

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

Present:
Hon'ble Justice Shampa Sarkar

AP-COM/1042/2024

VARIETY INDUSTRIAL WORKS PRIVATE LIMITED
VS
THE EASTERN RAILWAY

For the petitioner : Mr. Sarosij Dasgupta,
Mr. Biswaroop Mukherjee,
Mr. Avijit Dey,

For the respondent : Mr. Siddhartha Lahiri,
Mrs. Sarda Sha

Hearing concluded on:- 13.01.2025
Judgment on:- 02.04.2025

Shampa Sarkar, J.:-

1. This is an application under Section 14, read with Section 11 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the said Act).
2. The petitioner is a small scale industrial unit engaged in the business of manufacturing and supply of Grooved Rubber Sole Plates (for short 'GRSP') and other allied items to the Indian Railways, Eastern Railways, South Western Railways, etc.

3. Pursuant to a tender which was floated by the respondent (Eastern Railways), the petitioner was offered the work of supply of GRSP. A formal purchase order was issued on December 11, 2006. Due to various differences and disputes between the parties, the petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), being Misc. Case No.117 of 2010, before the learned City Civil Court at Calcutta. By an order dated February 4, 2020, the said Court restrained the respondents from giving effect or further effect to two letters dated December 24, 2009 and December 31, 2009, or from making any risk purchase at the risk and cost of the petitioner. The respondent was also restrained from levying any general damage on the petitioner or from withholding payment.

4. By order dated August 2, 2012, while disposing of the application under Section 9, the learned City Civil Court directed the parties to proceed towards arbitration and restrained the respondents from making any risk purchase at the cost of the petitioner, till disposal of the arbitral proceeding.

5. According to the petitioner, the parties were governed by the Indian Railways Standard Conditions of Contract (IRSCC). Clause 2900 thereof, contained an arbitration clause.

6. On October 4, 2012, the first arbitrator, one Dinesh Kumar (Dy. FA & CAO/WST), was appointed by the respondent. On January 21, 2015, the second arbitrator Mr. S.K. Karmakar (Dy. CEE/Con HQ), was appointed on

transfer of the first arbitrator. The petitioner filed a statement of claim before the second arbitrator and also gave its consent for the proceedings to continue under the provisions of the Arbitration and Conciliation (Amendment) Act, 2015. The petitioner agreed not to raise any objection with regard to the applicability of Section 12(5) of the said Act as the arbitrator was an employee of the Eastern Railways. Thereafter, on September 7, 2020, one Shri Achinta Roy Chowdhury was appointed as the third learned arbitrator, in place of Mr. S.K. Karmakar.

7. The petitioner filed this application for termination of the mandate of Shri Achinta Roy Chowdhury, Dy. CME/Workshop/HQ Eastern Railway, Kolkata. The petitioner prayed for appointment of a substitute arbitrator. The petitioner's contentions were as follows:-

- (a) The petitioner had not waived the applicability of the legal bar under Section 12(5) of the said Act, with regard to the appointment of Shri Achinta Roy Chowdhury. No such agreement had been entered into by and between the parties.
- (b) The appointment of Shri Achinta Roy Chowdhury was contrary to a decision of the Hon'ble Apex Court in **TRF Ltd. v. Energo Engineering Project Ltd.** decided in **Civil Appeal No.5306 of 2017**, as the appointment was not permissible under the provisions of the 5th and 7th Schedule of the said Act.

- (c) Shri Achinta Roy Chowdhury was *de jure* incapable of acting as an arbitrator, being an employee of Eastern Railways, and the petitioner had already informed such fact to the learned Arbitrator.
- (d) The learned Arbitrator refused to acknowledge the objection regarding invalidity of his appointment.
- (e) The learned Arbitrator failed to make the disclosure in terms of Section 12 of the said Act.
- (f) The arbitrator addressed a letter to the petitioner on August 23, 2023, requesting the petitioner to confirm and consent to the arbitration proceeding.
- (g) There were justifiable grounds for apprehension of lack of independence and impartiality.
- (h) Unilateral appointment of arbitrator, by the Railways, was contrary to law. Without an agreement between the parties to waive the applicability of Section 12(5) of the said Act, the arbitrator could not proceed with the matter.
- (i) The arbitrator, in spite of knowing that the application for termination of mandate was pending before the High Court, had rejected the objection raised by the petitioner with regard to his inability to act as an arbitrator. The arbitrator rejected the application on the advice and written comments of the senior law officer of the respondent.

(j) The Hon'ble Apex Court had held that consent to waive the applicability of Section 12(5) of the said Act should be obtained in writing, each time an arbitrator was appointed, even if the appointment was in the same arbitral proceeding.

8. Mr. Lahiri, learned Advocate for the respondent submitted that the petitioner filed an application under Section 16 of the said Act, challenging the jurisdiction of the learned Arbitrator. The said application was rejected. The grounds taken were lack of independence and impartiality of the learned Arbitrator. When the learned Arbitrator had passed an order rejecting the application under Section 16, the said order could only be challenged under Section 34 of the said Act, after termination of the arbitral proceeding. The present application was not maintainable.

9. The petitioner had signed a waiver clause as per the proviso to Section 12(5), which implied that the petitioner would have no objection to the respondent appointing their own official as an arbitrator. Similar agreements in each and every round of appointment of an arbitrator, were not contemplated under the law.

10. Considered the submissions of the learned Advocates for the respective parties.

11. The prayers in the application are quoted below:-

“(a) The mandate of the learned arbitrator being Shri Achinta Roy Chowdhury be terminated;

(b) A neutral and impartial individual be appointed to discharge the functions and duties as the learned arbitrator in the place and stead of

Shri Achinta Roy Chowdhury, to entertain, try and determine the disputes and differences amongst the parties to the arbitration agreement;

(c) The papers and documents pertaining to the subject arbitration be transferred from the office of the learned incumbent arbitrator to the office of the learned arbitrator to be appointed while disposing of the instant application;

(d) Stay of all proceedings pertaining to the Arbitration Case in connection with Agreement No. 02/06/6005/1/25/991 dated 11th December, 2006 presently before the learned incumbent arbitrator Shri Achinta Roy Chowdhury, pending hearing of the instant application;

(e) Ad interim orders in terms of prayers above;

(f) Such further and/or other orders.”

12. The petitioner may have an arguable case with regard to the inability of the learned Arbitrator to continue with the proceeding on the ground that he was *de jure* unable to perform under the provisions of Section 12(5) read with the 5th and the 7th Schedule of the Act. Similar objections which were raised by an application under Section 16 of the said Act, was rejected by the learned Arbitrator. The petitioner had asked the Arbitrator to recuse from the proceeding.

13. However, the petitioner had filed an application under Section 9 of the said Act, before the City Civil Court. The petitioner had sought for interim protections. The petitioner had treated the said court as the principal civil court having jurisdiction to entertain the prayers for interim reliefs.

14. The said Act defines Court as below:-

“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.

15. Termination of mandate of the learned Arbitrator is provided under Section 14 of the said Act, which is quoted below:-

“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.”

16. In my opinion, reference to ‘Court’ under Section 14 is the principal civil court of ordinary jurisdiction, which the petitioner chose to be the City Civil Court at Calcutta. By virtue of the applicability of Section 42, which is quoted below, all applications under Part-I must be filed in the same court, that is, the City Civil Court at Calcutta, in this case. This is also an application under Part-I of the said Act. Section 42 is quoted below:-

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

17. In the matter of ***State of West Bengal and Others vs Associated Contractors***, reported in **(2015) 1 SCC 32**, a three Judges Bench of the Hon’ble Apex Court answered a reference made by the Division Bench of this Court with regard to interplay of Section 2(1)(e) and 42 of the said Act. The Hon’ble Apex Court held as follows:-

“9. As the matter has been referred to us for an authoritative pronouncement on Section 2(1)(e) and Section 42 it will be important to set out Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 which read as follows:

“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;

42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.”

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25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court

having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

18. The Hon’ble Apex Court held that even an application for termination of mandate must be filed before the principal civil court. In ***Swadesh Kumar Agarwal vs Dinesh Kumar Agarwal* reported in (2022) 10 SCC 235**, the appeals before the Apex Court, arose out of an order dated September 7, 2017 and order dated November 17, 2017 passed by the High Court of Madhya Pradesh by which the High Court in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 had terminated the mandate of the

sole arbitrator appointed by the parties and substituted the sole arbitrator by appointing a fresh arbitrator on the ground that the mandate of the sole arbitrator stood terminated in view of Section 14(1)(a) of the 1996 Act. The termination was on the basis that there was undue and unreasonable delay in proceeding with the arbitration proceeding by the erstwhile arbitrator.

19. The question which before the Apex Court, is quoted below:-

“14.Now the next question which is posed for consideration of this Court is, whether, in exercise of powers under sub-section (6) of Section 11 of the 1996 Act, the High Court can terminate the mandate of the sole arbitrator and appoint a substitute the arbitrator in view of Section 14(1)(a) of the 1996 Act on the ground that he has failed to act without undue delay and in such a situation aggrieved party has to approach the “court” to terminate his mandate.”

20. While answering the said question, the Hon’ble Apex Court considered the provisions of Section 11, 12, 13, 14, 15, 25, 30 and 32 of the said Act. The Hon’ble Apex Court held as follows:-

18. Sections 14 and 15 provide for termination of the mandate of the arbitrator. Section 14 of the 1996 Act provides that the mandate of the arbitrator shall terminate and he shall be substituted by another arbitrator in case of any eventuality mentioned in Section 14(1)(a). As per sub-section (2) of Section 14, if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, apply to the “court” to decide on the termination of the mandate.

19. The expression “court” is defined under Section 2(1)(e) of the 1996 Act, which reads as under:

“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;”

20. Section 15 provides other grounds for termination of the mandate of the arbitrator. It provides that 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 an agreement of the parties. Where the mandate of an arbitrator is terminated on the aforesaid grounds mentioned in Sections 15(1)(a) and (b) in such a situation a substitute arbitrator shall have to be appointed and that too, according to the rules that were applicable to the appointment of the arbitrator being replaced.

21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the “court” concerned as defined under Section 2(1)(e) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.

22. So far as the termination of the mandate of the arbitrator and/or termination of the proceedings mentioned in other provisions like in Section 15(1)(a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties, the dispute need not be raised before the court concerned. For example, where the sole arbitrator himself withdraws from office for any reason or when both the parties agree to terminate the mandate of the arbitrator and for substitution of the arbitrator, thereafter, there is no further controversy as either the sole arbitrator himself has withdrawn from office and/or the parties

themselves have agreed to terminate the mandate of the arbitrator and to substitute the arbitrator. Thus, there is no question of raising such a dispute before the court. Therefore, the legislation has deliberately provided that the dispute with respect to the termination of the mandate of the arbitrator under Section 14(1)(a) alone will have to be raised before the “court”. Hence, whenever there is a dispute and/or controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/dispute has to be raised before the “court” concerned only and after the decision by the “court” concerned as defined under Section 2(1)(e) of the 1996 Act and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the rules that were applicable to the initial appointment of the arbitrator. Therefore, normally and generally, the same procedure is required to be followed which was followed at the time of appointment of the sole arbitrator whose mandate is terminated and/or who is replaced.

32.5. In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section 14(1)(a), such a dispute has to be raised before the “court”, defined under Section 2(1)(e) of the 1996 Act and such a dispute cannot be decided on an application filed under Section 11(6) of the 1996 Act.

21. The facts of the case in ***Gammon Engineers and Contractors Pvt. Ltd. vs State of West Bengal*** reported in **2023 SCC Online Cal 2326**, are similar to those herein. Paragraphs 14 and 15 of the said judgment are quoted below for convenience:-

“14. The respondent has raised the issue of maintainability and challenged the jurisdiction of this court to entertain the instant application under Section 14, 15 read with Section 11 of the Act. Therefore, before alluding to other aspects of the dispute, it is imperative that I first decide upon the maintainability of the application.

15. Owing to a prior Section 9 application being filed before the learned District Judge at Jalpaiguri, the respondent contends that the instant application must be made before the same ‘court’, as per the mandate of Section 42 of the Act. The said Section is reproduced hereinbelow:—

‘42. Jurisdiction - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court’.”

22. The learned court went on to hold as follows:-

18. In ***Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, (2022) 10 SCC 235***, the Supreme Court delineated the law with respect to the court to which an application for termination of an arbitrator's mandate would lie. The appropriate portions are extracted below: —

‘21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(e) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.

32.3. In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under Section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under Sections 11(6)(a) to (c) of the Act.

32.4. Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time.

32.5. In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section

14(1)(a), such a dispute has to be raised before the "court", defined under Section 2(1)(e) of the 1996 Act and such a dispute cannot be decided on an application filed under Section 11 (6) of the 1996 Act.'

19. Therefore, it is palpably clear that the 'court' to be approached under Section 14(1)(a) for termination of an arbitrator's mandate, for de jure or de facto reasons, is the 'court' under Section 2(1)(e).

Correspondingly, the bar of Section 42 is applicable in the instant case.

Additionally, termination cannot be made in an application filed under Section 11(6) of the Act, contrary to what was contended by the petitioner during oral pleadings."

23. Under such circumstances and in view of the above discussions, the application for termination of mandate ought to have been filed before the principal civil court having jurisdiction, i.e., the City Civil Court at Calcutta. This application is not maintainable before this Court, seeking termination. Appointment of a substitute arbitrator can be made only upon termination of mandate.

24. AP-COM 1042 of 2024 is disposed of.

25. The order will not preclude the petitioner from proceeding as per law.

26. There shall be no order as to costs.

(Shampa Sarkar, J.)