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Arb.O.P. No.47 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **28.02.2023**

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.No.47 of 2022

R.Saravanan

... Petitioner

vs.

1.Sakthivel

2.Mrs.Balamani

3.Srinivasan

4.Yogeshwaran

5.G.Manisekaran

... Respondents

PRAYER: Arbitration Original Petition filed under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996, praying to (i) terminate the mandate of the 5th respondent as the sole arbitrator and appoint a substitute arbitrator in accordance with the Arbitration and Conciliation Act,1996 to adjudicate upon the disputes/differences between the petitioner and the respondents 1 to 4 and (ii) direct the respondents to pay the cost of this proceedings.



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For Petitioner : Mr.Suhrith Parthasarathy
for Mr.Arun Karthik Mohan

For Respondents : Mr.B.Prashanth Nadaraj
for R1, 2 & 4

ORDER

By order dated 19.12.2019 in O.P.No.637 of 2019, this Court allowed a petition under Section 11 of the Arbitration and Conciliation Act, 1996(the Arbitration Act), by appointing a Sole Arbitrator to adjudicate the disputes between the petitioner and respondents 1 to 4 herein.

2. By alleging that the arbitrator appointed earlier by this Court failed to act without undue delay, this petition was presented as a composite petition under Sections 14 & 15 of the Arbitration Act. A counter was filed by the first respondent. In paragraphs 5 and 6 of the counter, in relevant part, the first respondent stated as under:-

"5. I submit that this Hon'ble Court was pleased to appoint a Sole Arbitrator in O.P.No.637 of 2019 on 19.12.2019. Despite such appointment and communication of the order by this Hon'ble Court to the Sole Arbitrator, reference was not entered upon



by the Sole Arbitrator within a reasonable time period....”

“6. The Petitioner states to have addressed a letter dated 16.12.2020 seeking action on part of the Sole Arbitrator. Despite the Sole Arbitrator's inaction to even respond to this letter, the Petitioner had not taken any steps to substitute the arbitrator for over 2 years and the next communication seems to have been made only on 03.06.2022, clearly in a vain attempt to revive the arbitration by filing this Petition. I submit that the Petitioner has slept over his rights and delayed the process of substitution indefinitely, and has now filed the present Petition seeking termination of the mandate of the 5th respondent on the ground of undue delay on the part of the 5th respondent....”

3. Upon noticing the above statements, I concluded that a *prima facie* case is made out and ordered notice to the Sole Arbitrator/5th respondent. The said notice was served on the 5th respondent on 15.02.2023. Since the 5th respondent did not enter appearance, the Registry was directed to print his name in the cause list and list the matter for hearing



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today. At the hearing today, the 5th respondent has not entered appearance either in person or through counsel. Therefore, the matter is proceeded with in his absence.

4. Learned counsel for respondents 1 to 4 opposes the petition on the ground that this Court does not have jurisdiction to receive the petition under Section 14 of the Arbitration Act. In support of this contention, he relies upon the judgment of the Hon'ble Supreme Court in *Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal and others*, (2022) 10 SCC 235(*Swadesh Kumar Agarwal*), particularly paragraph 22 thereof, wherein the Hon'ble Supreme Court held that a petition under Section 14(1)(a) of the Arbitration Act should be filed before the "Court" as defined in Section 2(1)(e) of the Arbitration Act. He also relies upon paragraph 23 of the judgment, wherein the Hon'ble Supreme Court held that an application under Section 11(6) of the Arbitration Act is maintainable to terminate the mandate of the arbitrator and substitute such arbitrator.



5. This contention is refuted by learned counsel for the petitioner on the ground that a petition before the Court, as defined in Section 2(1)(e) of the Arbitration Act, is required only if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub Section 1 of Section 14. In view of the express statements in the counter of the first respondent to the effect that the Sole Arbitrator failed to enter upon reference, he submits that the petition before this Court is maintainable.

6. The next ground on which respondents 1 to 4 oppose this petition is that a petition under Section 11(6) of the Arbitration Act should be filed for purposes of substituting the arbitrator. In this regard, learned counsel relies upon Sub-section 2 of Section 15 and contends that the rules relating to appointment are made applicable to substitution. In response to this contention, learned counsel for the petitioner submits that neither Section 11(5) nor Section 11(6) is applicable in the present situation inasmuch as the petitioner had approached the Court under Section 11(6) when the appointment procedure prescribed in the contract had failed. At this juncture, he submits that the petition is triggered not by the failure of the



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appointment procedure but by the failure of the arbitrator to act without undue delay.

7. Both these objections warrant consideration. As contended by learned counsel for respondents 1 to 4, the Hon'ble Supreme Court held in ***Swadesh Kumar Agarwal*** that the court for purposes of deciding a petition under Section 14(1)(a) of the Arbitration Act is the 'Court' as defined in Section 2(1)(e) of the Arbitration Act. Since the relevant arbitration clause provides for arbitration in Trichy and the dispute relates to an asset in Trichy, this Court does not qualify as the 'Court', as defined in Section 2(1)(e).

8. It should be noticed, however, that the petition is a composite petition under Sections 14 & 15 of the Arbitration Act. As stated at the outset, the Sole Arbitrator was appointed by this Court by order dated 19.12.2019 in O.P.No.637 of 2019. Under the scheme of the Arbitration Act, the power of appointment is vested in: the jurisdictional High Court as regards domestic arbitration; and, in the Supreme Court as regards



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international commercial arbitration. Therefore, the appropriate court for purposes of substitution of the arbitrator is this Court.

9. While the petitioner had the option of filing a stand-alone petition for termination of the mandate under Section 14 of the Arbitration Act before the jurisdictional District Court, the present petition was filed as a composite petition under Sections 14 & 15 of the Arbitration Act. Section 14 of the Arbitration Act refers to the substitution of the arbitrator upon termination of mandate. Therefore, it cannot be concluded that proceedings for termination of mandate and substitution are unrelated and should not be consolidated or rolled-up in one petition. Such consolidation also subserves one of the principal objectives of the Arbitration Act, i.e. the expeditious conclusion of arbitral proceedings. In the facts and circumstances outlined above, the only court which could have been approached for purposes of such composite petition is this Court. ***Swadesh Kumar Agarwal*** arose out of a standalone application under Section 14(1)(a) of the Arbitration Act before the District Court. In the said case, an application under Order VII Rule 11 CPC was filed to reject the petition under Section 14 and writ



petitions were filed against the order rejecting the Order VII Rule 11 application. At that juncture, one of the parties filed a petition under Section 11(6) of the Arbitration Act. The judgment was delivered in that factual context. Therefore, ***Swadesh Kumar Agarwal*** does not hold that even a composite petition under Sections 14 and 15 of the Arbitration Act would only lie before the 'Court' as defined under Section 2(1)(e) of the Arbitration Act. The other objection of respondents 1 to 4, as regards the necessity to file this petition under Section 11(6) of the Arbitration Act remains to be considered.

10. Section 15(2) of the Arbitration Act provides as under:

"(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."

The contention of learned counsel for respondents 1 to 4 is that Section 15(2) makes the rules relating to the appointment of the arbitrator applicable for purposes of substitution and, therefore, a Section 11 petition



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should be filed. The question that arises for consideration is: what are the implications of the expression “according to the rules that were applicable to the arbitrator being replaced” in Section 15(2)? An arbitration clause may name the arbitrator or prescribe eligibility, such as a chartered accountant or engineer. Such clause may also provide for the manner of appointment of the arbitrator. In my view, by virtue of Section 15(2), the agreement between the parties with regard to the manner of formation of the arbitral tribunal is required to be followed while substituting the arbitrator; but there is nothing in Section 15(2) which stipulates or prescribes that such appointment should only be made by filing a petition under Section 11.

11. On the facts of this case, the contract names two persons as arbitrators. This stipulation is not in consonance with Section 10 of the Arbitration Act. Besides, the named arbitrators have also recused. Therefore, there is no scope to follow the contractual mechanism. In any event, even proceeding on the assumption that the contention of learned counsel for the respondents 1 to 4 is correct, it would amount, at best, to filing a petition under the wrong provision of law, and that does not lead to rejection of the petition. Therefore, this objection is overruled.



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12. As discussed earlier, the petitioner, on the one hand, and respondents 1 to 4, on the other, are in agreement that the 5th respondent has caused undue delay in the conduct of arbitral proceedings by failing to enter upon reference pursuant to order dated 19.12.2019. The 5th respondent opted not to refute this allegation after receiving notice. The facts speak eloquently in this regard. Therefore, this petition is liable to be allowed.

13. For the reasons aforesaid, the petition is allowed by appointing Mr.D.Kesavan, Advocate, No.10-A, St. Paul's Complex, Bharathiyar Road, Cantonment, Trichirapally-1, Mobile No. 9894574484, as the sole Arbitrator in place of Mr.G.Manisekaran. Learned arbitrator is called upon to enter upon reference and adjudicate the dispute. The fees and expenses in relation to the arbitral proceedings may be fixed by the arbitral tribunal in consultation with the parties.

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Index : Yes / No
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