was appointed as an Arbitrator.
4.	24/07/2007	Award passed by Arbitrator, Shri N.B.Patil.
5.	20/09/2019	Challenge to the Award dated 24.7.2007 under Section 34 of the A & C Act in Civil M.A. No. 163/2007 was allowed by the District Judge, Akola and the Award dated 24.7.2007 was set aside and the matter was remitted back to the Arbitrator, who had since then superannuated.
6.		Appeal under Section 37 of the A & C Act was filed before this Court, in which the challenge was restricted to the order of remand by the Principal District Judge vide order dated 20/09/2019.
7.	07/04/2022	Arbitration Appeal No.9 of 2020 was allowed by setting aside the order of remand and the parties were left to pursue their remedy in

		accordance with law.
8.	21/11/2022	SLP (C)-Diary No. 29281/22 filed by the non-applicants was dismissed as withdrawn.
9.	25/04/2022	Notice for appointment of Arbitrator was issued by the applicant to the non-applicants.
10.	25/05/2022	Reply was given by non-applicants repudiating the claim.
11.	20/06/2022	Present application under Section 11(6) of the A & C Act has been filed for appointment of an independent Arbitrator.

3] Mr. N.G. Moharir, learned counsel for the applicant submits that in view of the judgment dated 7.4.2022 in Arbitration Appeal No.9/2020, which is confirmed by the dismissal of the special leave petition, there is a need to appoint an independent Arbitrator, in view of Section 12(5) read with Schedule VII of the A & C Act. In support of it, reliance is placed upon *Ellora Paper Mills Limited Vs. State of Madhya Pradesh, (2022) 3 SCC 1; TRF Ltd Vs. Energo Engineering Projects Ltd., AIR 2017 SC 3889; Jaipur Zila*

Dugdh Utpadak Sahkari Sangh Limited and others Vs. Ajay Sales and Suppliers, 2021 SCC Online SC 730.

4] Mr. Kasat, learned counsel for the non-applicant no.2 opposes the submission and contends that the amendment to the A & C Act in 2015 would not be applicable in the instant matter, as the amendment to Section 12(5), which has come into force w.e.f. 23.10.2015, would be prospective in effect in light of Section 26 of the Arbitration and Conciliation (Amendment) Act No.3 of 2016. He further relies upon ***Rajasthan Small Industries Corporation Limited Vs. Ganesh Containers Movers Syndicate, (2019) 3 SCC 282*** and ***State of West Bengal Vs. Amritlal Chatterjee, (2003) 10 SCC 572.***

5] ***Ellora Paper Mills*** (supra) was a case in which though in terms of the agreement between the parties, the Arbitral Tribunal i.e. the Stationery Purchase Committee comprising of the officers of respondent was constituted in the year 2001, no steps, however, were taken and no proceedings, in fact, were commenced, in light of which, it was held that technically it cannot be said that the arbitration proceedings by the Tribunal had commenced and therefore, since an application was filed before the High Court under

Section 14 read with Sections 11 & 15 of the A & C Act, seeking termination of the mandate of the originally constituted Arbitral Tribunal and for appointment of new Arbitrator, it was held that in such circumstances that is in absence of commencement of the proceedings, the provisions of Section 11 of the A & C Act could be invoked with the assistance of Section 12 (5) of the A & C Act, as it stood amended w.e.f. 23.10.2015 and therefore, a fresh Arbitrator was required to be appointed.

5.1. *Ellora Paper Mills* (supra) relies upon *Jaipur Zila Dugdh Utpadak Sahakari Sangh Limited* (supra) and also takes into consideration *TRF Ltd.* (supra).

5.2. In *Jaipur Zila Dugdh Utpatak Sahakari Sangh Limited* (supra) the Hon'ble Apex Court was considering a position where though the agreement in question containing the arbitration clause was dated 31.03.2015, a grievance/dispute was raised by the respondent vide a representation dated 22.08.2018, the respondent was advised to raise dispute before the sole Arbitrator/Chairman of the Sangh. The respondent approached the sole Arbitrator on 19.10.2019, for settlement of the commercial dispute between the

parties, during the pendency of which. an application under Section 11(6) of the A & C Act, was filed by the respondent before the High Court for appointment of an Arbitrator. It is this contextual background that the appointment of the Arbitrator was opposed contending that since the agreement dated 31.03.2015, was prior to the amendment of 2015, which was w.e.f. 23.10.2015, Section 12(5) of the A & C Act, would not be attracted, which contention was refuting holding that since the Managing Director of the Sangh had become ineligible on account of the applicability of Section 12(5) read with Schedule VII of the A & C Act, it was inconceivable in law that the person who is statutorily ineligible can nominate a person.

5.3. In **TRF Ltd.** (supra), the purchase order was dated 10.05.2014, and the arbitration was invoked by the letter dated 28.12.2015, in terms of Clause 33 of the General Terms and Conditions, which was denied by the respondent and eventually by letter dated 27.01.2016, a former Judge of the Hon'ble Supreme Court was nominated as an Arbitrator. After this appointment, the appellant had preferred an application under Section 11(6) of the A & C Act contending that after the Amendment Act No.3 of 2016, the Managing Director of the respondent having become ineligible to act

as an Arbitrator, under Section 12 (5) read with Schedule VII of the Amended A & C Act, had no power to nominate, which has been upheld.

5.4. It would thus be apparent that neither in *Jaipur Zila Dugdh Utpatak Sahkari Sangh Ltd.*; nor in *TRF Ltd.* (supra), the applicability of the Amending Act No.3 of 2016, whereby Section 12 (5) and Schedule VII were introduced in the A & C Act, to proceedings in which arbitration had already commenced, prior to the coming into force of the Amendment Act No.3 of 2016 was under consideration, as in both these matters, though the agreement between the parties containing the arbitration clause was prior to 23.10.2015, the arbitration proceedings had not commenced altogether on the relevant date when the Amendment Act No.3 of 2016 came into force i.e. on 23.10.2015. In *Ellora Paper Mills* (supra) though the agreement containing the arbitration clause was prior to 23.10.2015 and the Arbitrator had already been appointed, on the premise that no steps whatsoever had been taken further it was held that the arbitration proceedings had not commenced at all.

6] Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 [No.3 of 2016], has a great relevance to the

controversy in the present matter. For the sake of ready reference Section 26 of the Arbitration & Conciliation (Amendment) Act, 2015 [No.3 of 2016], is reproduced as under :

“26. 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 but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

6.1. The provisions of Section 26 of the Amendment Act No.3 of 2016, fell for consideration of the Hon’ble Apex Court, in ***Board of Control For Cricket In India Vs. Kochi Cricket Private Limited and others, (2018) 6 SCC 287***, wherein while considering the meaning, effect and applicability of the same, it was held as under :

“36. All the learned counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word “but”, which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression “but” means only that there is an emphatic repetition of the first part of Section 26 in

the second part of the said section. For this, he relied upon Concise Oxford Dictionary on Current English, which states:

“introducing emphatic repetition; definitely (wanted to see nobody, but nobody).”

Quite obviously, the context of the word “but” in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

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.

38.*That the expression “the arbitral proceedings” refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*

“Conduct of arbitral proceedings”

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression “to” as contrasted with the expression “in relation to” making this

*clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may “otherwise agree” and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. [Section 29-A of the Amend (sic Amended) Act provides for time-limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26) “26.... (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.” It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (sic Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable “in relation to” arbitral proceedings which commenced on*

or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings “in relation to” arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words “in relation to the arbitral proceedings” in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. *Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force.*

BCCI (supra) also goes on to hold that Section 36 as substituted by the Amendment Act No.3 of 2016, would apply to Section 34 petitions which have been filed before the commencement of the Amendment Act, on the ground that execution of a decree pertains to the realm of procedure, and there is no substantive vested right in a judgment-debtor to resist execution. We are however not concerned with this proposition in the instant matter.

6.2. *Rajasthan Small Industries Corporation Limited* (supra), was a case in which the agreement was dated 28.01.2000, and on account of a dispute having arisen, one I.C. Shrivastava IAS (Retd.) was appointed as the sole Arbitrator on 21.02.2005, who on account of unsatisfactory progress was removed on 26.03.2009, and was replaced by Chairman-cum-Managing Director of the appellant Corporation by the consent of both the parties. The proceedings before the Arbitrator were not completed as the matter was being adjourned from time to time. On 07.02.2013, the respondent-contractor sent a legal notice calling upon the appellant to make payment which was replied on 19.03.2013 stating that since the Arbitrator was transferred, award could not be passed.

On 13.05.2015 the respondent-contractor filed an application under Section 11(6) and Section 15 of the A & C Act, for appointment of an independent Arbitrator. In spite of this position being brought to the notice of the Arbitrator and a request for adjournment was made, the same was rejected and some time thereafter an *ex parte* award was passed by the Arbitrator on 21.01.2016. The High Court thereafter appointed an Arbitrator, which was assailed before the Hon'ble Apex Court. After considering **TRF Ltd.** (supra) and relying on **BCCI** (supra), it was held as under :

“26. The facts of the said case are entirely different from the case in hand. In the said case, when notice invoking arbitration was issued on 28-12-2015, after the Amendment Act, 2015 came into force with effect from 23-10-2015, by virtue of which the person named in the agreement became ineligible to act as the arbitrator. In the case in hand, the arbitration proceedings started way back in 2009, long before the 2015 Amendment Act came into force and therefore, the 2015 Amendment Act is not applicable to the case in hand. The statutory provisions that would govern the matter are those which were then in force before the Amendment Act.

36. As held in Yashwith Constructions [Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles (India) Ltd., (2006) 6 SCC 204] , 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.”

By invoking Article 142 of the Constitution, the Hon’ble Apex Court in order to do full justice to the parties, passed the following order :

“41. In the result, the impugned order of the High Court dated 22-4-2016 is set aside and this appeal is allowed. The present Managing Director of the appellant Rajasthan Small Industries Corporation Limited shall be the sole arbitrator and the Managing Director is directed to take up the matter and continue the proceedings and afford sufficient opportunity to both the parties to adduce further evidence and to make oral submissions and pass the final award within a period of four months. It is made clear that the arbitrator may not be influenced by any of the views expressed by the High Court.”

7] Section 21 of the A & C Act, 1996, speaks of commencement of the arbitration proceedings, which commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent, unless otherwise agreed by the parties. In the instant case, there is no agreement between the parties hereto. The arbitration proceedings have already commenced long back by the Arbitrator, having already passed an award on 24.07.2007, which was set aside by judgment dated 20.09.2019, by the learned Principal District Judge in an application under

Section 34 of the A & C Act, by remanding the matter back to the Arbitrator, challenge to the same to the extent of remand under Section 37 of the A & C Act has been allowed by this Court by the judgment dated 07.04.2022.

8] The position therefore enunciated by the Hon'ble Apex Court, in *BCCI* (supra) and *Rajasthan Small Industries Corporation Limited* (supra), is clearly applicable to the facts of the present matter, and the same would be governed by the pre-amendment position and the parties will be bound by the terms of the agreement between them and the arbitration clause therein, which requires that any dispute is to be referred to Secretary, Department of Agriculture, Animal Husbandry, Government of Maharashtra or his nominee.

9] Since the dispute between the parties has not yet been resolved, it would be appropriate to appoint an Arbitrator, considering which the Secretary, Department of Agriculture Animal Husbandry, Government of Maharashtra, is hereby appointed as an Arbitrator to arbitrate the disputes between the parties hereto.

10] The Misc. Civil Application is allowed. Rule is made absolute in the aforesaid terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

Rvjalit