

ORDER SHEET

AP/15/2024

IN THE HIGH COURT AT CALCUTTA  
Ordinary Original Civil Jurisdiction  
ORIGINAL SIDE

MSTC LIMITED  
VS  
GYSCOAL ALLOYS LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 8<sup>th</sup> July, 2024.

Appearance:

*Mr. Mainak Bose, Adv.*  
*Mr. Samriddha Sen, Adv.*  
*Mr. Sourjya Roy, Adv.*  
*..for the petitioner*

*Mr. Anirban Ray, Adv. (VC)*  
*Mr. Swarajit Dey, Adv.*  
*Ms. Riddhi Jain, Adv.*  
*..for the respondent*

The Court: The present application has been filed under Sections 15 read with 14 of the Arbitration and Conciliation Act, 1996. This is an unfortunate case for the parties where a learned Arbitrator was appointed in terms of the agreement between the parties by the Chairman-cum-Managing Director of the petitioner MSTC as per Clause 21.1 of the agreement.

The Arbitrator concluded his hearing as long back as on February 2, 2018. The parties had filed notes of arguments lastly on June 4, 2018. However, over these long six years, the Arbitrator has failed to pass the award, prompting the present application.

Learned counsel appearing for the respondent takes an objection as to the maintainability of the present application. It is contended that the application ought to be one under Section 11 of the 1996 Act, since Section 15(2) of the said Act is not applicable. Section 15(2) contemplates 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.

However, in view of several judgments of the Supreme Court as well as different High Courts having come in the meantime, the appointment of an employee of one of the parties as Arbitrator and/or the power vested in an employee of one of the parties to appoint such Arbitrator has been held itself to be an ineligibility at par with the situations envisaged in Section 12 of the 1996 Act. Hence, the rules by which the Arbitrator was initially appointed cannot be reverted back to. Thus, Section 15(2) is not applicable and a fresh Arbitrator is required to be appointed, which comes within the contemplation of Section 11.

It is argued that the provisions of Article 137 of the relevant Schedule of the Limitation Act applies, since the applications filed either under Section 11 or Section 14 of the 1996 Act are applications coming within the ambit of Article 137.

The Arbitrator having failed long back to perform his duties by passing an award, it is submitted that limitation for preferring the present application began to run long back.

It is argued by the respondent that at best, the period of one year, which is the outer limit for completion of an arbitral proceeding, could be

taken to be a reasonable period for commencement of the cause of action. More than six years having elapsed, even after the conclusion of the arguments before the Arbitrator, it cannot be said that the present application has been filed in time.

Learned senior counsel appearing for the petitioner contends that there was no fault on the part of the petitioner in the delay occasioned in preferring the instant application. It is argued that even as late as in the year 2020, the Arbitrator communicated to the petitioner that due to the ongoing Pandemic, he was in some difficulty and that he would be passing the award soon. It is pointed out by learned senior counsel for the petitioner, by placing reliance on the several correspondence annexed to the application, that the petitioner had all along been diligent and has been pursuing the cause by repeatedly writing to the Arbitrator. However, despite such attempts, the same failed to elicit any positive response from the latter.

It is submitted that even in the year 2023, an application under Section 29-A of the 1996 Act was filed by the petitioner for termination of the mandate of the Arbitrator and substitution, which was, however, turned down on October 3, 2023 by a co-ordinate Bench on the ground that since the situation herein is a pre-2015 scenario, the provisions of Section 29-A are not applicable. However, in the self-same order, the learned Single Judge observed that the non-applicability of Section 29-A does not mean that the petitioner or any of the parties to the arbitration will be left without a remedy in terms of obtaining an award which fulfills reasonable time limit even in the absence of Section 29-A and that it cannot be that a party to an arbitration who is deprived of the benefit of Section 29-A will have to wait for

an interminable period for an Arbitrator to make an award. Accordingly, liberty was given to the petitioner to take out appropriate application under Sections 14 and 15 of the 1996 Act, as the petitioner may be advised.

Upon a perusal of the materials annexed to the application, it is seen that the Arbitrator has committed an undue delay in performing his functions. In fact, the use of the expression “undue delay” would be underplaying the extreme negligence shown by the learned Arbitrator in the present case in failing to deliver the award even after six years from the conclusion of arguments by the parties.

Thus, the present case definitely comes within the purview of Section 14(1)(a) which envisages that the mandate of an Arbitrator shall terminate and he shall be substituted by another Arbitrator if he becomes *de facto* unable to perform his functions or for other reasons fails to act without undue delay.

The question which arises is whether the provisions of Section 15 are applicable. The resounding answer is in the negative since, as rightly argued by the respondent, Section 15(2) contemplates that where the mandate of an Arbitrator terminates, a substitute Arbitrator shall be appointed according to the rules applicable to the initial appointment, which is not possible in view of the several judgments of the Supreme Court and this Court to the effect that the appointment of Arbitrator by an employee of one of the parties is vitiated at par with Section 12 of the 1996 Act.

In any event, I find that the pre-requisites of Section 15(1) are not available in the present case, since the Arbitrator has neither withdrawn

from office, nor has it been agreed between the parties that the mandate of the Arbitrator shall terminate, in so many words.

The argument that in such a case Section 11 has to be invoked is not tenable in the eye of law, since Section 14 of the 1996 Act provides a comprehensive and self-sufficient ecosystem by itself and does not require the Court to refer back to Section 11 as if the appointment was akin to an initial appointment of Arbitrator. Section 14(2) is sufficient to confer jurisdiction on the Court to terminate the mandate of an Arbitrator and substitute another Arbitrator if a controversy remains regarding any of the grounds referred to in Clause (a) of Sub-Section (1).

The controversy in the present case, although, does not pertain to whether the Arbitrator has failed to perform his functions but as to whether a substitution prayer is maintainable at all. In view of the stand taken by the respondent that such an application would be barred by limitation, the present case falls within Section 14(2), since the 'controversy' contemplated therein is not confined to controversies on merit but also relates to a controversy as to whether an application or prayer for substitution is maintainable at all.

Seen from such perspective, the provisions of Section 14(2) are squarely applicable in the present case without any reference to Section 11 and 15 of the 1996 Act.

Inasmuch as the question of limitation is concerned, I find that no clear line can be drawn as to exactly when the cause of action for the present application arose, since the *de facto* inability of the Arbitrator to

perform his functions and failure to act without undue delay is a continuum having no discrete pauses in between.

Hence, the cause of action for the present application is a continuing one and as such, it cannot be said that the same is time-barred.

In any event, even during the Pandemic in 2020, the Arbitrator delayed the matter in writing by taking shelter under the Pandemic situation. The Pandemic ended in the year 2021-22. The petitioner filed an application under Section 29-A of the 1996 Act in the year 2023 itself, giving rise to AP/696/2023.

The said application was decided by a co-ordinate Bench on October 3, 2023 by giving liberty to the petitioner to file the present application with a specific observation that non-applicability of Section 29-A could not leave the parties to an arbitration high and dry, without a remedy for obtaining an award.

Hence, I find from the records that the cause of action of the present application was not only continuous but had new leases of life at different points of time, when the Arbitrator sought further time in 2020, when the petitioner subsequently wrote several letters to the Arbitrator thereafter and when the Pandemic period was over and the petitioner applied under Section 29-A, albeit under a mistaken notion of law.

Thus, I do not find any reason to unduly penalize the parties for the delay occasioned in the meantime, thereby curtailing the applicability of the 1996 Act despite the parties having initially agreed to refer disputes to arbitration and having submitted to the jurisdiction of the erstwhile Arbitrator.

In such view of the matter, this Court is of the opinion that the present application is maintainable and the situation in which the parties are languishing falls within Section 14(2) of the 1996 Act.

Accordingly, AP/15/2024 is allowed, thereby terminating the mandate of the erstwhile Arbitrator, Sri Pradip Mitra and substituting him by appointing Mr. Debabrata Saha Roy, a member of the Bar Association, as the sole Arbitrator to resolve the dispute between the parties, subject to a disclosure being obtained from the said learned Arbitrator in terms of Section 12 of the Arbitration and Conciliation Act, 1996. The remuneration of the learned Arbitrator shall be decided by the Arbitrator within the framework of the Arbitration and Conciliation Act, 1996, read with its Schedules.

It is left to the best discretion of the Arbitrator to decide as to from what stage he will resume the arbitral proceeding.

The parties shall communicate this order to the erstwhile Arbitrator.

The erstwhile Arbitrator shall return all the records to the newly appointed Arbitrator within a fortnight from the date of communication of this order to the erstwhile Arbitrator by acting on a server copy of this order.

(SABYASACHI BHATTACHARYYA, J.)