

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

ARBITRATION APPLICATION No. 43 of 2024

ORDER:

Mr. P. Pratap, learned counsel for the applicant.

Mr. T. Bala Mohan Reddy, learned counsel for the respondent.

2. This application is filed under Section 14(2) read with Sections 11 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the A&C Act”) seeking to terminate the mandate of the arbitrator, namely, Mr. Thoom Srinivas, Advocate, and to appoint another arbitrator in his place.

3. Facts giving rise to filing of this application briefly stated are that the parties have entered into an agreement on 26.05.2021 for construction of commercial complex. Clause 20 of the aforesaid agreement contains an arbitration clause, which is extracted below for the facility of reference:

“In case any dispute or difference should arise between the parties, whether in respect of quality of material used by the Contractor or work done in respect of delay in completion of works or in respect of payment of extra work required to be done and so executed or in respect of measurement of work done or in respect of delay of payment to the Contractor or touching the

interpretation, fulfillment of any of the terms of these presents or any other matter arising out of or in connection with these presents and arising out or in connection with this agreement or the carrying out of the work, shall be referred to arbitration mutually appointed by the parties and mutually nominated by the parties i.e., Mr. Thoom Srinivas, Advocate and Arbitrator, 189/739, SBI Colony, New Bakaram, Hyderabad, 500003. The arbitrator shall make his/her award within three months from the date of entering on the reference and the parties shall co-operate for passing of such award within the agreed time frame.”

4. Thus, it is evident that Mr. Thoom Srinivas, Advocate has been appointed as an arbitrator, who was required to pass an award within a period of three months from the date of entering in the reference. The parties have further undertaken to co-operate with the arbitrator for passing an award within the said period.

5. The dispute between the parties has arisen. Therefore, the applicant sent a notice on 04.05.2023 in view of the arbitration clause. The sole arbitrator, Mr. Thoom Srinivas, Advocate, thereupon sent a notice to the parties on 05.06.2023 for hearing on 11.06.2023. In the aforesaid notice, it was provided that the schedule of arbitration proceedings shall be decided on 11.06.2023.

6. According to the applicant, the arbitrator on 11.06.2023 orally told the parties to file their claims on 24.06.2023, but on the said date the arbitrator did not conduct any proceedings.

7. Thereafter, the applicant filed a petition under Section 14 of the A&C Act before the arbitrator *inter alia* on the ground that Mr. Thoom Srinivas, Advocate, was in-house counsel of the respondent and was appointed as arbitrator in six other cases. The sole arbitrator, Mr. Thoom Srinivas, Advocate, did not advert to the aforesaid application. Thereafter, the applicant filed this application on 08.02.2024 before this Court.

8. Learned counsel for the respondent at the outset has raised the issue of maintainability of this application before this Court and has submitted that such an application ought to have filed before the District Court. In support of his submissions, reliance has been placed on the decision of the Supreme Court in **Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal and others**¹ as well as the decision of Calcutta High Court in **Gammon Engineers and Contractors Private Limited vs. State of West Bengal**².

¹ (2022) 10 SCC 235

² 2023 SCC OnLine Cal 2326

9. In response thereto, learned counsel for the applicant submitted that since this Court has power to appoint an arbitrator under Section 11(6) of the A&C Act, the High Court alone has power to terminate the mandate of the arbitrator.

10. I have considered the submissions made on both sides.

11. The sole issue which arises for consideration in these proceedings is about the maintainability of the proceedings before this Court.

12. Before proceeding further, it is apposite to take note of Section 2(1)(e) as well as Section 14 of the A&C Act, which read as under:

“2. Definitions, - (1) In this Part, unless the context otherwise requires,-

(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

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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.”

“**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.”

13. Thus, if Section 14(2) is read in conjunction with Section 2(1)(e) of the A&C Act, it is evident that ‘Court’ means a Court of original jurisdiction in a District and includes a High Court in exercise of its

ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration.

14. The Supreme Court in **Swadesh Kumar Agarwal (supra)** has dealt with Sections 11(5), 11(6) and 14 of the A&C Act and in para 32 it has been held as under:

“32. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under:

32.1. That there is a difference and distinction between Section 11(5) and Section 11(6) of the 1996 Act.

32.2. In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to Section 11(2), Section 11(5) of the Act shall be attracted and in such a situation, the application for appointment of arbitrator or arbitrators shall be maintainable under Section 11(5) of the Act and not under Section 11(6) of the 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.”

15. Thus, from a perusal of para 32.5 of the aforesaid decision, it is evident that in 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 A&C Act.

16. In the instant case, the dispute has arisen between the parties under Section 14(1)(a) of the A&C Act, as, according to the applicant, the arbitrator has become *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay.

17. According to the applicant, the arbitrator has withdrawn from his office. However, there is no such material on record. Therefore, the dispute has arisen within the meaning of Section 14(1)(a) of the A&C Act, which has to be dealt with by the Court within the meaning of Section 2(1)(e) of the A&C Act on termination of the mandate.

18. In view of the law laid down by the Supreme Court in **Swadesh Kumar Agarwal (supra)**, it is held that the application under Section 14 of the A&C Act is not maintainable before this Court. However, liberty is reserved to the applicant to approach the competent Court as defined under Section 2(1)(e) of the A&C Act and thereafter to file an application under Section 11(6) of the A&C Act depending on the outcome of the proceedings under Section 14 of the A&C Act.

19. It is made clear that this Court has not expressed any opinion on the eligibility of the arbitrator to continue with the arbitration proceedings, as the aforesaid question has to be dealt with by the appropriate forum in a proceeding, which may be instituted by the applicant under Section 14 of the A&C Act.

20. For the aforementioned reasons, the arbitration application is disposed of in terms of the liberty as aforesaid.

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Miscellaneous applications pending, if any, shall stand closed. No order as to costs.

ALOK ARADHE, CJ

Date: 10.07.2024
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